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 FINAL APPROVAL OF THE CLASS SETTLEMENT, CERTIFICATION OF THE SETTLEMENT CLASS, AND APPROVAL OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS

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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 final approval of the Class Settlement Agreement and Release ("Settlement"), certification of the Settlement Class, and approval of attorneys' fees, litigation expenses, and Service Awards.[1] The proposed Settlement will resolve all claims against Defendants Bactolac Pharmaceutical, Inc. ("Bactolac"), NaturMed, Inc. ("NaturMed"), and Independent Vital Life ("IVL2") and, if approved, will provide significant relief for the Settlement Class—namely, a Total Cash Payment of $1.725 million, as well as $1,888,970 in Settlement Credits, for a Total Settlement Value of $3,613,970. Each eligible Settlement Class Member—of which they are approximately 189,000—is entitled to receive either (i) $10 in Settlement Credit redeemable for three years to purchase any IVL2 product, including ADEG in its reformulated form, or (ii) a $5 Alternative Payment. These Settlement benefits represent approximately 25 percent of each class member's "full refund" damages (if Settlement Credit is selected) or 12.5 percent 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.

On January 10, 2022, the Court granted preliminary approval to the Settlement and ordered that the Notice Program commence. Since that time, over 10,000 Claimants have filed claims for

[1] Terms that are capitalized in this memorandum shall be defined as they are in the Settlement Agreement unless stated otherwise.

Settlement benefits; over 6,000 of these Claimants have elected to receive Settlement Credit, while over 4,000 have elected to receive an Alternative Payment. As of this filing, the Enrollment Period remains open and claims may be filed until May 20, 2022. Moreover, although objections to the Settlement were due on April 11, 2022, only one such objection has been filed and it raises no concerns with the Settlement's fairness or Plaintiffs' requests for attorneys' fees, costs, or a Service Award. Rather, the objector complains only that he obtained a default judgment against NaturMed in another forum in another matter that remains unpaid and he seeks to satisfy the judgment through the proceeds negotiated by the Settlement Class. The objector offers no legal justification for his request and, as he makes no complaint to the Settlement itself, his objection should be denied. No other objections to the Settlement have been raised and only one Settlement Class Member has elected to opt out of the Settlement. In short, the Settlement enjoys overwhelming support among Settlement Class Members, which weighs strongly in favor of approval.

In addition to their motion seeking final approval, Plaintiffs respectfully petition the Court for an award of attorneys' fees of $992,421, which is less than their lodestar of $1,050,940. Plaintiffs also seek reimbursement of litigation costs of $202,236.34, and a $5,000 Service Award for each of the Plaintiffs.

In support of this motion, Plaintiffs submit declarations from Class Counsel and the Claims Administrator. Plaintiffs will also submit a proposed final approval order prior to the Final Approval Hearing. At that hearing, Plaintiffs will respectfully request, *inter alia*, that the Court: (1) grant final approval to the Settlement, (2) certify for settlement purposes the Settlement Class pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3); (3) grant Plaintiffs' application for attorneys' fees, expenses, and Service Awards; and (4) deny the lone objection raised by James

Henson; and (5) enter final judgment dismissing the Action against the Settling Defendants with prejudice.

BACKGROUND

A detailed summary of the relevant background and procedural history, as well as the work performed by Plaintiffs' counsel, is set forth in Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Approval of Class Settlement, Preliminary Certification of Settlement Class, and Approval of Notice Plan (hereafter, "Preliminary Approval Memorandum"), (Dkt. 247-5), as well as the Court's Preliminary Approval Order, (Dkt. 248), which Plaintiffs incorporate herein by reference.

A. The Litigation

This case arises from allegations that in 2014 and 2015, Defendant Bactolac Pharmaceutical, Inc. ("Bactolac") manufactured 99 lots of the dietary supplement All Day Energy Greens ("ADEG") using ingredients that were not disclosed by the product formula and improperly omitted ingredients from the product that were required by that formula. Plaintiffs allege that as a result of Bactolac's actions, ADEG manufactured as part of these 99 lots was adulterated and misbranded. Bactolac, in turn, provided products from these lots to Defendant NaturMed, Inc. ("NaturMed"), which sold ADEG directly to consumers as a health drink purporting to, *inter alia*, naturally increase energy and aid digestion. In the fall of 2014, NaturMed began receiving customer complaints alleging that consumption of ADEG was causing gastrointestinal distress. This ultimately led to a product recall in March 2016 and a subsequent financial freefall resulting in NaturMed's insolvency. In 2017, Defendant Independent Vital Life ("IVL2") purchased NaturMed's assets, including those related to ADEG, and continued marketing a reformulated version of the supplement product.

Plaintiffs in the *Copley* matter commenced this lawsuit on behalf of nationwide and statewide classes in January 2018, alleging 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 March 2020, Plaintiffs in the *Faris* matter filed a related suit alleging similar violations on behalf of a nationwide class and New York, Arizona, Florida, and Washington statewide classes. These actions were consolidated and Plaintiffs moved for class certification against all Defendants. Over the course of over four years of litigation, the parties conducted extensive fact and expert discovery, resulting in the production of voluminous documents and over thirty depositions.[2] When the parties jointly agreed to enter the Court's mediation program, discovery was complete and a motion for class certification, partial summary judgment, multiple *Daubert* motions, and a motion to strike certain testimony were all fully briefed and pending before the Court.

B. Negotiation of the Proposed Settlement

At the suggestion of the Court, in the spring of 2021 the Parties consented to participate in the Court's mediation program and jointly agreed to the appointment of Joseph DiBenedetto of JDB Mediation LLC as mediator. (Preliminary Approval Decl. ¶ 19, Dkt. 247-1.) On July 9, 2021, the Parties engaged in a full-day mediation at arm's length with Mr. DiBenedetto. (*Id.* ¶ 21.) At

[2] Plaintiffs' Preliminary Approval Memorandum and accompanying 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, "Preliminary Approval Decl.") set forth in detail the history of this litigation and the work performed by Class Counsel to achieve preliminary approval of the Settlement. Plaintiffs incorporate and rely on these previous submission herein, and also submit the Declaration of Class Counsel in Support of Final Approval of the Class Settlement, Certification of the Settlement Class, and Approval of Attorneys' Fees, Expenses, and Service Awards (hereafter, "Final Approval Decl.") to supplement their prior submissions, recount the work performed since submission of the Preliminary Approval Memorandum, and to describe the positive reaction of the Settlement Class thus far.

the conclusion of the mediation, the Parties reached an agreement in principle to resolve the case on a classwide basis for a combination of cash and product credit. (*Id.*) The Parties then spent the next several months negotiating the detailed written Settlement Agreement and exhibits that are now before the Court.

The mediation was challenging in part because two of the three Settling Defendants had pressing financial shortfalls. NaturMed essentially dissolved in 2017 following financial pressures purportedly caused by the 2016 product recall and subsequent litigation. (*Id.* ¶ 20.) For its part, IVL2 is a small company that was not generating much profit. (*Id.*) These considerations would limit the ability of these Defendants to meaningfully contribute to a cash settlement. (*Id.*) Accordingly, the parties explored, and ultimately negotiated, a classwide settlement that included the option for Settlement Class Members to receive product credit or a lesser amount of cash.

