IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No.: 1:22-cv-06497

EMILY GLASPIE, on behalf of herself and all others similarly situated,

Honorable Virginia M. Kendall

Plaintiff,

v.

NATIONAL ASSOCIATION OF BOARDS OF PHARMACY,

Defendant.
_____/

UNOPPOSED AMENDED[1] MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT AND INCORPORATED MEMORANDUM OF LAW[2]

[1] This Motion is amended as to note 2. In addition, the Incorporated Memorandum of Law is amended as to Sections I(A) and VI only.

[2] While this Motion with incorporated memorandum of law would otherwise be overlength pursuant to Northern District of Illinois Local Rule 7.1, Plaintiff separately sought leave of the Court for the length of the Motion with incorporated memorandum of law. (D.E. 31.) The Court granted that Motion in D.E. 33.

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MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT

Plaintiff Emily Glaspie ("Plaintiff" or "Glaspie"), on behalf of herself and the proposed Settlement Class, by and through the undersigned counsel of record, hereby moves for an Order initially approving the Settlement Agreement and Stipulation entered into between the Parties and attached to this motion as fair, reasonable, and adequate; conditionally certifying a Settlement Class (as defined herein); directing that Notice (as defined herein) be given to the Settlement Class; and setting a Fairness Hearing for the Court's ultimate consideration of the proposed Settlement Agreement and Stipulation. Defendant the National Association of Boards of Pharmacy (the "NABP") does not oppose the relief sought in this Motion. More particularly, for the reasons set forth in Plaintiff's incorporated Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Settlement Agreement, Plaintiff seeks an Order:

1. Preliminarily approving the proposed Settlement, as set forth in the Settlement Agreement and Stipulation attached to this Motion as **Exhibit 1** ("the "Settlement Agreement");

2. Conditionally certifying, pursuant to Federal Rule of Civil Procedure 23—and solely for the purposes of the Settlement Agreement—a Settlement Class consisting of:

a. **2021 Subclass**: All Candidates in the United States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands who took the NAPLEX test administered by the NABP during the period of August 31, 2021, through and including September 8, 2021, to whom Defendant sent the September 17, 2021 Notice informing the Candidate that the Candidate's NAPLEX score was incorrectly reported as "failed" when they had actually passed.

b. **2022 Subclass**: All Candidates in the United States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands who took the NAPLEX test

administered by the NABP during the period of July 30, 2022, through and including October 26, 2022, to whom Defendant sent the November 8, 2022 Notice informing the Candidate that the Candidate's NAPLEX score was incorrectly reported.

3. Approving in form and content the proposed notice plan outlined in the Settlement Agreement, which includes:

a. The establishment of a claims administration website which shall provide Class Members with the Long Form Notice, attached hereto as **Exhibit 2**, and the Claim Form, as well as an electronic Claim Form, and the Settlement Agreement, selected pleadings from the Court file, and other information regarding the Settlement;

b. Notice by direct mail of the Mail Notice, attached hereto as **Exhibit 3**, as well as a Claim Form to those Class Members whose addresses the NABP can readily identify, to be accomplished by the Settlement Claims Administrator, via first-class mail, postage pre-paid, addressed to the last known address shown by the records of the NABP;

c. Notice by electronic mail of the Email Notice, attached hereto as **Exhibit 4**, as well a claim form, via electronic mail to be sent by the NABP to the email address that the NABP has on file for all Class Members. This Email Notice is to be re-sent in the same manner fifteen days after the first notice.

All of which, collectively, are referred to as the "Notice."

4. Finding that the proposed Notice program provided by the Parties' Settlement Agreement will satisfy the requirements of Federal Rule of Civil Procedure 23, due process, and applicable law; that it is the best notice practice; and that it shall constitute due and sufficient notice of the Settlement Agreement and Fairness Hearing to Class Members;

5. Directing that all proceedings in the Litigation, other than such proceedings as may be necessary to carry out the terms and conditions of the Settlement Agreement, are hereby stayed and suspended until further orders of this Court, and enjoining all Class Members, or any of them, from commencing, prosecuting, participating in, or continuing the prosecution of, any suit asserting any of the Claims released in the Settlement Agreement in any capacity, against the NABP, pending the final determination of whether the Settlement Agreement should be approved by the Court;

6. Conditionally designating Emily Glaspie as the Class Representative for the sole purpose of settlement proceedings;

7. Conditionally designating Jordan A. Shaw, Zachary D. Ludens, and Lauren N. Palen of Zebersky Payne Shaw Lewenz, LLP and David A. Rolf of Sorling, Northrup, Hanna, Cullen & Cochran, Ltd. as Class Counsel as defined as Settlement Class Counsel in the Settlement Agreement;

8. Authorizing the Parties to retain a Settlement Class Administrator and directing that as soon as practicable following an Order preliminarily approving the Settlement Agreement, the Settlement Claims Administrator shall, at the NABP's expense, cause Notice to be provided to the Class Members in accordance with the Notice program outlined in the Settlement Agreement;

9. Directing that the NABP shall, at its expense, cause the Settlement Claims Administrator to establish a website providing the information set forth above and directing that the Settlement Claims Administrator shall also make a copy of the Long Form Notice and Claim Form available to any Class Member who requests a copy in writing or by calling the Settlement Claims Administrator toll free;

10. Scheduling a hearing to determine the reasonableness, adequacy, and fairness of the proposed settlement and whether it should be approved by the Court (the "Fairness Hearing");

