UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Fred Wallin, *on behalf of himself and all others similarly situated,*	:	
Plaintiff,	:	Civil Action No. 3:22-cv-05960 (GC) (DEA)
vs.	:	
	:	Motion Date: February 20, 2024
Naturelo Premium Supplements LLC,	:	
Defendant.	:	

UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff Fred Wallin ("Wallin" or "Plaintiff"), on behalf of himself and all others similarly situated, hereby moves for entry of an Order granting preliminary approval of the Class Action Settlement Agreement between Plaintiff and Defendant Naturelo Premium Supplements LLC ("Naturelo").

Plaintiff respectfully requests that the Court (i) conditionally certify the Settlement Class for purposes of settlement; (ii) appoint Plaintiff as the Settlement Class Representative; (iii) appoint Lemberg Law, LLC, as Class Counsel; (iv) preliminarily approve the terms of the Settlement Agreement; (v) approve the form, content and method of delivering notice to the Settlement Class as set out in the Settlement Agreement as "the best notice that is practicable under the circumstances" (Fed. R. Civ. P. 23(c)(2)(B)); and (vi) schedule a final approval

hearing in accordance with the deadlines set forth in the proposed Preliminary Approval Order (Ex. A hereto) at ¶¶ 10 & 19.

In support, Plaintiff submits the accompanying Memorandum of Law in Support of Unopposed Motion to Preliminarily Approve Class Action Settlement, the executed Settlement Agreement and its exhibits, and the Declarations of Sergei Lemberg and Stephen F. Taylor

Plaintiff respectfully requests that the Court enter the proposed Preliminary Approval Order in the form attached as Exhibit A and schedule a Final Approval Hearing (Preliminary Approval Order ¶ 10) no earlier than 150 days after entry of the proposed Preliminary Approval Order to provide time for the notice process, exclusions and objections.

Undersigned counsel has conferred with Naturelo regarding this motion. Naturelo does not oppose the relief sought in this motion and entry of the proposed Preliminary Approval Order but does not join in all Plaintiff's factual or legal arguments set forth in his memorandum.

Dated: January 31, 2024

Respectfully submitted,
/s/ Sergei Lemberg
Sergei Lemberg
/s/ Stephen Taylor
Stephen Taylor (*phv*)
LEMBERG LAW, LLC
43 Danbury Road
Wilton, CT 06897
Telephone: (203) 653-2250
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2024, a true and correct copy of the foregoing was filed with the Clerk of the Court through the ECF system which gave notice of such filing to all parties of record.

/s/ Sergei Lemberg
Sergei Lemberg

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MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Rules

Plaintiff Fred Wallin ("Wallin" or "Plaintiff") respectfully submits this Memorandum in Support of Plaintiff's Unopposed Motion for Preliminary Approval of the Parties' Class Action Settlement.[1]

Plaintiff and Defendant have resolved this class action arising from allegedly false and deceptive advertising of certain magnesium supplements sold by Naturelo (the "Supplements"). Plaintiff alleged, for himself and those similarly situated, that Defendant advertised the Supplements as containing 200 mg of magnesium "as Magnesium Glycinate Chelate" per capsule when, in fact, they did not. Magnesium glycinate chelate is a form of magnesium with purported calming properties and is easier for a body to absorb. Thus, magnesium glycinate chelate is more attractive to consumers searching for these benefits than alternate types of magnesium, such as magnesium oxide or buffered magnesium. The Supplements, purchased by the Plaintiff and class members, appeared as follows:

[1] Naturelo Premium Supplements LLC ("Naturelo" or "Defendant"), does not oppose this motion or entry of the proposed Preliminary Approval Order. Naturelo does not join all the factual or legal arguments in this memorandum. The executed Settlement Agreement is attached hereto as Exhibit A. Appended to the Settlement Agreement and incorporated therein are the following exhibits:
Exhibit A – the Claim Form
Exhibit B – the Email Notice
Exhibit C – the Long Form Notice
Exhibit D – the Preliminary Approval Order
Exhibit E – the Postcard Notice
Exhibit F – the Final Order and Judgment

(Doc. No. 1 (the "Complaint") ¶ 16). However, because the Supplements used "Size 00 capsules" they were physically incapable of containing 200 mg of magnesium glycinate chelate per serving. (Complaint ¶¶ 24-31). Plaintiff alleged that the advertisements were deceptive, knowingly so, and sought relief.