SUMMARY OF THE SETTLEMENT

The Court granted preliminary approval to the Settlement on January 10, 2022, finding that it will "likely be able to" grant final approval to the Settlement as "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e). (Dkt. 248 ¶ 27.) The Court further found that it would 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." (*Id.* ¶ 33.) "Excluded Persons" are defined as

> (i) any such Person who has timely and validly excluded himself, herself, or themself 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 from a Recalled Lot and who previously received either (a) a full refund for his or her purchase, or (b) Replacement Product.

(Dkt. 247-2 § 1(u).) In addition, the Court found that the Notice Program described in the Settlement was "the best notice that is practicable under the circumstances," and ordered that the Notice Program be implemented within thirty days. (Dkt. 248 ¶¶ 42, 55.)

A. The Settlement's Benefits

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 approximately $1,888,970 in Settlement Credits, meaning the Total Settlement Value is $3,613,970.[3] Following the Court's order granting preliminary approval, the Settling Defendants deposited the Total Settlement Payment into the Escrow Account to create the Settlement Fund. (Final Approval Decl. ¶ 5.) This Fund has been used to pay for the Notice Program, to process claims filed by Claimants, and to process opt-outs and objections. (*Id.*) If the Settlement becomes Effective, the Settlement Fund will be used to create the Alternative Payment Fund, pay any Court-approved Service Awards to the Plaintiffs, and to pay attorneys' fees, litigation expenses, and Settlement Administration Costs. (Settlement, Dkt. 247-2 § 2(b)(i).) After the Effective Date, not a single dollar will revert to the Settling Defendants under any circumstances.

Settlement Class Members who file eligible claims have the option to receive either $10 in Settlement Credit redeemable for three years to purchase any IVL2 product or a $5 Alternative Payment. (*Id.* § 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

[3] Plaintiffs estimated that the class size was approximately 190,000 in their Preliminary Approval Memorandum. (*See* Dkt. 247-5 at 1.) After further analysis of the customer lists received from the Settling Defendants, Plaintiffs believe that the class consists of approximately 188,897 persons. (Final Approval Decl. ¶ 6 n.3.)

aligns with the evidence in the case; multiple witnesses testified that many ADEG purchasers were longtime, loyal customers who purchased the product before and after the 2016 product recall. (Preliminary Approval Decl. ¶ 28, Dkt. 247-2.) 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 formulated. (*Id.*) Indeed, although the claims program remains open until May 10, the Claims Administrator reports that 4,237 Claimants have selected to receive Settlement Credit as compensation versus 6,136 Claimants who have opted for an Alternative Payment. (*See* Declaration of Bradley Madden Regarding Notice Plan Implementation and Settlement Administration (hereafter, "Madden Decl.") ¶ 18, submitted herewith.)

Those Settlement Class Members who no longer wish to do business with IVL2 or who simply prefer a cash payment may elect to receive a $5 Alternative Payment from the $100,000 Alternative Payment Fund.[4] (Settlement, Dkt. 247-2 § 4(b).) If the number of Claimants who elect to receive Alternative Payments exceeds the Alternative Payment Fund, then each Settlement Class Member electing 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.*) To date, approximately 41 percent of Claimants have elected to receive an Alternative Payment and were

[4] 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), Dkt. 247-2.)

the Enrollment Period to close today, each Alternative Payment would be approximately $16.29. (Madden Decl. ¶ 18.)

The Settlement's options for Settlement Class Member compensation are reasonable in light of the compensation theory advanced by Plaintiffs in this Action. Specifically, Plaintiffs pursued a "full refund" theory of damages. (*See* Dkt. 171 at 18, 37-39, 41.) Evidence in the case demonstrated that the cost of one canister of ADEG was at most $40, but multiple canisters were often purchased by a customer at discount for a lesser amount. (Preliminary Approval Decl. ¶ 30, Dkt. 247-1.) The compensation options offered by the Settlement provide Settlement Class Members with either 25 percent of the "full refund" (if they choose Settlement Credit) or 12.5 percent of the "full refund" (if they choose a $5 Alternative Payment). (*Id.*)

To participate in the Settlement, Claimants must complete a simple Claim Form, a copy of which was attached to the Settlement as Exhibit B. A postcard containing the Claim Form was mailed to all individuals who purchased at least one canister of ADEG directly from NaturMed and who were subsequently mailed a recall notice in March 2016. A copy of the postcard sent to potential Settlement Class Members is attached as Exhibit A to the Madden Declaration. Because postage on the Claim Form is prepaid, the form can be removed from the postcard and returned at no charge to the Claimant. (Final Approval Decl. ¶ 9.) This mailing was overinclusive, including customers who later received a refund or Replacement Product after receipt of the recall notice. (*Id.* ¶ 6.) Potential Settlement Class Members may also file claims using an online portal linked to the Settlement Website. (*Id.* ¶ 8.) To demonstrate eligibility, the only information required of most Claimants is a name and address, which the Claims Administrator may then cross-check against the Recalled Lots Customer List. (*Id.* ¶ 9.) To date, a total of 10,373 Claimants have filed claims for Settlement benefits. (Madden Decl. ¶ 17.)

B. Releases

In consideration for the Settlement, Settlement Class Members will release all claims against the Released Parties (including the Settling Defendants) that were, or could have been, asserted in the Action. Upon the Effective Date, NaturMed will also release Bactolac from the cross-claims asserted in the Action. (*See* Settlement § 6, Dkt. 247-2.)

C. Attorneys' Fees, Case Expenses, and Service Award

Class Counsel is moving for an award of attorneys' fees of $992,421, which as explained below, is less than Class Counsel's lodestar in this case. In addition, Class Counsel's motion seeks reimbursement of litigation costs amounting to $202,236.34. The Settling Defendants have agreed not to oppose a motion for attorneys' fees and litigation costs in these amounts. (Settlement § 5(a), Dkt. 247-2.) Further, the Long Form Notice and Settlement Website expressly state that Class Counsel may seek attorneys' fees and case expenses in these amounts. Settlement Class Members thus had the opportunity to review and comment upon the attorneys' fees and litigation costs Class Counsel intended to request, and not one Settlement Class Member has objected to or opposed these requests. The Settlement also allows Plaintiffs to seek Court approval of Service Awards up to $5,000. (*Id.* § 5(b).) Like the request for attorneys' fees and expenses, Plaintiffs' motion for Service Awards is unopposed.