11. Permitting any person falling within the definition of Class Member to request to be excluded from the Settlement Class by submitting in writing (and not via telephone or email) a Request for Exclusion to the Settlement Claims Administrator, Class Counsel, and Defense Counsel within 30 days after the Settlement Claims Administrator has mailed the Mail Notice to the Class;

12. Providing that any member of the Settlement Class who objects to the approval of the Settlement Agreement may appear at the Fairness Hearing and show cause why all terms of the proposed Settlement Agreement should not be approved as fair, reasonable, and adequate and why judgment should not be entered thereupon, as long as that Person (a) has served on counsel of record, (i) a written notice of objection, including a written notice of his, her, or their intention to appear if he, she, or they intends to do so, (ii) a written statement of the position that he, she, or they will assert, (iii) the reasons for his, her, or their position, and (iv) copies of any papers, briefs, or other matters that he, she, or they wish for the Court to consider; and (b) filed said objections, papers, and briefs, and proof of service on counsel of record within 30 days after the Settlement Claims Administrator has mailed the Mail Notice to the Class;

13. Entering the proposed Order Preliminarily Approving Class Action Settlement, Conditionally Certifying a Class, and Granting Other Relief attached hereto as **Exhibit 5**;

14. Counsel for Plaintiff has conferred with counsel for the NABP regarding the present motion and counsel for the NABP has indicated that the NABP does not oppose the relief requested herein.

WHEREFORE, Plaintiff Emily Glaspie respectfully requests the preliminary approval of the Settlement Agreement, the Court's entry of the attached proposed Order, and any such other and further relief as this Court deems mete and just for the effective administration of this Class Action.

INCORPORATED MEMORANDUM OF LAW

Plaintiff Emily Glaspie ("Plaintiff" or "Glaspie") and Defendant National Association of Boards of Pharmacy ("Defendant" or the "NABP") (collectively, the "Parties") have reached a proposed Settlement Agreement in this putative class action. Plaintiff respectfully requests that the Court enter the proposed Order Preliminarily Approving Class Action Settlement, Conditionally Certifying a Class, and Granting Other Relief (the "Proposed Order"), which attached hereto as Exhibit 5.

For the reasons set forth more particularly below, the Settlement Agreement negotiated by the Parties is fair, adequate, and reasonable. Therefore, it should be preliminarily approved.

I. STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

A. Background

As alleged by Plaintiff in her Complaint (D.E. 1), this is a putative class action lawsuit arising out of almost unthinkable facts. The NABP administers various licensing exams for aspiring pharmacists, including the North American Pharmacist Licensure Examination (the "NAPLEX")—roughly equivalent to the bar examination for pharmacy students. (D.E. 1 ¶ 23.) By the time that test takers take the NAPLEX, most have already taken the requisite ethics exam (the Multistate Pharmacy Jurisprudence Examination ["MPJE"]) and secured coveted jobs and residencies contingent upon passing the NAPLEX. (D.E. 1 ¶¶ 19–20.) Without passing the

NAPLEX, candidates cannot become licensed pharmacists and, thus, cannot obtain employment as a practicing pharmacist. (D.E. 1 ¶ 32.)

Further, Plaintiff alleged in her Complaint (D.E. 1) that the NABP represents that, in exchange for the registration fee of several hundred dollars, the NABP properly administers, scores, and reports the scores of the NAPLEX exam. (D.E. 1 ¶¶ 22, 25, 41.) While the NABP did administer the exam, the NABP did not, in 2021 and 2022, properly score and/or report the scores of the NAPLEX. (D.E. 1 ¶¶ 5, 43.) Instead, in 2021, the NABP advised nearly 410 test takers that those test takers had failed the NAPLEX when, in fact, those test takers had *passed the examination*. (D.E. 1 ¶ 51; D.E. 1 Exh. C.) Then, in 2022, despite having actual knowledge of its scoring problems in 2021, the NABP advised another 220 test takers that they had failed the NAPLEX when, in fact, the test takers had passed. (D.E. 1 ¶ 57; D.E. 1 Exh. D.) Plaintiff Emily Glaspie was one such test taker. (D.E. 1 ¶ 67.) Despite her hard work and passing score, the NABP reported to Glaspie that she had failed the NAPLEX. (D.E. 1 ¶ 63.) Glaspie's incorrect score—as well as the scores of the Settlement Class—was then reported to various pharmacy boards across the country. (D.E. 1 ¶ 71.) These candidates lost jobs and internships from the incorrectly reported false failing score, costing the Class Members up to thousands in lost salary and other damages. (D.E. 1 ¶¶ 6, 39, 72–74.)

B. Procedural Background

As a direct result of the NABP's actions, Glaspie, on behalf of herself and others similarly situated, filed the operative Class Action Complaint against the NABP on November 19, 2022 (the "Complaint"). (D.E. 1.) The Complaint contains causes of action for breach of contract, negligence, negligent misrepresentation, defamation per se, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (the "Act").

On February 1, 2023, the NABP filed a Partial Motion to Dismiss, requesting dismissal with prejudice of all claims but the breach of contract claim. (D.E. 15, 16.) The NABP did not move to dismiss Glaspie's breach of contract claim, however. After mutual discussions between counsel, the Parties agreed to stay briefing on the Partial Motion to Dismiss in favor of an early mediation.