All told, Naturelo sold 129,829 Supplements throughout the United States for approximately $24.95 each. Due to the alleged misrepresentation, Plaintiff (a resident of California) brings causes of action against Naturelo (a New Jersey company) for violation of the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1, *et seq.*, Fraudulent Concealment, Breach of Express and Implied Warranties, violation of California's Untrue, Misleading and Deceptive Advertising law, Cal. Bus. & Prof. Code §§ 17500, *et seq.*, violation of the California Consumers Legal

Remedies Act, Cal. Civ. Code §§ 1750, *et seq.*, and violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*

Plaintiff first filed this case in California.[2] Defendant disputed Plaintiff's claims and moved to dismiss on various grounds, including failure to state a claim, preemption and jurisdictional grounds. While that motion was not decided, Defendant argued that the label of the Supplements was not deceptive, that consumers received the advertised levels of magnesium and received the benefits of magnesium glycinate chelate. Following discovery and refiling in this Court, the Parties attended a private mediation before the Honorable Jose Linares (Ret.) and reached a fair, adequate and reasonable Settlement that provides substantial relief to Settlement Class Members.

Under the Settlement Agreement, Naturelo will pay $1,500,000.00 into a non-reversionary common fund from which Settlement Class Members can make a claim for recovery. Settlement Agreement ("SA") Art. II ¶ 35. The fund, after deductions for administrative costs and awarded attorneys' fees and costs and incentive award, will be distributed *pro rata* to valid claimants based on the number of Supplements they purchased. Specifically, a Settlement Class Member without a proof of

[2] As detailed below, Plaintiff filed in the Superior Court in California before removal to federal court and the Central District of California. Ultimately, the Parties agreed that Plaintiff should refile in the United Stated District Court for the District of New Jersey where Defendant is headquartered.

purchase is entitled to one equal share, capped at $24.95, per Household. SA Art. III (1)(d)(1). A Settlement Class Member with proof of purchase is entitled to one share, capped at $24.95, for *each* Supplement they purchased. SA Art. III (1)(d)(2). To the extent Settlement Checks remain uncashed, and it is administratively feasible to do so, a Second Distribution matching the same *pro rata* distribution of the first will be made to those members that cashed their first checks and only thereafter will the residual fund be distributed *cy pres*. SA Art. III (1)(g). Under no circumstances will any portion of the fund return to Naturelo. SA Art. II ¶ 35. After the filing of the Complaint, the Supplement labeling at issue here was changed because of this litigation.

This Settlement enables those allegedly injured by the alleged unfair and deceptive business practices to receive substantial compensation and the conduct at issue in the Complaint has been discontinued. As a result of this litigation and this settlement, Class Members will receive these benefits now without the risks of non-recovery, non-certification, and delays in any potential recovery that would be involved in a lengthy litigation. Plaintiff therefore respectfully requests that this Court grant this Unopposed Motion for Preliminary Approval of the Class Action Settlement.

As set forth in the Motion, Plaintiff requests that the Court enter the Parties' proposed Preliminary Approval Order (Mot. Ex. A), adopt the case deadlines set

forth therein at ¶ 19, and schedule a final approval hearing no earlier than 150 days after entry of the Preliminary Approval Order (*id.* ¶ 10).

BACKGROUND

On April 27, 2022, Plaintiff filed a class action complaint against Defendant in the Superior Court of California, County of Los Angeles, titled *Wallin v. Naturelo Premium Supplements LLC,* 22STCV14128, alleging, for himself, a putative Nationwide Class and a putative California Sub-Class, claims against Defendant arising from the allegedly unlawful sale and marketing of magnesium supplements. (Declaration of Stephen Taylor ("Taylor Decl.") ¶ 9 & Ex. A).

On May 27, 2022, and pursuant to the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1441, 1446, and 1453, Defendant removed the Action to the United States District for the Central District of California, Western Division captioned *Wallin v. Naturelo Premium Supplements LLC,* 22-cv-03657. (Taylor Decl. ¶ 10) On July 11, 2022, the parties entered a Rule 26 discovery plan (22-cv-03657, Doc. No. 18), and began discovery. (Taylor Decl. ¶ 11). On August 22, 2022, Defendant filed a motion to dismiss (Taylor Decl. ¶ 12 & Ex. B), arguing Plaintiff's claims were preempted by the Federal Food, Drug, and Cosmetic Act ("FDCA") and U.S. Food and Drug Administration ("FDA") regulations promulgated thereunder, that his warranty claims failed for insufficient notice, that his fraudulent concealment

claims fail for lack of reliance and specificity, that his implied warranty claims fail for lack of privity and that he had no basis for equitable or injunctive relief (*id*.).

In conferrals regarding the claims and discovery, the Parties agreed to move the matter to the District of New Jersey, where Naturelo is domiciled and headquartered, rather than California where only the Plaintiff is domiciled. (Taylor Decl. ¶ 13). Thus, the Parties executed a tolling agreement which preserved Plaintiff and class claims from potential statute of limitations defenses, stipulated to a dismissal of the action in the Central District of California, and Plaintiff refiled his class action complaint on October 7, 2022, in the District of New Jersey. (Taylor Decl. ¶ 14; Doc. No. 1).