OBJECTIONS AND OPT-OUT REQUESTS

The Settlement set forth a procedure under which any Settlement Class Member could raise objections to any aspect of the Settlement. (*Id.* § 12.) In a class of approximately 190,000 potential members, only one individual, James Henson, has objected to the Settlement. (*See* Dkt. 249-1.) Mr. Henson does not contend that the Settlement is unfair; rather, he argues that he should be paid out of the Settlement Fund to satisfy a default judgment obtained against NaturMed in a personal

injury lawsuit filed in the District of Maryland. (*Id.*) Plaintiffs respond to Mr. Henson's objection below. It is telling, however, and a testament to the fairness of the Settlement, that no Settlement Class Members have objected to the Settlement itself or to Plaintiffs' requests for attorneys' fees, expenses, and Service Awards. Settlement Class Members wishing to opt out of the Settlement were required to postmark a writing memorializing their choice by April 11, 2022. (Dkt. 248 ¶ 55.) To date, only one Settlement Class Member has submitted a timely request for exclusion. (Madden Decl. ¶ 22.)

ARGUMENT

I. THE SETTLEMENT MEETS THE RULE 23(e) FINAL APPROVAL STANDARDS.

Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of any class action settlement. The court must "carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citation omitted). This evaluation requires the Court to consider "both the settlement's terms and the negotiating process leading to the settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A.*, 396 F.3d 96, 116 (2d Cir. 2005).

"The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigor of prolonged litigation." *In re Advanced Battery Techs. Sec. Litig.*, 298 F.R.D. 171, 174 (S.D.N.Y. 2014). Accordingly, when exercising its discretion to approve the Settlement, the Court should be "mindful of 'the strong judicial policy in favor of settlements.'" *Wal-Mart Stores*, 396 F.3d at 116 (citations omitted). "Absent fraud or collusion," courts "should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *City of Providence v. Aeropostale,*

Inc., No. 11 Civ. 7132, 2014 WL 1883494, at *4 (S.D.N.Y. May 9, 2014), *aff'd sub nom.*, *Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

Rule 23(e)(2), as amended on December 1, 2018, provides that the Court should determine whether a proposed settlement is "fair, reasonable, and adequate" after considering 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). Rule 23(e)(2)(A)-(B) focuses on procedural fairness, while Rule 23(e)(2)(C)-(D) focuses on the Settlement's substantive fairness. *See Kirby v. FTC Restaurants, Inc.*, No. 5:19-CV-01306 (FJS/ML), 2020 WL 5791582, at *2 (N.D.N.Y. Sept. 28, 2020).

Additionally, courts in the Second Circuit have long considered the following factors set forth in *City of Detroit v. Grinnell Corp.*:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

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). Not every factor must weigh in favor of settlement; "rather, the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003).

As demonstrated herein, the Settlement readily satisfies all of the Rule 23(e)(2) and *Grinnell* factors,[5] meets the favored public policy of resolving class action claims, and warrants the Court's final approval.

A. Plaintiffs and Class Counsel Have Adequately Represented the Settlement Class.

In determining whether to approve a class action settlement, the court should consider whether "the class representatives and class counsel have adequately represented the class." Fed. R. Civ. P. 23(e)(2)(A). "[T]he adequacy requirement 'entails inquiry into whether: (1) plaintiffs' interests are antagonistic to the interest of other members of the class and (2) plaintiffs' attorneys are qualified, experienced, and able to conduct the litigation.'" *In re Barrick Gold Sec. Litig.*, 314 F.R.D. 91, 99 (S.D.N.Y. 2016).

First, there are no conflicting interests that exist between Plaintiffs and the proposed Settlement Class; to the contrary, Plaintiffs are members of the Settlement Class who purchased one or more canisters of ADEG from the Recalled Lots and relied upon the representations on the product label while doing so. The interests of Plaintiffs and the Settlement Class Members are coextensive given that each Plaintiff, like each Settlement Class Member, has a strong interest in

[5] The factors set forth in Rule 23(e)(2) were intended "to add to, rather than displace, the *Grinnell* factors." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019). *See also* Advisory Committee Notes to 2018 Amendments to Rule 23 (noting that the Rule 23(e)(2) factors are not intended to "displace" any factor previously adopted by the Court of Appeals). Accordingly, Plaintiffs will discuss both the factors set forth in Rule 23(e)(2) and the non-duplicative *Grinnell* factors.

obtaining redress for the harm caused by the Settling Defendants. In addition, the class representative Plaintiffs actively participated in the litigation, timely responding to written discovery requests and producing responsive documents. (Final Approval Decl. ¶ 25.) Plaintiffs provided Class Counsel with important factual information regarding the representations conveyed in Defendants' marketing material and the impact of those representations on purchasing decisions. (*Id.*) Each Plaintiff also sat for a deposition and was questioned by counsel for each of the Settling Defendants. (*Id.*) In short, each Plaintiff adequately represented the Settlement Class through their dedication to this litigation.

Second, Class Counsel has extensive experience in class action litigation and other complex litigation. (Preliminary Approval Decl. ¶¶ 42-44, Dkt. 247-1.) Through over four years of litigation, Class Counsel has diligently prosecuted this Action before this Court and, in so doing, has undertaken a significant amount of work, effort, and expense, demonstrating a commitment to devote the resources necessary to achieving a successful outcome for the Settlement Class. (*Id.*) These efforts demonstrate Class Counsel's adequacy. *See, e.g.*, *Karic v. Major Auto Cos.*, No. 09 CV 5708, 2015 WL 9434847, at *6 (E.D.N.Y. Dec. 22, 2015) (counsel adequately represented class where they had "done substantial work identifying, investigating, prosecuting, and settling the claims over the past four years"), *report and recommendation adopted by Karic v. Major Auto Cos.*, No. 09cv-5708, 2016 WL 323673 (E.D.N.Y. 2016). In short, Plaintiffs and Class Counsel have adequately represented the Settlement Class.

B. The Settlement was Negotiated at Arm's Length with the Assistance of an Experienced, Court-Appointed Mediator.

Rule 23(e)(2)(B) further supports final approval because the Settlement was reached only after arm's-length negotiations facilitated by an experienced, court-appointed mediator, Joseph DiBenedetto. "To determine procedural fairness, courts examine the negotiating process leading

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*, 396 F.3d at 116 (quoting Manual for Complex Litig. (Third) § 30.42 (1995)); *see also In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (fact that "settlement was the product of prolonged, arm's-length negotiation, including as facilitated by a respected mediator" established that it was "procedurally fair"). This Settlement, which was negotiated at arm's length with the assistance of an experienced, court-appointed mediator, is procedurally fair and satisfies Fed. R. Civ. P. 23(e)(2)(B).

C. The Settlement Provides Reasonable Relief to the Settlement Class, Taking Into Account the Relevant Rule 23(e) and *Grinnell* Factors.

1. The relief provided by the Settlement is reasonable given the costs, risks, and delay of trial and appeal.

The best indicator of the fairness of the Settlement is the significance of the relief it provides—$3,613,970 in total value for the resolution of this litigation. In this case, Plaintiffs pursued a "full refund" theory of damages, which if successful, would have provided reimbursement to class members for ADEG purchased from the Recalled Lots. Under this Settlement, each Settlement Class Member will receive either 25 percent of the "full refund" value of a canister of ADEG (if they choose to receive Settlement Credit) or 12.5 percent of the "full refund" value of the product (if they choose an Alternative Payment). Accordingly, the classwide relief available to each Settlement Class Member through the Settlement is reasonable.