That mediation took place on February 28, 2023, before mediator Harry Schafer. The Parties reached a resolution that day, reducing the resolution to a binding settlement term sheet. Thereafter, the NABP identified additional members of the Settlement Class and/or otherwise identified that members of the Settlement Class should be moved within the tiers of the proposed monetary relief. Thus, the Parties executed an Amended Settlement Term Sheet on April 4, 2023. Finally, on July 13, 2023, the Parties executed the Settlement Agreement.

Since that point, counsel for the Parties have worked together to finalize the proposed Notice attached hereto as Exhibits 2 through 4 such that this Motion could be made.

II. SUMMARY OF THE PROPOSED SETTLEMENT TERMS

A. The Proposed Settlement Class

Pursuant to the Settlement Agreement, the Parties have agreed to the following Settlement Class:

> **2021 Subclass**: All Candidates in the United States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands who took the NAPLEX test administered by the NABP during the period of August 31, 2021, through and including September 8, 2021, to whom Defendant sent the September 17, 2021 Notice informing the Candidate that the Candidate's NAPLEX score was incorrectly reported as "failed" when they had actually passed.
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> **2022 Subclass**: All Candidates in the United States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands who took the NAPLEX test administered by the NABP during the period of July 30, 2022, through and including October 26, 2022, to whom Defendant sent the November 8, 2022 Notice

informing the Candidate that the Candidate's NAPLEX score was incorrectly reported.

B. Substantive Relief Provided to Plaintiff and Settlement Class

The Settlement Agreement provides monetary relief for the benefit of Plaintiff and the Settlement Class. In total, the Settlement Agreement provides $831,800.00 (the "Total Settlement Amount") for just 615 class members. The Settlement Agreement is broken up between two subclasses, the 2021 Subclass and the 2022 Subclass. Furthermore, within the two subclasses, there are different tiers of monetary compensation depending on whether the Class Members were otherwise "license-ready" and whether Class Members took the NAPLEX a second time given the scoring error by the NABP.

In the 2021 Subclass, there are two tiers of monetary compensation, depending on whether the Class Member had already passed the MPJE prior to taking the NAPLEX and were, therefore, "license-ready." For those Class Members in the 2021 Subclass who were "license-ready," the Settlement Agreement provides compensation of $500.00—190 Class Members. For those Class Members in the 2021 Subclass who were not "license-ready," the Settlement Agreement provides compensation of $100.00—218 Class Members.

In the 2022 Subclass, there are three tiers of monetary compensation, building in not only whether the Class Member was "license-ready" but also whether the Class Member had subsequently re-taken and passed the NAPLEX. For those Class Members who were "license-ready" and re-passed the NAPLEX, the Settlement Agreement provides compensation of $7,500.00—32 Class Members. For those Class Members who were "license-ready" and had not re-passed the NAPLEX, the Settlement Agreement provides compensation of $4,000.00—100 Class Members. For those Class Members who were not "license ready," the Settlement Agreement provides compensation of $1,000.00—75 Class Members.

In short, with maximum compensation amounts of $7,500.00 for 32 Class Members, maximum compensation of at least $4,000.00 for over 100 Class Members, and maximum compensation of at least $1,000.00 for every member of the 2022 Subclass—over 200 Class Members—the Settlement Agreement is a far cry from the ever-scrutinized coupon settlement.

Taking into account the risks, uncertainties, delays, and expenses involved in litigation, Plaintiff and proposed Class Counsel believe that it is in the best interest of the Settlement Class and Defendant believes that it is in Defendant's best interest to proceed with this fair, adequate, and reasonable resolution of the issues raised in the Action, on the terms set forth herein.

For the reasons set forth more particularly below, the Settlement negotiated by the Parties is fair, adequate, and reasonable, and it should be preliminarily approved.

C. Defendant Will Pay for Class Administration

Defendant NABP will pay 100% of the costs of administration *in addition to* payments to Class Members—the payments to Class Members will not be reduced by administration costs.

D. Claims Process

Subject to this Court's preliminary approval of the Settlement Agreement, the Settlement Claims Administrator will mail the Mail Notice (Exh. 3) to each Settlement Class Member within 30 days after the Court's preliminary approval order. The Mail Notice by the Settlement Claims Administrator will be sent by first-class mail.

In addition, the NABP will also send two Email Notices (Exh. 4) to each Settlement Class Member via electronic mail, with the second notice to follow the first by fifteen days.

Settlement Class Members will have 30 days after the mailing of the Mail Notice to formally opt out of the Settlement Agreement or to file an objection to the Settlement Agreement.

This is a claims-made settlement meaning that all Class Members will need to submit claim forms to the Settlement Class Administrator. Settlement Class Members will have 60 days within which to submit their claims.

E. Cy Pres

In the unlikely event of a claim made for which the issued check goes uncashed by the Class Member, any such remaining sums will be paid to a *cy pres* recipient.

F. Class Representative Incentive Award

Plaintiff intends to apply to the Court for an incentive award in the amount of $15,000.00 at the final approval stage. Defendant has agreed to not oppose this amount as an award for the risk that Glaspie took in suing the NABP, which is composed of the regulatory boards that regulate her career as a Pharmacist.