On October 24, 2022, the Parties engaged in a full day mediation session before the Hon. Jose L. Linares, former United States District Court Judge for the District of New Jersey. The session was productive but did not result in a settlement. (Taylor Decl. ¶ 15). Negotiations continued before Judge Linares and, on February 23, 2023, the Parties reached an agreement in principle to resolve this action on a class-wide basis. *Id*. As a condition of the negotiations, additional confirmatory discovery on the class size and circumstances surrounding the sale, through third parties like Amazon, and use of the challenged Supplement label was conducted. Over the last year, that discovery was completed, and the Settlement Agreement (with exhibits) was negotiated and finalized and signed.

TERMS OF THE SETTLEMENT

The Settlement of this Action is on behalf of "All persons residing in the United States of America who purchased the Supplement, during the Class Period." SA, Art. II ¶ 32. The "Class Period" is September 1, 2018, through the date of the Preliminary Approval Order.

"The Supplement" means the "Magnesium Glycinate Chelate" supplement with the labeling Plaintiff alleges contain false and misleading representations as set forth above and at paragraph 16 of the Complaint. *Id*. ¶ 38. From September 2018 through August of 2022, Naturelo sold approximately 129,829 Supplements. (Taylor Decl. ¶ 16). Since August 2022, after Plaintiff sued, Naturelo modified the packaging of its magnesium glycinate chelate packaging. *Id*.

A. Monetary Relief

Naturelo will fund a settlement fund of one million five hundred thousand dollars ($1,500,000.00) to pay Settlement Class Members who purchased Supplements, any attorney's fees and costs, any incentive award and to pay administrative costs. SA, Art. II ¶ 34. This is a non-reversionary fund; no amount will return to Naturelo. *Id*.

Using an award unit formula, each Settlement Class Member may receive a pro-rata share of the Settlement Fund weighted by the number of Supplements they purchased. SA, Art. III(1)(d). Thus, Settlement Class Members that submit a claim

without proof of purchase will be entitled to one award unit, capped at $24.95 (the price of one Supplement) per household. *Id.* at (d)(1). Settlement Class Members that submit a valid claim with proof of purchase, or Naturelo otherwise has the records of the number of Supplements the member bought, will be entitled to one award unit, capped at $24.95 per unit, for each Supplement purchased. *Id.* at (d)(2). The value of the award units will be determined by dividing the net settlement fund (the total fund minus any award for fees, costs, incentive award and administrative costs) by the sum of the without proof of purchase claimants plus the Supplements purchased by the with proof of purchase claimants. *Id.* at (d)(3).

Members will be notified to submit claims with proofs of purchase via the notice (the Long Form, the Email, and/or the Postcard), on the claim portal, on the settlement website (SA Exhibits A, B, C, & E) and will be able to upload their proof of purchase online.

B. Attorneys' Fees and Incentive Award

Plaintiff intends to move for an award of attorneys' fees and cost award of up to 1/3 of the Settlement Fund. *E.g.*, SA, Exhibit C, No. 8. Naturelo has not agreed to this amount, or to any amount, in attorneys' fees and costs. SA Art. VI(1). The Court, and only the Court, shall determine the final amount of the fee award. *Id.*

Plaintiff also intends to move for an incentive award of $10,000 for Wallin for his services to Settlement Class as Class representative. *Id.*, Exhibit C, No. 7. As

with the fees, Naturelo has not agreed to any amount in an incentive award and only the Court shall determine the amount. *Id*. Art. VI(1).

Both the fee and incentive award application will be filed 30 days before the objection deadline and posted on the Settlement Website. *Id*. & Art. III(2)(h).

C. Notice Plan

The Parties have selected Kroll Settlement Administration (the "Settlement Administrator") to administer the notice process and claims. Kroll is an experienced class action administrator (*see, e.g., Somogyi v. Freedom Mortg. Corp.*, 2023 WL 8113242, at *1 (D.N.J. Nov. 22, 2023) (where Kroll handled the notice and claims process); *Everetts v. Pers. Touch Holding Corp.*, 2024 WL 227811, at *4 (E.D.N.Y. Jan. 22, 2024) (appointing Kroll as class administrator)) with experience in administering false advertising or labeling class settlements such as the settlement here (*see, e.g.*, *Casey v. Doctor's Best, Inc.*, 2022 WL 1726080, at *12 (C.D. Cal. Feb. 28, 2022) (appointing Kroll as the claims administrator for a dietary supplement class action settlement). The Preliminary Approval Order asks that the Court approve Kroll as the Settlement Administrator. (Mot. Ex. A. ¶ 9).