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 this principle, courts

often approve class settlements even 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) (approving settlement that provided 2% of defendants' maximum possible liability and observing that "the Second Circuit has held that . . . even a fraction of the potential recovery does not render a proposed settlement inadequate"); *see also In re Merrill Lynch Tyco Rsch. Sec. Litig.*, 249 F.R.D. 124, 135 (S.D.N.Y. 2008) (approving settlement of 3% of estimated damages); *Hall v. Children's Place Retail Stores, Inc.*, 669 F. Supp. 2d 399, 402 (S.D.N.Y. 2009) (approving settlement of 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)).

Not only is the relief offered by the Settlement reasonable in light of the damages theory pursued by Plaintiffs in the litigation, but it must also be assessed against the significant litigation obstacles looming absent a negotiated resolution. *See* Fed. R. Civ. P. 23(e)(2)(C)(i); *see also Grinnell*, 495 F.2d at 463 (explaining that courts should consider "the complexity, expense, and likely duration of the litigation"). 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. For example, Bactolac argued that Plaintiffs should be foreclosed from seeking a full refund since many consumers purportedly received some benefit from consumption of the product. (*See* Dkt. 173 at 37-39.) Each Settling Defendant separately opposed Plaintiffs' motion for class certification, and Bactolac moved to exclude Plaintiffs' class

certification experts. (Preliminary Approval Decl. ¶¶14, 16, Dkt. 247-1.) The Court did not rule on these motions prior to the Parties' resolution, but it is possible that some or all of the proposed litigation classes would not have achieved class 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 without the attendant risks of continued litigation.

Furthermore, the fact that the Settlement provides certain relief in the form of product credit does not diminish the relief provided to the class. Under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1712, a settlement that offers as a benefit a discount on a product or service offered by the defendant is considered a "coupon settlement," which warrants heightened scrutiny. *See, e.g.*, *Berkson v. Gogo LLC*, 147 F. Supp. 3d 123, 131-32 (E.D.N.Y. 2015). The Settlement, however, avoids the type of abusive settlements that CAFA was intended to curtail; Settlement Class Members may elect to receive Settlement Credit or an Alternative Payment and thus no class member is forced to do business with one of the Settling Defendants in order to receive their settlement benefits. *See, e.g.*, *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 706 (7th Cir. 2015) (explaining that coupon settlements are most abusive when they force class members to do business with a defendant that injured them in some way). Further, Settlement Class Members may use Settlement Credit for up to three years before it expires. (Settlement § 4(a), Dkt. 247-2); *see In re Sw. Airlines*, 799 F.3d at 706 (explaining that abusive coupon settlements often distribute coupons that expire quickly). Here, of 10,373 claims received to date, 4,237 have selected to receive Settlement Credit versus 6,136 that have elected to receive an Alternative Payment, suggesting Settlement Class Members find the Settlement Credit to be a useful benefit. (Madden Decl. ¶ 18.) Simply put, the Settlement avoid the pitfalls CAFA sought to eradicate and offers a

reasonable benefit, albeit in the form of product credit, to Settlement Class Members. *See Berkson*, 147 F. Supp. 3d at 133 ("[A] settlement which provides what might be characterized as coupons as a primary benefit is within the range of possible approval." (internal quotation and quotation marks omitted)).

Plaintiffs and 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 and appeals. 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 v. MetroPlus Health Plan, Inc.*, No. 11-cv-05669 (BMC), 2012 WL 5874655, at *4 (E.D.N.Y. Nov. 20, 2012). 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 Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006) ("Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation."); *In re Citigroup Inc. Bond Litig.*, 296 F.R.D. 147, 155 (S.D.N.Y. 2013) ("[T]he more complex, expensive, and time consuming the future litigation, the more beneficial settlement becomes as a matter of efficiency to the parties and to the Court.").

2. The stage of the proceedings and substantial discovery completed favor final approval.

The advanced stage of the proceedings also supports approval of the Settlement. Under the third *Grinnell* factor, settlement is especially favored when the litigation is at an "advanced stage"

with an "extensive amount of discovery completed." *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04 Civ. 8144, 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009). This factor goes to "whether the parties had adequate information about their claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement." *In re Facebook IPO Sec. & Derivative Litig.*, MDL No. 12-2389, 2015 WL 6971424, at *4 (S.D.N.Y. Nov. 9, 2015). Here, the Parties negotiated the Settlement after discovery was complete, class certification experts had been disclosed and deposed, and Plaintiffs' motion for class certification was fully briefed. The litigation was therefore at a mature stage and counsel were able to discern the relative strengths and weaknesses of their cases. This factor favors approval of the Settlement.

3. The risks of maintaining the class action through trial, the risks of establishing liability, and the risks of establishing damages all favor 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 class certification of nationwide and statewide classes, which each Defendant independently opposed. 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 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 classwide damages also favor approval of the Settlement. *See Asare v. Change Grp. of N.Y.*, 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 and IVL2's relative lack of financial wherewithal further

complicates these risks; it is questionable whether NaturMed or IVL2 would have the ability to contribute financially to a verdict after trial. *See Guippone*, 2016 WL 5811888, at *6 (explaining that a defendant's insolvency creates greater risks for plaintiffs in establishing liability, damages, and maintaining a certified class).

4. The Settlement claims process is straightforward and effective.

Under Fed. R. Civ. P. 23(e)(2)(C)(ii), the Court must review the method by which the Settlement distributes relief to the Settlement Class. 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)(2)(C) advisory committee's note to 2018 amendments.

Settlement Class Members are treated equitably under the terms of the Settlement. Every Settlement Class Member may elect to obtain either $10 in Settlement Credit or a $5 Alternative Payment. *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."). Settlement Class Members have received information about these benefits through the comprehensive, Court-approved Notice Program. (*See generally* Madden Decl.) To obtain one of these benefits, Settlement Class Members must submit a simple Claim Form that, in most circumstances, requires only basic identifying information.[6] (Final Approval Decl. ¶ 9.) This Claim Form may be submitted either by returning the pre-paid postcard delivered to over 95 percent of potential class members, or through an online portal available on

[6] 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), Dkt. 247-2.)

the Settlement Website. (Madden Decl. ¶ 9; Final Approval Decl. ¶¶ 8-9.) To date, over 10,000 claims have been submitted to the Claims Administrator for eligibility review. (Madden Decl. ¶ 17.) Accordingly, the Settlement allocates benefits equitably, efficiently, and treats Settlement Class Members equitably relative to each other., satisfying Fed. R. Civ. P. 23(e)(2)(C)(ii).

5. Two of the three Settling Defendants are unlikely to withstand a greater judgment and the ability of Bactolac to do so does not weigh against final approval.