G. Attorney's Fees and Costs

The Settlement Agreement provides that Class Counsel will seek 22.5% of the Total Settlement Amount in attorneys' fees payable within 40 days after the entry of Final Judgment unless an appeal or other relief is sought from the Final Judgment. Defendant has agreed to not oppose this amount. While not dispositive, 22.5% is well within the generally accepted range of attorneys' fees awards approved in Illinois federal district courts and the Seventh Circuit Court of Appeals. *See Kaufman v. Am. Exp. Travel Related Servs. Co., Inc.*, 264 F.R.D. 438 (N.D. Ill. 2009) (approving attorneys' fees of roughly 29 percent of the settlement amount); *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408–09 (7th Cir. 2000) (finding that district court did not abuse its discretion in awarding 25 percent as appropriate percentage-of-recovery); *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 748–49 (7th Cir. 2006) (finding that district court did not abuse discretion in approving attorneys' fees which were 30 percent of defendant's maximum payment).

Importantly, this 22.5% is the total amount sought by Class Counsel. Class Counsel waives and will not seek any additional amounts as costs and expenses.

H. Release of Claims

In exchange for the payments made to the Class Representative and Class Members as set forth in the Settlement Agreement, the Class Representative and Class Members have agreed to release the claims in the lawsuit.

III. CONDITIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS APPROPRIATE

For purposes of conditionally certifying the Rule 23(b)(3) Settlement Class sought by the Parties, the Manual for Complex Litigation (Fourth) Section 21.632 advises:

> If the case is presented for both class certification and settlement approval, the certification hearing and preliminary fairness evaluation can usually be combined. The judge should make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b).

This comports with the Supreme Court of the United States's holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619–20 (1997) that "Settlement is relevant to a class certification," but the requirements of Rule 23(a) and Rule 23(b)(3) must still be met. When the Court is "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Id.*

Federal courts naturally favor the settlement of class action litigation. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *Butler v. Am. Cable & Tel., LLC*, 09 CV 5336, 2011 WL 2708399, at *7 (N.D. Ill. July 12, 2011). Certification of the proposed Settlement Class will allow Notice of the proposed Settlement Agreement to issue, thereby informing Class Members of the existence and terms of the proposed Settlement Agreement, of Class Members' right to be heard on the

Settlement Agreement's fairness, of Class Members' right to opt out, and of the date, time, and place of the formal Fairness Hearing. *See Manual for Complex Litigation*, at §§ 21.632, 21.633.

The Parties' proposed Settlement Agreement contemplates the certification of a Settlement Class defined as follows:

> **2021 Sublass**: All Candidates in the United States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands who took the NAPLEX test administered by NABP during the period of August 31, 2021, through and including September 8, 2021, to whom Defendant sent the September 17, 2021 Notice informing the Candidate that the Candidate's NAPLEX score was incorrectly reported as "failed" when they had actually passed.
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> **2022 Subclass**: All Candidates in the United States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands who took the NAPLEX test administered by NABP during the period of July 30, 2022, through and including October 26, 2022, to whom Defendant sent the November 8, 2022 Notice informing the Candidate that the Candidate's NAPLEX score was incorrectly reported.

Excluded from this proposed Settlement Class are (1) any in-house or outside counsel for NABP and the immediate family members of such persons; (2) employees of NABP; (3) any members of the judiciary assigned to the Action and their staff; (4) the Parties' counsel in the Action; and (5) any Candidate whose claims which have already been paid or resolved, whether by direct payment, appraisal, arbitration, settlement, release, judgment, or other means. For the 2021 Subclass, the Settlement Class Period runs from August 31, 2021, through and including September 8, 2021. For the 2022 Subclass, the Settlement Class Period runs from July 30, 2022, through and including October 26, 2022.

In this case, all of the requirements for Rule 23(a) have been met. 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 class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3) requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." As the Supreme Court noted in *Amchem*, however, the issue of class management is not relevant for purposes of certifying the Settlement Class.

A. The Proposed Settlement Class Satisfies Rule 23(a) Requirements of Numerosity, Commonality, Typicality, and Adequacy

i. Numerosity

Rule 23(1)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, the Settlement Class consists of 615 Candidates. Courts in the Seventh Circuit have found that substantially smaller classes satisfy the numerosity requirement. *See Swanson v. Am. Consumer Indus., Inc.*, 415 F.2d 1326, 1333 n. 9 (7th Cir. 1969) (noting that a group of forty would have been sufficiently large for Rule 23(a) purposes); *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 56–57 (N.D. Ill. 1996) (explaining that eighteen class members satisfied numerosity requirement); *Chandler v. S.W. Jeep–Eagle, Inc.*, 162 F.R.D. 302, 307–08 (N.D. Ill. 1995) (describing that classes of fifty and one hundred fifty sufficiently numerous); *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986) (holding that twenty-nine-member class is sufficient and collecting cases finding numerosity with fewer class members). Accordingly, numerosity is satisfied here because the proposed Settlement Class is so numerous that joinder of all Class Members would be impracticable.

ii. Commonality

The commonality requirement of Rule 23(a)(2) is also met in this case. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Supreme Court of the United States opined that in order to support a finding of commonality, the plaintiff's claims necessarily depend on a common

contention and that common contention, "must be of such a nature that it is capable of classwide resolution—which means 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." *Id.* at 350. "'What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Id.* (emphasis in original) (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 132 (2009)). Here, the NABP engaged in standardized conduct by failing to accurately report the results of over 600 Class Members' NAPLEXs. Plaintiff's Complaint (D.E. 1) presents numerous questions of fact and law common to the Settlement Class, including, among others:

a. Whether the NABP improperly scored the NAPLEX;

b. Whether the NABP provided Plaintiff and Class Members with erroneous failing test scores;

c. Whether the NABP breached its contracts with Plaintiff and Class Members;

d. Whether the NABP owed duties to Plaintiff and Class Members which were independent of any of the NABP's contractual duties;

e. Whether the NABP was negligent;

f. Whether the NABP timely discovered the NABP's errors;

g. Whether the NABP timely reported the NABP's errors;

h. Whether the NABP informed Plaintiff and Class Members of the NABP's scoring errors in a timely fashion;

i. What measures the NABP took to determine and identify all those whose scores were impacted by the scoring errors; and

j. Whether the NABP is legally liable for damages to Plaintiff and Class Members.