Within thirty days of entry of the Preliminary Approval Order, Notice will commence. SA Art. III(2)(a). By that date, the Settlement Administrator will send the Short Form/Postcard Notice by first class mail to those Settlement Class

Members whose names and addresses are available in Defendant's Records. SA Art. III(2)(c) & Exhibit E (the Postcard Notice).

In addition, because Naturelo sold the Supplements indirectly through Amazon.com, the Settlement Administrator will coordinate with Amazon.com to ensure the sending of the Email Notice to Settlement Class Members in the records of Amazon.com. *Id*. Art. III(2)(e) & Exhibit B (the Email Notice). To that end, the Parties subpoenaed Amazon.com for purchase and email addresses of Settlement Class Members who purchased the Supplements. *Id*.; Taylor Decl. ¶ 17.

The Settlement Administrator will establish the Settlement Website. SA Art. III(2)(h). The website will contain the Long Form Notice, a downloadable Claim Form that may be printed and mailed to the Settlement Administrator, an electronic version of the Claim Form that may be completed and submitted electronically, the Settlement Agreement, the Complaint, the Preliminary Approval Order, and any other relevant documents. *Id*. The Settlement Administrator will post online Class Counsel's application for a Fee Award and the motion seeking approval of the Incentive Award. *Id*.

The Settlement Administrator will also set up a toll-free telephone number that will provide automated information about the Settlement, the Settlement Class Members' rights, important deadlines, and instructions as to how Settlement Class Members may request and obtain hard-copy Settlement documents. *Id*. Art. III(2)(i).

D. The Release

In exchange for the foregoing, Settlement Class Members who do not timely exclude themselves will be bound by a release applicable to all claims of any nature brought "regarding the marketing, advertising, labeling, or sale of the Supplements to the Settlement Class Members." SA Art. V(1)(c).

ARGUMENT

I. Legal Standard

Before a settlement of a class action can receive final approval, the Court must determine that it is "fair, reasonable, and adequate." *See* Fed. R. Civ. P. 23(e)(2). The Court must also "direct notice in a reasonable manner to all class members who would be bound by the proposal." *See* Fed. R. Civ. P. 23(e)(1).

To preliminary approve a class action settlement, Rule 23 provides that the Court must ultimately be likely to "(i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). In other words, the question before the Court now is "whether, following notice to the class and a final fairness hearing, the Court will likely be able to: (1) approve the settlement proposal under Rule 23(e)(2); and (2) certify the proposed class." *Swinton v. SquareTrade, Inc.*, 2019 WL 617791, at *5 (S.D. Iowa Feb. 14, 2019); *accord In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. Jan. 28, 2019). As discussed below,

Plaintiff respectfully submits that all of the requirements for preliminary approval are met.

II. The Settlement Is Fair, Reasonable, and Adequate

The Third Circuit has, "on several occasions, articulated a policy preference favoring voluntary settlement in class actions." *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 378 (3d Cir. 2013). Rule 23 requires that a class action settlement be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). For purposes of determining whether a proposed settlement meets these criteria, Rule 23(e)(2) directs the Court to consider whether "the class representatives and class counsel have adequately represented the class"; "the proposal was negotiated at arm's length"; "the relief provided for the class is adequate"; and "the proposal treats class members equitably relative to each other." *Id*. The Advisory Committee Notes make clear that these factors do not displace the "lists of factors" courts have traditionally applied to assess proposed class settlements. Instead, the enumerated factors under Rule 23(e)(2) "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e)(2) (advisory committee's note to 2018 amendment).

Courts in the Third Circuit evaluate whether a settlement is "fair, reasonable, and adequate" using the applicable *Girsh* approval factors:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) stage of the proceedings and the amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the class action through the trial; (7) 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.

Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975). Thus, the "Court first considers the Rules 23(e)(2) factors, and then considers additional [Girsh] factors not otherwise addressed by the Rule 23(e)(2) factors." *In re Payment Card Interchange Fee*, 330 F.R.D. at 29. Application of both the Rule 23(e)(2) and traditional factors demonstrates that the settlement here is fair, reasonable, and adequate and is in the best interests of the class.

A. The Proposed Settlement Is the Product of Arms-Length Negotiations Among Experienced Counsel

Under Rule 23(e)(2)(A) and (B), the Court considers whether the class representative and class counsel adequately represented the class and whether the settlement proposal was negotiated at arm's length. *See In re Payment Card Interchange Fee*, 330 F.R.D. at 29; *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004) (citation omitted) ("The third Girsh factor captures the degree of case development that class counsel [had] accomplished prior to settlement.

Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating.").

A presumption of fairness arises when the settlement was negotiated by experienced and informed counsel assisted by a respected mediator. *See, e.g., In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 435 (3d Cir. 2016). This approach is consistent with the principle that "settlement of litigation is especially favored by courts in the class action setting." *In re Insurance Brokerage Antitrust Litig.*, 297 F.R.D. 136, 144 (D.N.J. 2013). "The participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at arm's length and without collusion between the parties." *Shapiro v. All. MMA, Inc.*, 2018 WL 3158812, at *2 (D.N.J. June 28, 2018) (*quoting Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012), aff'd, 559 F. App'x 151 (3d Cir. 2014)).

Here, Class Counsel are experienced in the prosecution and resolution of consumer class actions and have carefully evaluated the merits of Plaintiff's case and the proposed settlement. (Lemberg Decl. ¶¶ 2-8; Taylor Decl. ¶¶ 3-5). The named Plaintiff has actively participated in the litigation, providing invaluable insights to counsel into consumers' experiences purchasing the Supplements. (Taylor Decl. ¶ 21).

A presumption of fairness should arise as the Settlement was reached after extensive negotiations before a respected neutral party, Judge Linares (Ret.). *See* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment (advising that "the involvement of a neutral . . . mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."); *Demmick v. Cellco P'ship*, 2015 WL 13643682, at *6 (D.N.J. May 1, 2015) ("[T]he use of a mediator with respect to the present settlement is persuasive evidence that the negotiations were hard-fought, armslength affairs.").

Further, to negotiate a fair and reasonable settlement, class counsel must be "aware of the strengths and weaknesses of their case." *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 435. The parties in this case reached their settlement after Plaintiff had gained a thorough understanding of the relevant law and facts. In addition to the discovery obtained from Naturelo, Class Counsel conducted their own extensive investigation before filing suit, including consultations with experts regarding magnesium content in dietary supplements, the differing types of magnesium compounds used, their characteristics and magnesium content. (Lemberg Decl. ¶ 10). Class Counsel conducted extensive legal analysis regarding the types of claims that did or could arise from the alleged misrepresentations at issue here including analyzing and rebutting Naturelo's arguments in favor of dismissal. *Id.* Class Counsel had a firm "grasp of the legal hurdles that [Plaintiff]

would need to clear in order to succeed on" his claims which informed their negotiations. *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 436. These factors support the presumption of fairness of the settlement and approval.

B. The Settlement Treats Class Members Fairly and Reasonably

"A district court's 'principal obligation' in approving a plan of allocation 'is simply to ensure that the fund distribution is fair and reasonable as to all [Settlement Class members].'" *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 326 (3d Cir. 2011) (quoting *Walsh v. Great Atl. & Pac. Tea Co., Inc.*, 726 F.2d 956, 964 (3d Cir. 1983)). The proposed plan of allocation treats class members fairly by compensating members based on the number of Supplements they purchased. SA Art. III(1)(d). Thus, members that submit claims showing they purchased two or more Supplements will recover a share commensurate with the amount they purchased. Members without proof of purchase will be treated as if they purchased one Supplement. The allocation plan is rational and fair "as it treats class members equitably while taking into account variations in the magnitude of their injuries." *Rosenfeld v. Lenich*, 2021 WL 508339, at *6 (E.D.N.Y. Feb. 11, 2021).

C. The Relief Under the Proposed Settlement Is Reasonable and Adequate

In determining whether the class-wide relief is adequate, the Court considers "the costs, risks, and delay of trial and appeal"; "the effectiveness of any proposed

method of distributing relief to the class, including the method of processing class-member claims"; "the terms of any proposed award of attorney's fees, including timing of payment"; and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C).[3]

The monetary relief, a $1,500,000 common fund, is a very strong settlement in a case with modest individual damages. Approximately 130,000 challenged Supplements were sold. Thus, if a claim was made for *each and every* Supplement, the per unit recovery would be approximately $7.00 for class members flowing from a $24.95 purchase.[4] It is not expected that *all* Supplements sold will have a corresponding claim but, even if they did, the relief would be reasonable and compare very favorably to similar cases. *See Lerma v. Schiff Nutrition Int'l, Inc.*, 2015 WL 11216701, at *5 (S.D. Cal. Nov. 3, 2015) (granting final approval to deceptive labeling class action settlement providing for reimbursement of $3 without proof of purchase or $10 with proof of purchase and capping recovery at 4 and 5 products respectively. Though not stated in the opinion, the sales price of the product was $30) (also noting "restitutionary disgorgement, which is the price paid minus

[3] There are no side agreements to disclose under Rule 23(e)(3) and consideration of the reaction of class members is premature at this preliminary approval stage.