One factor courts may assess under *Grinnell* is the ability of the defendant to withstand a greater judgment. *Grinnell*, 495 F.2d at 463. As discussed above, NaturMed is insolvent, or nearly so, and is unlikely to be capable of paying a litigated judgment. (Preliminary Approval Decl. ¶ 20.) In addition, Class Counsel understands IVL2's financial means to be limited as well. (*Id.*) Two of three Settling Defendants thus may not have the capacity to afford the costs associated with continued litigation and, ultimately, a judgment in Plaintiffs' favor. The third Settling Defendant, Bactolac appears likely to withstand a greater judgment, but "a defendant is not required to empty its coffers before a settlement can be found adequate." *Shapiro v. JPMorgan Chase & Co.*, Nos. 11-cv-8331, 11-cv-7961, 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014). The fact that two of three Settling Defendants may not be able to contribute to a greater final judgment after litigation through trial favors approval of this negotiated Settlement, while Bactolac's financial wherewithal "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.*

6. The requested attorneys' fees and costs are reasonable and will only be paid after the Effective Date.

Rule 23(e)(2)(C)(iii) requires evaluation of the terms of any proposed attorneys' fees, including the timing of payment. Plaintiffs are petitioning the Court for an award of attorneys' fees of $992,421 and litigation costs of $202,236.34. The Settling Defendants have agreed not to object

to requests for attorneys' fees and costs equal to these amounts. (Settlement § 5(a), Dkt. 247-2.) Further, no Settlement Class Members have raised an objection to the application for attorneys' fees or costs. As set forth below, the requests here are reasonable and supported by the law, evidence, and results achieved in this case.

7. The existence of side agreements does not weigh against final approval.

Rule 23(e)(2)(C)(iv) requires the Court to consider any side agreements that must be disclosed under Rule 23(e)(3). This is because side agreements can result in inequitable treatment of class members. Fed. R. Civ. P. 23(C) advisory committee's note to 2018 amendments. Here, there are two side agreements that Plaintiffs disclosed in their preliminary approval papers. The first allows the Settling Defendants to terminate the Settlement if a significant percentage of eligible Settlement Class Members opt out of the Settlement. The threshold necessary to trigger this termination right was not disclosed in the Settlement 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. Although this side agreement did not affect the adequacy or fairness of the Settlement, its import on the Court's fairness inquiry is further diminished by the fact that the Claims Administrator has received only one valid opt-out request, which is insufficient to meet the threshold set in the side agreement. (*See* Madden Decl. ¶ 22.)

The second side agreement is an agreement among the Settling Defendants regarding each Defendant's responsibility to pay a percentage of the Settlement Fund. The relative responsibility of each Settling Defendant to pay a portion of the Settlement does not impact the fairness or adequacy of the Settlement to the Settlement Class, as both the Total Settlement Payment and the Total Settlement Value have been disclosed.

8. The overwhelmingly positive reaction of the Settlement Class supports final approval of the Settlement.

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley*, 186 F. Supp. 2d at 362. Here, "[t]he fact that the vast majority of class members neither objected nor opted out is a strong indication that the proposed settlement is fair, reasonable, and adequate." *Wright v. Stern*, 553 F. Supp. 2d 337, 345 (S.D.N.Y. 2008). There has been only a single objection the Settlement, which, as discussed below, has nothing to do with the substance of the Settlement, the benefits provided, or the request for attorneys' fees, costs, or Service Awards; rather, the lone objector, Mr. James Henson, seeks to collect a default judgment obtained against NaturMed in another forum for personal injuries and emotional distress allegedly caused by consumption of ADEG. (*See* Dkt. 249-1.) Accordingly, there is not a single objection to the Settlement itself and only one Settlement Class Member has validly exercised an right to opt out. (Madden Decl. ¶¶ 22-23.)

The reaction of Settlement Class Members has been uniformly positive. Although the claims deadline is several days away, over 10,000 claims have been received to date; 4,237 of those claims request Settlement Credit and 6,136 seek an Alternative Payment. (*Id.* ¶¶ 17-18.) On the other hand, the Claims Administrator has received only one valid opt-out request and only one Settlement Class Member has raised an objection, albeit on grounds that have nothing to do with the Settlement itself. In a class of potentially more than 188,000 members, this miniscule number of opt outs and objectors provides powerful evidence of the Settlement's fairness. *See, e.g.*, *Romero v. La Revise Assocs.*, 58 F. Supp. 3d 411, 420 (S.D.N.Y. 2014) (approving settlement with 1.2% opt-out rate); *Ferrick v. Spotify USA Inc.*, No. 16-cv-8412, 2018 WL 2324076, at *4 (S.D.N.Y. May 22, 2018) (approving settlement where court received 1224 opt outs out of 535,380 notices mailed, and observing that "[d]espite the exclusions and objections . . . the vast majority of class members did not object to the settlement or opt out of it, which indicates that the settlement

is fair"); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013) (reaction of the class overwhelmingly support settlement approval where 2.5 million notices generated 134 exclusion requests); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 167 (S.D.N.Y. 2007) (11 objections out of 1.8 million mailed notices reflected "overwhelmingly positive reaction of the class . . . weigh[ing] heavily in favor of approval of the Settlement").

In sum, the positive reaction of Settlement Class Members, including the near-absence of opt-out requests and objections, "weighs strongly in favor of [final] approval." *In re Bear Stearns Cos., Inc. Secs., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 266-67 (S.D.N.Y. 2012) (holding that 5.1% exclusion rate and less than 1% objection rate "weighs strongly in favor of approval"); *see also Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 239 (E.D.N.Y. 2010) ("[s]uch a small number of class members seeking exclusion or objecting [24 objections and 127 opt-outs of 11,800,514 class members] indicates an overwhelmingly positive reaction of the class").

D. The Objection Raised by James Henson is Not Directed at the Settlement or its Fairness and Improperly Seeks Relief Obtained in Another Matter and in Another Forum and Should Be Rejected.

The lone objection to the Settlement was filed by James Henson, who is represented by Attorney Robert Joyce.[7] Mr. Henson alleges that after consuming ADEG manufactured as part of the Recalled Lots, he became severely ill, experiencing gastrointestinal reflux and an inability to speak, known as dysphonia. (*Id.* at 5-6.) Mr. Henson attempted to treat these conditions by seeing his primary care physician, an ear, nose, and throat specialist ("ENT"), and a gastroenterologist. The ENT specialist prescribed two acid reflux medications, Omeprazole and Ranitidine, and performed a flex laryngoscopy. (*Id.* at 6; Henson Dep. Tr. at 13:9-25, attached as Exhibit A to

[7] Attorney Joyce has not made an appearance in this Action, though he states in the objection papers that he "plans on attending the Final Approval Hearing." (Dkt. 249-1.)

Final Approval Declaration.) Mr. Henson's gastroenterologist performed an esophagogastroduodenoscopy and a colonoscopy. (Dkt. 249-1 at 6-7.) A pathologist reviewed specimens collected during these procedures and found them to be consistent with gastroesophageal reflux. (*Id.* at 7.) Although Mr. Henson acknowledged that he had experienced gastrointestinal reflux and dysphonia in the past, after receiving the March 2016 recall notice from NaturMed, he associated the severity and recurrence of these conditions with his consumption of ADEG. (*Id.* at 6.)