This non-exhaustive list of common issues is more than sufficient to meet the commonality requirement of Rule 23(a). *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (class relief is

"peculiarly appropriate" when the "issues involved are common to the class as a whole" and they "turn on questions of law applicable in the same manner to each member of the class"); *In re AT & T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 342 (N.D. Ill. 2010) ("While Plaintiffs bring claims that differ somewhat from state to state, that does not pose an insurmountable hurdle because Plaintiffs have requested class certification for settlement purposes only."); *Kaufman v. Am. Express Travel Related Servs. Co.*, 264 F.R.D. 438, 442 (N.D. Ill. 2009) ("The commonality requirement does not necessitate every class member's factual or legal situation to be a carbon copy of those of the named plaintiffs, so the low commonality hurdle is easily surmounted.") (internal quotation omitted). Therefore, the commonality requirement is satisfied.

iii. Typicality

The typicality requirement of Rule 23(a)(3) "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." 6 Newberg on Class Actions § 18:9 (citations omitted). In other words, the Court must determine "whether other [class] members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Beale v. EdgeMark Fin. Corp.*, 164 F.R.D. 649, 654 (N.D. Ill. 1995) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). If litigating the named plaintiff's claims will advance the interests of absent class members, then the claims are typical. *See*, *e.g.*, *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156–57 (1982). The proper focus is whether plaintiff's claims "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the

same legal theory." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (citing *De La Fuente v. Stokley–Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)).

Here, Glaspie's claims are aligned with those of the Class Members. The facts supporting Glaspie's claims are typical of the claims that would be asserted by the other members of the Settlement Class because Glaspie and all other Class Members are candidates to whom the NABP reported an incorrect failing NAPLEX score. As such, the proposed Settlement Class satisfies the Rule 23(a)(3) typicality requirement.

iv. Adequacy of Representation

Rule 23(a)(4) requires that the named representatives "not possess interests which are antagonistic to the interests of the class." 1 Newberg on Class Actions § 3:54. Rule 23(a)(4) also requires that the named representative's counsel "be qualified, experienced, and generally able to conduct the litigation." *Id.*; *Amchem*, 521 U.S. at 625–26. At the preliminary stage of the approval process, there is sufficient evidence to support a finding that these requirements have been satisfied.

Glaspie has no interests that are antagonistic to or conflict in any way with the interests of the Settlement Class. Glaspie has willingly stepped forward to pursue her claims on a class-wide basis. Glaspie is a member of the Settlement Class and like the Class Members that Glaspie represents, Glaspie was incorrectly provided with a failing score on the NAPLEX. *See* Declaration of Emily Glaspie, attached hereto as **Exhibit 6**. Glaspie will, thus, fairly and adequately protect the interests of the Settlement Class. *Id.* Glaspie's declaration shows that she has acted in the best interests of the Settlement Class from the outset of the litigation and has remained fully informed regarding the progress of the case and settlement negotiations. *Id.* As such, the Court should find

that Glaspie is an adequate representative of the Settlement Class and conditionally appoint Glaspie as the Class Representative for purposes of settlement.

Further, Glaspie is represented by qualified and competent Class Counsel with extensive experience and expertise prosecuting class actions. *See* Declaration of Jordan A. Shaw, attached hereto as **Exhibit 7**. Class Counsel have represented Glaspie and Class Members vigorously and zealously to date and are ready, willing, and able to do so should the Court appoint proposed Class Counsel as Class Counsel. Therefore, the Court should find that proposed Class Counsel will fairly and adequately represent the Settlement Class and conditionally appoint proposed Class Counsel as Class Counsel for purposes of settlement.

B. The Proposed Settlement Class Satisfies Rule 23(b)(3) Requirements of Predominance and Superiority

In addition to meeting the four requirements of Rule 23(a), a plaintiff seeking class certification must satisfy one of the subsections of Rule 23(b). Plaintiff here seeks certification under Rule 23(b)(3), which requires that (1) questions of law or fact common to class members predominate over any questions affecting only individual members, and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *See* Fed. R. Civ. P. 23(b)(3).

i. Common Questions of Law or Fact Predominate

For purposes of satisfying Rule 23(b)(3)'s requirements, "the predominance test asks whether a class suit for the unitary adjudication of common issues is economical and efficient in the context of all the issues in the suit." 1 Newburg on Class Actions § 4:25; *see also Amchem*, 521 U.S. at 623 ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation"). When evaluating Rule 23(b)(3) predominance with respect to a proposed settlement class, individualized factual issues and legal

variation among the laws of the states which implicate the manageability aspect of predominance are not considered. *Amchem*, 521 U.S. at 623.