[4] Net Settlement Fund ($903,990)/130,000. The Net Settlement Fund is calculated assuming the Court awards the anticipated fee and incentive award requests ($1,500,000.00 - fees and costs ($500,000) - incentive award ($10,000) – approximate administrative costs ($86,010.00)).

the value actually received—not nonrestitutionary disgorgement of profits—is the proper measure of damages on the unfair competition and false advertising claims."); *Casey v. Doctor's Best, Inc.*, 2022 WL 1726080, at *2 (C.D. Cal. Feb. 28, 2022) (granting preliminary approval to deceptive labeling settlement providing $5 to claimants, per product and without proof of purchase, to a maximum of $25.00 per household, and a refund of "60%" of the purchase price with proof of purchase, up to a maximum of twelve products, with products ranging in price from $10-$65.99).

However, it is expected that a percentage of the Class Members, not all, will submit claims and individual member recovery will be greater than $7.00 per product and closer to the purchase price. Moreover, unlike in *Lerma* and *Casey*, the Settlement has no cap on recovery based on the number of Supplements a member purchased where there is proof of purchase.

Against this relief is the risk that members receive nothing. Defendant has vigorously denied liability from the outset. Though not yet filed in this Court, Defendant's arguments in favor of dismissal were extensive. (Taylor Decl. Ex. B). Defendant raised myriad avenues of attack which, even if the Court were to deny dismissal, Defendant would continue to pursue at summary judgment or at trial. These arguments go from knocking out singular claims under the California Consumers Legal Remedies Act or the California Unfair Competition Law, to issues of federal preemption by FDA regulations. *See, e.g.*, *Scheibe v. ProSupps USA, LLC*,

2023 WL 3573898, at *3 (S.D. Cal. May 18, 2023) (dismissing putative class action arising from purported inaccurate supplement content description on the basis that the labeling standards were preempted by FDA food labeling rules and testing standards). Plaintiff disagreed that his claims was subject to similar preemption defenses (Plaintiff was not imposing testing or labeling standards beyond what is required by the FDA and mandated by state law), but the factual and legal issues involve were complex and, absent negotiated resolution, their outcome uncertain. And while the Parties agree to certify a class for settlement purposes, Plaintiff would likely have faced considerable risks obtaining class certification if litigation proceeds.

To prevail, Plaintiff would have had to withstand Naturelo's dismissal arguments, defend a certification order on appeal under Rule 23(f), survive inevitable motions for decertification and for summary judgment, and prevail at trial and any subsequent appeal. By comparison, the proposed settlement provides certain and timely relief. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) ("difficulties in proving the case" favored settlement approval). In contrast to the uncertainty and delays attendant to continued litigation, this settlement "provides a significant, easy-to-obtain benefit to class members" now. *In re Haier Freezer Consumer Litig.*, 2013 WL 2237890, at *4 (N.D. Cal. May 21, 2013); *see also Ebarle v. Lifelock, Inc.*, No. 15-CV-00258- HSG, 2016 WL 234364,

at *8 (N.D. Cal. Jan. 20, 2016) (settlement that provides immediate benefits to class members has value compared to the risk and uncertainty of continued litigation).

Finally, the amount of Plaintiff's attorneys' fees and litigation expenses are reasonable. *See* Fed. R. Civ. P. 23(e)(2)(C)(iii). Naturelo has not agreed to the amount, and it must be approved by the Court. Class Counsel will request up to a third of the total fund in fees which is well within the boundaries of what is reasonable in the Third Circuit. *Checchia v. Bank of Am., N.A.*, 2023 WL 6164406, at *10 (E.D. Pa. Sept. 21, 2023) ("We are persuaded by Plaintiff's reference to the abundant caselaw within our Circuit recognizing that attorneys' fees tend to range from 19 percent to 45 percent of the settlement fund when the percentage-of-recovery method is used").

Considering Rule 23(e) factors and the additional Girsh factors, the proposed settlement is fair, adequate, and reasonable.

III. The Court Will Be Able to Certify the Class for Purposes of Settlement

Plaintiff seeks to certify a settlement class comprised of:

> "All persons residing in the United States of America who purchased the Supplement, during the Class Period."

SA, Art. II ¶ 32. The "Class Period" is September 1, 2018, through the date of the Preliminary Approval Order.

When a class has not been certified before settlement, the Court considers whether "it likely will be able, after the final hearing, to certify the class." Fed. R. Civ. P. 23(e)(1) advisory committee's note to 2018 amendment; *see In re Payment Card Interchange Fee*, 330 F.R.D. at 50. As discussed below, the Court will likely be able to certify the proposed settlement class in connection with final approval, and since the class is being certified in the context of a settlement, there are no "manageability" concerns as may exist if the case were litigated. *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997).