On April 17, 2018, Mr. Henson filed a complaint for damages against NaturMed in the United States District Court for the District of Maryland. (*Id.* at 7.) On May 19, 2019, Mr. Henson filed an amended complaint that named Bactolac, IVL2, and HKW Capital Partners III, L.P. as additional defendants. (*Id.* & n.4.) During a deposition in this Action, Mr. Henson testified that he had no understanding whether Bactolac or IVL2 was involved in his lawsuit. (Henson Dep. Tr. at 23:2-6.) Neither of these parties were served with process in Mr. Henson's case and both were voluntarily dismissed. (Dkt. 249-1 at 7 n.4.) On February 5, 2020, the clerk of court entered an order of default against NaturMed for its failure to respond or participate in Mr. Henson's suit. (*Id.* at 8.) The court then conducted a hearing to determine damages on January 28, 2021, during which it concluded that Mr. Henson failed to present evidence that his gastrointestinal reflux was caused by consumption of ADEG. (*Id.* at 8, 10.) The court concluded, however, that Mr. Henson sought medical treatment only after he received the recall notice and thus could collect damages for incurring medical expenses, undergoing invasive medical procedures, and suffering heightened anxiety and pain associated with the diagnostic process. (*Id.* at 10-11.) Mr. Henson sought economic, non-economic, and punitive damages, as well as attorneys' fees, totaling $1,510,981.37. (*Id.* at 11.) The court awarded $7,313.00 in economic damages and $50,000 in non-economic

damages, for a total of $57,313.00. (*Id.* at 12-14.) There is no evidence in the record that Mr. Henson or his counsel has done anything to enforce this judgment or collect from NaturMed.[8] (Final Approval Decl. ¶ 15.)

Mr. Henson now claims that the $57,313 default judgment he obtained against NaturMed should be paid from the Total Settlement Payment. (Dkt. 249-1 at 1.) He acknowledges that he does not know how much NaturMed contributed to the Total Settlement Payment; indeed, Mr. Henson conceded that he does not know if NaturMed contributed ***any*** portion of the Total Settlement Payment. (Henson Dep. Tr. at 31:18-25.) Furthermore, while Mr. Henson testified that his lawsuit was an effort to "get compensation for the episode of sickness" he experienced after consuming ADEG in 2015 and 2016, he conceded that he does not know whether the class Settlement is intended to compensate Settlement Class members for physical injuries, emotional distress, or medical bills. (*Id.* at 19:14-17; 28:19-30:8.) None of these damages are compensated by the Settlement, nor were they intended to be; this Settlement compensates consumers for purely economic injuries resulting from their purchase of adulterated or misbranded ADEG from the Recalled Lots. Mr. Henson, in short, is attempting to obtain compensation for personal injuries from a class Settlement that does not compensate for such damages. This is improper and unfair to every Settlement Class Member.

To be clear, Mr. Henson's objection is not directed at the Settlement and he makes no complaints regarding the Settlement's fairness. Mr. Henson testified that he has not reviewed the Settlement, any of the Settlement papers, or even looked at the Settlement Website. (*Id.* at 25:22-26:11.) Accordingly, Mr. Henson's "objection" is not to the Settlement, and its presentation is

[8] In a deposition taken in this Action on May 4, 2022, Mr. Henson testified that he took no steps to try and collect the default judgment and had no knowledge of any steps taken by his attorney to do so, stating, "I left that in my lawyer's hands." (Henson Dep. Tr. at 30:19-21.)

inappropriate at this hearing. Neither Mr. Henson nor his attorney cite any authority—and Class Counsel has also found none—that provides a legal basis for them to collect from an unrelated class settlement in a foreign jurisdiction, especially where they have taken no action to collect their judgment directly from NaturMed. (Final Approval Decl. ¶¶ 15, 17.) Mr. Henson should not be permitted to circumvent the legal processes available to collect a judgment by asserting a right to repayment from a class Settlement that expressly does not provide compensation for the type of injuries asserted in Mr. Henson's lawsuit. In short, the Court should reject Mr. Henson's objection.

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The proposed Settlement was negotiated at arm's length by Class Counsel and Plaintiffs who fulfilled their responsibilities under Rule 23. The Agreement provides reasonable monetary recoveries that are consistent with the economic damage theories pursued by Plaintiffs in the litigation, and the Settlement is fair, reasonable, and adequate in all respects, satisfying Rule 23(e)(2). Moreover, the Settlement is overwhelmingly supported by members of the Settlement Class, drawing only a single objection that is not even focused on the fairness of the Settlement or the benefits it provides. Plaintiffs respectfully request that the Court grant final approval to the Settlement.

II. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS.

In its Preliminary Approval Order, the Court found, for purposes of settlement, "that it will likely be able to certify the proposed Settlement Class" under Fed. R. Civ. P. 23(a) and 23(b)(3). (Dkt. 248 ¶ 33.) Since entry of the Preliminary Approval Order, nothing has changed to call the Court's conclusion into question. For the reasons discussed in Plaintiffs' Preliminary Approval Memorandum, and further addressed herein, Plaintiffs respectfully submit that the Settlement Class satisfies all the elements of Rule 23(a) and (b)(3). *See Bear Stearns*, 909 F. Supp. 2d at 264

(adopting the certification analysis set forth at the preliminary approval stage and granting final class certification).

III. THE COURT SHOULD GRANT PLAINTIFFS' APPLICATION FOR AN AWARD OF ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS.

A. The Court Should Grant Plaintiffs' Application for an Award of Attorneys' Fees.

In this class action Settlement, the Notice and Settlement Website provides that Class Counsel may request an attorneys' fee award up to one-third the Total Settlement Value, or $1,207,019. Here, however, Plaintiffs request an award of $992,421, which is less than Class Counsel's lodestar of $1,050,940 and less than the amount set forth in the Notice and Settlement Website. (Final Approval Decl. ¶ 21.) As of the date of this filing, no Settlement Class Member has objected to the attorneys' fee portion of the Settlement. The Settling Defendants have also agreed not to oppose this fee request. Accordingly, Plaintiffs' request for attorneys' fees is unopposed. For the reasons set forth below, Class Counsel's application should be approved.

1. The standard for awarding attorneys' fees to class counsel.

"[A] . . . lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980). The Second Circuit recognizes that a lawyer whose effort creates a common fund should recover a reasonable fee and "has observed that the fee awarded must reflect 'the actual effort made by the attorney to benefit the class.'" *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 249 (2d Cir. 2007) (quoting *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977) (internal quotation marks omitted)).