In this case, and in the context of the proposed Settlement Class, common questions of fact and law predominate over questions of fact and law affecting only individual Class Members. The NABP is alleged to have acted in a similar manner for all 615 Class Members insofar as each passed the NAPLEX but was told that the Class Members had failed the NAPLEX. Under Plaintiff's theory of the case, the duties owed by the NABP to the Settlement Class would have been the same for all Class Members. In proving her own case under this theory of liability, Glaspie would have to address and answer the very same factual and legal questions that would need to be addressed and answered in every other class member's case brought under the same theory. Hence, the commonality element of Rule 23(b)(3) has been met here.

ii. The Class Action is the Superior Method to Adjudicate Plaintiff's Claims

Rule 23(b)(3) also requires that the class action device be superior to other methods of adjudication. In other words, Rule 23(b)(3) "was designed for situations . . . in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate." *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006); *Amchem*, 521 U.S. at 617 (stating that the "very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights"). Here, absent a class action, Plaintiff and Class Members would find the cost of litigating their individual claims to be prohibitive. Moreover, multiple individual actions would be judicially inefficient, particularly given the large number of Class Members and the common questions of law and fact that would predominate each of those cases. And, as noted earlier, any difficulties of

management of the class need not be considered in this settlement context. *Amchem*, 521 U.S. at 620. Accordingly, a class action is superior to other means of resolution of the present matter.

IV. PROPOSED CLASS COUNSEL ARE QUALIFIED TO REPRESENT THE SETTLEMENT CLASS

Under Rule 23(g), "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the Court is to consider counsel's work in identifying or investigating potential claims, experience in handling class actions or other complex litigations and the types of claims asserted in the case, knowledge of the applicable law, and resources committed to representing the Settlement Class. *Id.*

Proposed Class Counsel, Zebersky Payne Shaw Lewenz, LLP and Sorling, Northrup, Hann, Cullen & Cochran, Ltd., are qualified and able to represent the Settlement Class. Proposed Class Counsel have extensive experience in prosecuting class actions and other complex litigation of a similar nature, scope, and complexity as the present case. *See* Declaration of Jordan A. Shaw, Esq., attached here as Exhibit 7. Zebersky Payne Shaw Lewenz, LLP has dedicated substantial resources to this case,[3] and both Class Counsel will continue to do so if appointed as Class Counsel. Additionally, both Class Counsel have successfully negotiated a settlement of this matter which provides significant benefits to the Settlement Class. As stated above, proposed Class Counsel performed substantial work in investigating, prosecuting, and negotiating settlement of the case, and are qualified to serve as Class Counsel. Accordingly, the Court should appoint Jordan A. Shaw, Zachary D. Ludens, and Lauren N. Palen of Zebersky Payne Shaw

[3] Zebersky Payne Shaw Lewenz, LLP has been serving as lead counsel with Sorling, Northrup, Hann, Cullen & Cochran, Ltd. serving as local trial counsel as required by the Northern District of Illinois Local Rules to this point. However, Plaintiff is seeking to have both firms appointed as Class Counsel.

Lewenz, LLP and David A. Rolf of Sorling, Northrup, Hanna, Cullen & Cochran, Ltd. as Class Counsel.

V. THE SETTLEMENT AGREEMENT IS FAIR, ADEQUATE, AND REASONABLE

Under Federal Rule of Civil Procedure 23(e), the Court should approve a proposed class action settlement upon finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Federal Rule of Civil Procedure 23(e) requires Court approval for any compromises of a class action. *Amchem*, 521 U.S. at 617. "Federal courts naturally favor the settlement of class action litigation." *Isby*, 75 F.3d at 1196. Moreover, "[d]istrict courts have broad discretion to determine whether certification of a class is appropriate." *Lechuga v. Elite Eng'g, Inc.*, 559 F. Supp. 3d 736, 741 (N.D. Ill. 2021) (citation omitted).

In considering a proposed settlement of a class action, federal courts normally follow a two-step process, the first step relating to preliminary approval and the second step relating to final approval. Annotated Manual for Complex Litigation at § 21.632. When presented with a motion for preliminary approval of a class action settlement, courts are asked to simply determine whether the proposed settlement is within the range of possible approval. *See Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980). This preliminary review is not to be confused with "a full-fledged inquiry" and instead functions to ensure that the distribution of class notice is appropriate. *See Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07 C 2898, 2011 WL 3290302, at *6 (N.D. Ill. July 26, 2011). The Court's role is not "resolving the merits of the controversy or making a precise determination of the parties' respective legal rights." *E.E.O.C. v. Hiram Walker & Sons*, 768 F.2d 884, 889 (7th Cir. 1985). Courts should therefore consider the facts "in the light most favorable to the settlement" and focus on the settlement as a whole, rather than on each individual component. *Isby*, 75 F.3d at 1191 (quoting *Armstrong*, 616 F.2d at 315).

In weighing whether to grant preliminary approval of a proposed settlement, courts in the Seventh Circuit must consider the following five factors: "(1) the strength of plaintiffs' case compared to the terms of the proposed settlement; (2) the likely complexity, length and expense of continued litigation; (3) the amount of opposition to settlement among [a]ffected parties; (4) the opinion of competent counsel; and (5) the stage of the proceedings and the amount of discovery completed." *In re AT & T Mobility Wireless*, 270 F.R.D. at 346 (citing *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). Such an analysis does "not focus on individual components of the settlements, but rather view[s] them in their entirety in evaluating their fairness." *Isby*, 75 F.3d at 1199 (internal quotation marks omitted).