A. The Settlement Class Members Are Too Numerous to Be Joined

For certification of a class to be appropriate, its members must be so numerous that their joinder would be "impracticable." Fed. R. Civ. P. 23(a)(1). Naturelo sold approximately 130,000 Supplements to thousands of persons. (Taylor Decl. ¶ 16). Numerosity, therefore, is readily satisfied. See, e.g., *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012) (noting that classes exceeding 40 are sufficiently numerous).

B. There Are Common Questions of Law and Fact

Rule 23 next requires common questions of law or fact. Fed. R. Civ. P. 23(a)(2). "Meeting this requirement is easy enough," *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 427, as commonality is satisfied if "the named plaintiffs share at least one question of fact or law with the grievances of the prospective

class." *Id.* at 426-27 (*quoting Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013)). This Action raises numerous questions of law and fact common to the Class, including whether Naturelo: (i) adequately labeled the composition of the Supplements; (ii) engaged in unconscionable commercial practices in the advertising of the Supplements; (iii) disclosed the actual composition of the Supplements; (iv) adequately stated the actual branding of the Supplements; and (v) had knowledge of the contents of the Supplements. These questions are common to the settlement class, capable of class-wide resolution, and "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 427 (*quoting Wal-Mart. Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). Thus, the commonality requirement is met.

C. Plaintiff's Claims Are Typical of the Class

"Typicality ensures the interests of the class and the class representatives are aligned 'so that the latter will work to benefit the entire class through the pursuit of their own goals.'" *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 182-83 (3d Cir. 2001) (*quoting Baby Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994)). Typicality does not require that every class member "share identical claims," *id.*, but only that plaintiffs' and "class members' claims arise from the same course of events and each class member makes similar legal arguments to prove the

defendant's liability," *Atis v. Freedom Mortg. Corp.*, 2018 WL 5801544, at *7 (D.N.J. Nov. 6, 2018).

In this case, Plaintiff and class members have the same types of claims stemming from the same allegedly false and deceptive marketed product. Typicality, therefore, is established. *See In re NFL Players Concussion Injury Litig.*, 821 F.3d at 428 (holding typicality met where plaintiffs "seek recovery under the same legal theories for the same wrongful conduct as the [classes] they represent").

D. Plaintiff and Class Counsel Will Fairly and Adequately Protect the Interests of the Class

Two questions are relevant to adequacy of representation under Rule 23(a)(4): "(1) whether Plaintiffs' counsel is qualified, experienced, and able to conduct the litigation; and (2) whether any conflicts of interest exist between the named parties and the class they seek to represent." *Atis*, 2018 WL 5801544 at *7

i. Class Counsel Are Well Qualified

Rule 23(g) sets forth the criteria for evaluating the adequacy of Plaintiff's counsel: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class . . . ." Fed. R. Civ. P. 23(g)(1)(A). Class Counsel has served as

representative counsel in myriad class action cases. (Lemberg Decl. ¶ 4; Taylor Decl. ¶ 5). Class Counsel's firm specializes in consumer rights actions. (Lemberg Decl. ¶ 4). They have investigated the class claims in this action and have committed the resources to representing the class. *Id*. Adequacy is thus satisfied.

ii. Plaintiff Has No Conflicts of Interest and Has Diligently Pursued the Action on Behalf of the Other Class Members

"A named plaintiff is 'adequate' if his interests do not conflict with those of the class." *Shapiro*, 2018 WL 3158812 at *5. Plaintiff has agreed to serve in a representative capacity, communicated diligently with his attorneys, gathered and produced relevant documents to his attorneys, and helped prepare the allegations in the Complaint. Plaintiff will continue to act in the best interests of the other class members; there are no conflicts between Plaintiff and the class. *See, e.g., id.* (holding adequacy requirement met where the plaintiff had no interests antagonistic to the class).

E. The Requirements of Rule 23(b)(3) are Met

As to the predominance and superiority requirements, when "[c]onfronted 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 will be no trial." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) (explaining that Rule 23(b)(3)(D) drops out of the analysis). Indeed, the

Third Circuit has noted that it is "more inclined to find the predominance test met in the settlement." *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 434 (*quoting Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 304 n.29 (3d Cir. 2011)). As set forth below, the predominance and superiority requirements are met for purposes of this settlement.

i. Common Issues of Law and Fact Predominate for Settlement Purposes

The predominance inquiry tests the cohesion of the class, "ask[ing] whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). Predominance is ordinarily satisfied, for settlement purposes, when the claims arise out of the defendant's common conduct. *See, e.g., Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 299-300 (3d Cir. 2011) ("[T]he focus is on whether the defendant's conduct was common as to all of the class members."); *Yaeger v. Subaru of Am., Inc.*, 2016 WL 4541861, at *7 (D.N.J. Aug. 31, 2016) (predominance satisfied for purposes of settlement where Subaru vehicles had an allegedly common, undisclosed design defect); *Mendez v. Avis Budget Grp., Inc.*, 2017 WL 5513691, at *4 (D.N.J. Nov. 17, 2017) ("[I]n cases where it is alleged that the defendant made similar misrepresentations, non-disclosures, or engaged in a common course of

conduct, courts have found that said conduct satisfies the commonality and predominance requirements.").