As explained above, because the Settlement offers Settlement Class Members the choice of either product credit or a cash payment, it implicates the "coupon settlement" provisions CAFA, 28 U.S.C. § 1712. When § 1712 of CAFA applies to a settlement, the district court has discretion to calculate attorneys' fees using either the lodestar method or by awarding a percentage of the fund based on the value of the coupons redeemed. *See In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 27 F.4th 291, 302 (4th Cir. 2022) (affirming district court's use of lodestar method to calculate fee in coupon settlement); *Linneman v. Vita-Mix Corp.*, 970 F.3d 621, 627 (6th Cir. 2020) (same); *Galloway v. Kan. City Landsmen, LLC*, 833 F.3d 969, 974-75 (8th Cir. 2016) (same); *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 706-07 (7th Cir. 2015) (same).

Here, Plaintiffs request that the Court use the lodestar method to calculate Class Counsel's fee. The lodestar method fairly reflects the significant time and effort required to advance the Action and, ultimately, to negotiate a classwide resolution. Further, although the Settlement includes a "coupon" component, the evidence in the case demonstrates that numerous customers were loyal to the ADEG product and continue to purchase the supplement from IVL2 even after the recall. Indeed, more Claimants have elected to receive Settlement Credit than an Alternative Payment. In other words, a sizable portion of the class remains willing to do business with the party that now markets and sells ADEG, albeit in reformulated form. For those who no longer wish to use ADEG or a related supplement product, the Alternative Payment Fund is available. *See In re Sw. Airlines*, 799 F.3d at 706 (explaining that the "potential for abuse [in coupon settlements] is greatest when the coupons have value only if a class member is willing to do business again with the defendant who has injured her in some way"). Under these circumstances, it is appropriate to calculate Class Counsel's fee using the lodestar method.

In contrast, utilizing the percentage-of-the-fund method would not provide fair compensation to Class Counsel given the results achieved in this case. Under CAFA, application of the percentage-of-the-fund method would require the district court to determine the settlement value using only the value of the cash provided plus the coupons actually redeemed by the class. *See* 28 U.S.C. § 1712(a)-(c). In this case, 4,237 Claimants have filed claims as of May 9, 2022 electing to receive Settlement Credit, meaning the value of credits redeemed is currently $42,370. (Madden Decl. ¶ 18.) Coupled with the $1.725 million in cash, the "value" of the Settlement, were the Court to utilize the percentage-of-the-fund method, would be $1,767,370. If the Court were to award one-third of this value, which the Settlement permits, Class Counsel's attorneys' fee award would only amount to $589,064.42—far below the lodestar of $1,050,940 as well as Class Counsel's fee request of $992,421. In short, the lodestar method provides the fair means of compensation given the results achieved in this case through Class Counsel's persistent and successful efforts.

2. Application of the Lodestar Method and the *Goldberger* Factors

Under the lodestar method, the court "scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate" to calculate the "lodestar." *Goldberger*, 209 F.3d at 47. "A reasonable hourly rate is 'the rate a paying client would be willing to pay,' 'bear[ing] in mind that a reasonable paying client wishes to spend the minimum necessary to litigate the case effectively.'" *McLaughlin v. IDT Energy*, No. 14 CV 4107 (ENV) (RML), 2018 WL 3642627, at *16 (E.D.N.Y. July 30, 2018) (quoting *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany*, 522 F.3d 182, 190 (2d Cir. 2008)). "To determine reasonable hourly rates, the Court considers this Circuit's adherence to the forum rule, which states that a district court should generally use the prevailing hourly rates in the

district where it sits." *Div. 1181 Amalgamated Transit Union-N.Y. Emps. Pension Fund v. D & A Bus Co.*, 270 F. Supp. 3d 593, 617-18 (E.D.N.Y. 2017) (citing *Simmons v. N.Y.C. Transit Auth.*, 575 F.3d 170, 175-76 (2d Cir. 2009)).

The Second Circuit has "held that the 'lodestar—the product of a reasonable hourly rate and the reasonable number of hours required by the case—creates a presumptively reasonable fee.'" *Millea v. Metro-North R.R. Co.*, 658 F.3d 154, 166 (2d Cir. 2011) (quoting *Arbor Hill*, 522 F.3d at 183). "[W]hether the calculation is referred to as the lodestar or the presumptively reasonable fee, courts will take into account case-specific factors to help determine the reasonableness of the hourly rates and the number of hours expended." *Tanski v. AvalonBay Communities, Inc.*, No. CV 15-6260 (AKT), 2020 WL 2733989, at *2 (E.D.N.Y. May 26, 2020) (quoting *Pinzon v. Paul Lent Merch. Sys.*, No. 11-CV-3384, 2012 WL 4174725, at *5 (E.D.N.Y. Aug. 21, 2012), *adopted by* 2012 WL 4174410 (E.D.N.Y. Sept. 19, 2012)). Here, Class Counsel's lodestar is $1,050,940 but Class Counsel is requesting only $992,421. (Final Approval Decl. ¶ 21.) Moreover, although courts in this district "regularly award multipliers from two to six times lodestar," Class Counsel is not requesting a multiplier in this case. *Mariani v. OTG Mgmt., Inc.*, No. 16 CV 01751 (CLP), 2018 WL 10468036, at *14 (E.D.N.Y. Sept. 28, 2018) (quoting *Monserrate v. Tequipment, Inc.*, No. 11 CV 5830557, at *3 (E.D.N.Y. Nov. 16, 2012)). Accordingly, Class Counsel's request easily falls within the range of reasonableness when considering the guidelines set forth by the Second Circuit in *Goldberger*: (1) the time and labor expended by counsel, (2) the magnitude of the litigation, (3) the risk of the litigation, (4) the quality of the representation, (5) the requested fee in relation to the settlement, and (6) public policy considerations. 209 F.3d at 50.

Magnitude and complexities of the litigation. The magnitude and complexity of the litigation weighs in favor of approval. This Action was complex, presenting novel legal and factual issues whose outcome was uncertain at the outset. Indeed, when the parties agreed to mediate the case, pending before the Court was a fully briefed motion for class certification proposing nationwide and multiple statewide consumer classes, multiple *Daubert* motions, a motion to strike certain witness testimony, and a motion for partial summary judgment. The first *Goldberger* factor easily weighs in Plaintiffs' favor.

Risks of the litigation. The Second Circuit has historically characterized the risk of success as "perhaps the foremost factor to be considered in determining whether to award an enhancement." *Goldberger*, 209 F.3d at 54. Courts recognize that regardless of the perceived strength of a plaintiff's case, liability is no sure thing. *Wal-Mart Stores*, 396 F.3d at 118. Class Counsel took on considerable risk in pursuing this case in light of the facts uncovered during the recall investigation. Indeed, both NaturMed and Bactolac's witnesses testified that the Recalled Lots were tested for bacteria and other pathogens multiple times but none were ever found. Instead, Class Counsel endeavored to show that the Recalled Lots were adulterated and misbranded using genetic testing, a method whose scientific reliability in litigation is relatively untested. Bactolac argued that such testing was inherently unreliable and Bactolac moved to exclude Plaintiffs' primary expert on the practice, Dr. Damon Little. Had Bactolac prevailed in this challenge, Plaintiffs' entire case would have been unprovable. For these and other reasons, Class Counsel invested extensive time and expense in this matter with no guarantee of success.