The proposed settlement is fair, adequate, and reasonable. It was not the product of fraud, collusion, or overreaching by either of the Parties. Glaspie and her attorneys reached an agreement in principle with the NABP only after hard-fought negotiations. This was the product of a mediation before Harry Schafer, a highly skilled and experienced mediator. The Parties did not negotiate the terms of any incentive award or attorneys' fees until after all material terms were agreed upon. The initial term sheet reached at the conclusion of the mediation was subsequently memorialized in the Settlement Agreement.

The Settlement Agreement provides significant financial relief to Class Members in the form of cash payments and will relieve the Parties of the burden of litigation. The Settlement Agreement is particularly valuable to absent Class Members who, but for the Settlement Agreement, likely would be unaware of the existence of their individual legal claims. The alternative to bringing this case as a class action is for each of the 615 individual Class Members to bring claims against the NABP. Realistically, the alternative to a class action under the present circumstances is no action at all. While the Parties could have litigated the case to judgment and

taxed the resources of the litigants and the Court, the Parties chose instead to rationally and reasonably forgo the expense and uncertainty of continued litigation and focus their efforts on achieving a fair and adequate Settlement Agreement that accounted for the risks of further litigation.

Accordingly, this Court should find that the proposed Settlement Agreement is within the range of reasonableness, such that Notice should be issued to the Settlement Class, a final Fairness Hearing should be scheduled, and the Settlement Classes should be provisionally certified for settlement purposes.

A. Strength of Plaintiff's Case vs. Settlement Offer

The "most important factor relevant to the fairness of a class action settlement . . . is the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *Synfuel Techs.*, 463 F.3d at 653 (quoting *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir. 1979)). Because "[t]he essence of settlement is compromise," *Hiram Walker,* 768 F.2d at 889, courts should not reject a settlement "solely because it does not provide a complete victory to the plaintiffs." *Isby,* 75 F.3d at 1200.

Here, the Settlement Agreement strikes an appropriate balance between the strength of Plaintiff's case and the benefit to the Settlement Class of securing a settlement. The Settlement Agreement was achieved early in the litigation after an intensive mediation, and because the Parties exchanged information informally, Plaintiff and the Settlement Class have been spared the cost of formal discovery.

"[A]n integral part of the strength of a case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985). Here, there would be significant risks and costs if the case is

not settled, the most obvious being that Plaintiff may not be successful on the merits. And, "[e]ven if Plaintiffs were to succeed on the merits at some future date, a future victory is not as valuable as a present victory." *In re AT & T Mobility Wireless*, 270 F.R.D. at 347; *see also Seiden v. Nicholson*, 72 F.R.D. 201, 208 (N.D. Ill. 1976) ("If this case had been litigated to conclusion, all that is certain is that plaintiffs would have spent a large amount of time, money and effort."). The proposed Settlement Agreement here, however, provides immediate monetary relief to the Class Members without the time, money, and effort it would take to litigate their claims individually. Specifically, the Settlement Agreement calls for the NABP to pay a Total Settlement Amount of $831,800.00.

It is also important to note that the Parties engaged in a lengthy arm's length mediation with a respected third-party mediator to negotiate the terms of the settlement. This too supports the fairness of the terms and the genuineness of the benefits to the Settlement Class Members. See Fed. R. Civ. P. 23(e)(2)(B).

The relief provided by the Settlement Agreement appears to be *at least* comparable to the result that Plaintiffs would be able to achieve through continued litigation. Therefore, this factor favors preliminary approval.

B. Likely Complexity, Length, and Expense of Litigation

If this case were to continue, litigation likely would take several more years to complete. During that time, Plaintiff would be required to contest a number of complex legal and factual issues. Moreover, there is a pending Partial Motion to Dismiss (D.E. 15, 16) that would be heavily litigated and could even lead to a potential amended Complaint. Settlement is therefore in the best interest of the Settlement Class because it will avoid the risks and expenses associated with years of litigation with NABP. *See In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion*

Injury Litig., 332 F.R.D. 202, 219 (N.D. Ill. 2019) ("By agreeing to the settlement, the settlement class eliminates the risks and expense associated with years of contentious litigation.") (citing Fed. R. Civ. P. 23(e)(2)(C)(i))).

i. Opposition to the Settlement Agreement

Because the Parties have not sent Notice to the Settlement Class, it is premature to fully assess this factor at this time. Nonetheless, taking into account the other factors, the Settlement Agreement should be preliminarily approved.

ii. Class Counsel's Opinion

District Courts are "entitled to rely heavily on the opinion of competent counsel" in preliminarily approving a class action settlement. *Gautreaux v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982) (citation omitted). As noted herein, Class Counsel are highly competent (Exh. 7) and believe that the Settlement Agreement is in the best interest of the Settlement Class. As such, this factor favors preliminary approval.

iii. Stage of the Proceedings and Amount of Discovery Completed

Although the Parties here have not engaged in discovery, this does not preclude the Court from approving the Settlement Agreement. *See In re AT & T Mobility Wireless*, 270 F.R.D. at 350 ("Because counsel have conducted a significant amount of informal discovery and dedicated a significant amount of time and resources to advancing the underlying lawsuits . . . this factor does not weigh against preliminary approval."); *Schulte v. Fifth Third Bank*, 09-CV-6655, 2010 WL 8816289, at *4 (N.D. Ill. Sept. 10, 2010) ("That counsel conducted no formal discovery prior to settlement does not necessarily preclude eventual final approval of the proposed settlement."). The Parties have dedicated a significant amount of time and resources to this lawsuit. Moreover, Class Counsel conducted interviews with a number of putative Class Members and engaged in

voluminous research regarding the relevant issues. Accordingly, this factor favors preliminary approval.