All Settlement Class Members purchased Supplements with the allegedly deceptive and fraudulent labeling. Whether the label was false, misleading and fraudulent, and Defendant's level of knowledge about the deception, are the common questions of law which predominate over variations in individual claims. *See Yaeger*, 2016 WL 4541861 at *7; *In re Philips/Magnavox Television Litig.*, 2012 WL 1677244, at *7 (D.N.J. May 14, 2012) (common questions predominate in settlement class where "Class Members share common questions of law and fact, such as whether Philips knowingly manufactured and sold defective televisions without informing consumers and when Philips obtained actual knowledge of the alleged defect.").

ii. A Class Action Settlement Is a Superior Means of Resolving This Controversy

The Rule 23(b)(3) superiority inquiry "asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re NFL Players Concussion Injury Litig.*, 821

F.3d at 434 (*quoting In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 528 (3d Cir. 2004)).

Here, given the relatively low monetary amount of the individual claims, class members are unlikely to bring individual lawsuits against Defendant. Furthermore, because the class members number in the thousands, class-wide resolution of their claims in a single action is efficient. *Atis*, 2018 WL 5801544 at *7 (finding superiority satisfied where "individual claims of class members are relatively small in monetary value," management issues were "less likely" given common questions that predominated, and there were no other litigations concerning the controversy*);* *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 435 (citation omitted) (superiority satisfied where "the [s]ettlement avoids thousands of duplicative lawsuits and enables fast processing of a multitude of claims"). For these reasons, consistent with Rule 23(e)(1)(B), the Court will likely be able to certify the settlement class in this case.

IV. The Proposed Class Notice and Plan for Dissemination Are Reasonable and Should Be Approved

Rule 23(e)(1)(B) requires the Court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." In an action certified under Rule 23(b)(3), the Court must "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who

can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "Generally speaking, the notice should contain sufficient information to enable class members to make informed decisions on whether they should take steps to protect their rights, including objecting to the settlement or, when relevant, opting out of the class." *In re NFL Players Concussion Injury Litig.*, 821 F.3d at 435 (*quoting In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013)).

The class notice presented here fully complies with Rule 23 and the due process mandates. Using plain language, the proposed notice provides all information required under Rule 23(c)(2)(B). As discussed above, the proposed notice program provides for direct mail notice to be disseminated by the Settlement Administrator to the members that purchased directly from Naturelo. SA Ex. E. For members that purchased indirectly through Amazon.com, detailed notice will be emailed to those members alerting them to the case, their rights and how and when they are to submit claims. SA Ex. B. The settlement website will be administered by the Settlement Administrator and will be a useful resource for Settlement Class Members—it will post the Claim Form, the Class Notice, and key pleadings and settlement related motions and orders in the case, including the attorneys' fee application once it is filed and the motion for final approval. The settlement website will also contain the date of the final approval hearing, the deadlines for objecting to or opting out of the settlement, the deadline and procedure for submitting

reimbursement claims, and other pertinent information. The Settlement Administrator will also establish a toll-free number for class members to call with questions. This plan provides the best notice practicable under the circumstances. *See In re Ins. Broker Antitrust Litig.*, 297 F.R.D. 136, 152 (D.N.J. 2013) (finding notice via postcards to be sufficient).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court (1) grant preliminary approval of the proposed Class Settlement; (2) preliminarily certify the Settlement Class pursuant to Fed. R. Civ. P. 23(a) and (b)(3) for settlement purposes; (3) direct notice to the settlement class as set forth in the Settlement Agreement; (4) preliminarily appoint Plaintiff as Settlement Class Representative and Lemberg Law, LLC as Class Counsel; (5) preliminarily appoint the settlement notice/claim administrator requested by the Parties; and (6) set a schedule for settlement proceedings, including the final fairness hearing.

Dated: January 31, 2024

Respectfully submitted,

/s/ Sergei Lemberg

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2024, a true and correct copy of the foregoing was filed with the Clerk of the Court through the ECF system which gave notice of such filing to all parties of record.

/s/ Sergei Lemberg
Sergei Lemberg