Quality of representation. As set forth above, Class Counsel is experienced in class action litigation. Class Counsel used this experience to obtain reasonable classwide relief for the Settlement Class and negotiate a workable resolution in the face of difficult mediation conditions.

"[T]he quality of representation is best measured by results, and such results may be calculated by comparing 'the extent of possible recovery with the amount of actual verdict or settlement.'" *Goldberger*, 209 F.3d at 55 (citations omitted). Here, Settlement Class Members will receive through settlement either 25 percent of the "full refund" value of a canister of ADEG or 12.5 percent of such value, depending on the form of relief selected. In other words, the relief made available by the Settlement closely tracks what was sought through litigation. This Court should find that Class Counsel achieved success and provided high-quality representation to the Settlement Class.

Requested fee in relation to the Settlement. The requested fee of $992,421, which is less than Class Counsel's lodestar, is reasonable in light of the work performed and the results obtained. Here, the Settlement will provide classwide relief despite challenging factual and legal obstacles, and offers Settlement Class Members benefits valued at either 25 percent or 12.5 percent of the "full refund" value sought through litigation. By any measure, the Settlement is a successful one. Further, although this Court regularly enhances the lodestar of class counsel who achieve a successful outcome, *see Mariani*, 2018 WL 10468036, at *14 (explaining that courts in the Eastern District "regularly award multipliers from two to six times lodestar"), Class Counsel does not seek such an enhancement here, rendering the fee request all the more reasonable. Accordingly, the Court should find that this *Goldberger* factor weighs in favor of Plaintiffs' request.

Public policy considerations. Where relatively small claims can only be prosecuted through aggregate litigation, "private attorneys general" play an important role. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980). Attorneys who fill the private attorney general role must be adequately compensated for their efforts. *Id.*; *see also Wal-Mart Stores*, 396 F.3d at 123. Counsel's fees should reflect the important public policy goal of "providing lawyers with

sufficient incentive to bring common fund cases that serve the public interest." *Goldberger*, 209 F.3d at 51. This factor, like the others articulated in *Goldberger*, supports Plaintiffs' request for an attorneys' fee award of $992,421.

For the reasons set forth above, the requested fee is appropriate, fair, and reasonable, and Plaintiffs respectfully request that the Court approve their request.

B. Class Counsel's Expenditures on Behalf of the Settlement Class Were Reasonable.

"It is well established that counsel who obtain a common settlement fund for a class are entitled to the reimbursement of expenses that they advance to a class." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-MD-1720 (MKB) (JO), 2019 WL 6888488, at *10 (E.D.N.Y. Dec. 16, 2019) (quoting *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015) (citation omitted)). "Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *Id.* (quoting *EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05-CV-10240, 2007 WL 2230177, at *18 (S.D.N.Y. July 27, 2007) (citations omitted)).

Class Counsel spent $202,236.34 in unreimbursed out-of-pocket costs in prosecuting the Action against the Settling Defendants. (Final Approval Decl. ¶ 24.) These expenses consist primarily of expenses associated with depositions, electronic discovery and case management, and expert witnesses, (*id.*), and "are the type of expenses typically billed by attorneys to paying clients in the marketplace." *Fleisher v. Phoenix Life Ins. Co.*, Nos. 11-cv-8405 (CM), 14-cv-8714 (CM), 2015 WL 10847814, at *23 (S.D.N.Y. Sept. 9, 2015). "The fact that Class Counsel was willing to expend their own money, where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." *Id.*

Plaintiffs' request for reimbursement of litigation expenses is reasonable and should be granted in full.

C. Service Awards to the Class Representative Plaintiffs Are Warranted Given Their Significant Efforts on Behalf of the Settlement Class.

In the Second Circuit, plaintiff incentive awards "are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs." *Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 101 (E.D.N.Y. 2015); *see also Bellifemine v. Sanofi-Aventis U.S. LLC*, No. 07 Civ. 2207 (JGK), 2010 WL 3119374, at *7 (S.D.N.Y. Aug. 6, 2010) (explaining that courts within this Circuit "have, with some frequency, held that a successful Class action plaintiff may, in addition to his or her allocable share of the ultimate recovery, apply for and, in the discretion of the Court, receive an additional award, termed an incentive award").

The class representative Plaintiffs have devoted considerable time and effort to this litigation's success. Each Plaintiff engaged with Class Counsel in a pre-filing investigation, reviewed multiple versions of the complaint, timely responded to written discovery requests, and produced responsive documents and electronically stored information. (Final Approval Decl. ¶ 25.) Each Plaintiff also prepared for and participated in a deposition that inquired, *inter alia*, into personal medical details that were at times of a sensitive nature. (*Id.*) Class Counsel reviewed the Settlement terms with the Plaintiffs and each was provided an opportunity to give feedback on those terms. (*Id.*)

Under the circumstances of this case, Plaintiffs request a Service Award for each representative Plaintiff of $5,000. This request is reasonable and falls squarely within the range approved within this Circuit. *See, e.g.*, *Story v. SEFCU*, No. 1:18-CV-764 (MAD/DJS), 2021 WL

736962, at *10-11 (N.D.N.Y. Feb. 25, 2021) (awarding $15,000 service awards to each class representative plaintiff); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126, 2018 WL 6250657, at *4 (S.D.N.Y. Nov. 29, 2018) (approving award of $50,000 for six plaintiffs and $100,000 for two plaintiffs); *Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 60 (W.D.N.Y. 2018) (approving $10,000 service award because named plaintiff had "been actively involved in the litigation of this case since its inception" and "provided counsel with assistance"); *Bd. of Trs. of AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, No. 09 Civ. 686 (SAS), 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (approving $50,000 service award to each of the named plaintiffs, who "diligently performed the tasks expected of them and reasonably incurred costs and expenses in responding to document requests and interrogatories, producing responsive documents, reviewing filings, attending depositions, and communicating regularly with plaintiffs' counsel"). The Court should approve the requested Service Awards.

CONCLUSION

The Settlement achieves a significant result in a complex litigation that will provide reasonable, classwide relief to Settlement Class Members. This outcome took over four years of litigation, full briefing of class certification and *Daubert* motions, significant discovery and thirty total depositions, as well as a hard-fought mediation presided over by a Court-appointed mediator. The resulting Settlement is overwhelmingly supported by members of the Settlement Class; indeed, only a single class member has raised an objection and it has nothing to do with the Settlement's fairness or the requests for attorneys' fees, costs, or a Service Award. The Settlement is fair, adequate, and reasonable, and this Court should grant final approval of the Settlement and certify the Settlement Class. In addition, the Court should award attorneys' fees of $992, 421, order

reimbursement of litigation expenses of $202,236.34, and award Service Awards of $5,000 to each class representative Plaintiff.

Dated: May 16, 2022
New York, New York

Respectfully submitted,

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