VI. THE FORM AND METHOD OF NOTICE ARE ADEQUATE AND SATISFY THE REQUIREMENTS OF RULE 23

Rule 23(e)(1) provides that in a proposed settlement, the Court must "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). In addition, Rule 23(c)(2) provides that, in any class action maintained under Rule 23(b)(3), as here, the Court must direct to Class Members the best notice that is practicable under the circumstances, including individual notice to all Class Members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2). The test is whether the method employed to distribute the notice was reasonably calculated to apprise the class of the pendency of the action, of the proposed Settlement Agreement, and of the Class Members' rights to opt out or object. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–77 (1974).

Rule 23(c)(2) requires the notice to "clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B).

The type of notice to which a member of a class is entitled depends upon the information available to the parties about that person and the possible methods of identification. *See Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). In determining the reasonableness of the effort required, the Court must look to the "anticipated results, costs, and amount involved." *In re Nissan Motor Corp. Antitrust Litig.,* 552 F.2d 1088, 1099 (5th Cir. 1977). The Supreme

Court of the United States has held that due process is satisfied where "a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to 'opt out.'" *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985).

Here, the list of the Class Members will come directly from the NABP. Unlike in some class actions, there is no doubt that each member of the Settlement Class registered with the NABP in order to take the NAPLEX. Moreover, since even the 2021 Subclass had updated their NABP accounts to their present mailing and email addresses as recently as two years ago, the NABP's records are well calculated to lead to notice to the Settlement Class.

Each Class Member was required to make a NABP account before registering for the NAPLEX, so the information is readily accessible to the NABP. Pursuant to the Settlement Agreement, the NABP will provide the Settlement Claims Administrator with the list of Class Members, including the name and last known email address and residence address for each Class Member. The Settlement Claims Administrator will then mail the Mail Notice (Exh. 3), by first-class mail, to each Class Member. In addition, the NABP will also send the Email Notice (Exh. 4) to the email address on file for each Class Member. There shall be a second electronic mail notice in the same manner as the original fifteen days after the first notice.

The Notice program proposed in the Settlement Agreement will provide the best notice to Settlement Class Members. The process of targeting direct mail and email to addresses and email addresses that have been updated in the past two years (coincidentally, to receive the results of the NAPLEX[4]) is well calculated to provide notice to the Settlement Class. Indeed, the direct mail

[4] This is stated only to show that one of the methods of Notice proposed (the Email Notice) is so specifically targeted that it is the *same* method by which the Class Members would have received notice that their NAPLEX score was available and received the correction notice from the NABP.

process and direct electronic mail process is clearly designed to reach the maximum number of Settlement Class Members at a reasonable expense.

The Parties' proposed Notice (Exhs. 2 through 4) provides a full description of the nature of the action, the proposed Settlement Agreement, and the requested attorneys' fees. The Notice describes in plain English the terms and operation of the Settlement Agreement, the considerations that caused Class Counsel to conclude that the Settlement Agreement is fair and adequate, the procedure for objecting to and opting out of the Settlement Agreement, and the date of the Fairness Hearing.

The Parties' proposed Notice plan will objectively and neutrally apprise all Class Members of the nature of the action, the definition of the Settlement Class sought to be certified for purposes of the Settlement Agreement, the Settlement Class claims and issues, that Class Members may enter an appearance before the Court at the Fairness Hearing, and that the Court will exclude from the Settlement Class any Class Member who opts out (and sets for the procedures for doing so), as well as the binding effect of a class judgment on Class Members under Rule 23(c)(3)(B). The proposed Notice plan further will apprise the Class Members of the procedures and deadlines for submitting objections. As such, the proposed notice plan should be approved.

VII. PROPOSED SCHEDULE TO COMPLETE SETTLEMENT

The Court's calendar permitting, Plaintiff proposes the following schedule to complete the tasks necessary to effectuate the proposed Settlement Agreement:

Mail Notice Mailed to Settlement Class Members: 30 days after entry of the proposed Order Preliminary Approving Class Action Settlement, Conditionally Certifying a Class, and Granting Other Relief.

Settlement Class Member Opt-out Deadline: 30 days after mailing of the Mail Notice (Exh. 3) to the Settlement Class.

Settlement Class Member Objection Deadline: 30 days after mailing of the Mail Notice (Exh. 3) to the Settlement Class.

Settlement Class Member Claims Deadline: 60 days after mailing of the Mail Notice (Exh. 3) to the Settlement Class.

Motion for Final Approval: 30 days after the deadline to opt-out or object.

Claims Payment Deadline: 60 days after Final Approval, absent *force majeur*.

VIII. CONCLUSION

For the reasons stated above, Plaintiff Emily Glaspie respectfully requests that the Court grant this Motion and enter the proposed Order Preliminarily Approving Class Action Settlement, Conditionally Certifying a Class, and Granting Other Relief that, among other things, conditionally certifies this class action for settlement purposes only, preliminarily approves the Parties' proposed Settlement Agreement, appoints Plaintiff as Class Representative, appoints Plaintiff's counsel as Class Counsel, and establishes a schedule to complete the tasks necessary to effectuate the proposed Settlement Agreement.

Dated: October 10, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2023, the foregoing was filed with the Court via the Court's CM/ECF system, which generated notices of electronic filing on all counsel of record.

/s/ Zachary D. Ludens