

**UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

Case No.: 1:23-cv-02511-DDD-STV

DAVID PLOWDEN, MARIO ORTEGA, and
KAMILLE FAYE VINLUAN-JULARBAL,
each individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

SIMILASAN CORP., a Colorado Corporation,

Defendant.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT, CERTIFICATION OF
SETTLEMENT CLASS AND APPOINTMENT OF SETTLEMENT CLASS COUNSEL**

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Named Plaintiffs David Plowden, Mario Ortega and Kamille Faye Vinluan-Jularbal (collectively, “Named Plaintiffs”), on behalf of themselves and all others similarly situated, through their attorneys, and with the consent of Defendant Similasan Corp. (“Defendant” or “Similasan”) (together with Named Plaintiffs, the “Parties”) hereby request the Court: (1) preliminarily approve the Parties’ proposed class action settlement (“Settlement Agreement”);¹ (2) certify the proposed Settlement Class for settlement purposes; (3) appoint of Melissa S. Weiner of Pearson Warshaw, LLP, Nick Suciu III and Rachel Soffin of Milberg Coleman Bryson Phillips Grossman PLLC, Jonas Jacobson of Dovel Luner LLP and William H. Anderson of Handley, Farah & Anderson PLLC as Class Counsel; (4) appoint of Named Plaintiffs David Plowden, Mario Ortega, and Kamille Faye Vinluan-Jularbal as representatives of the Settlement Class; (5) approve of the Class Notice Program; (6) grant a stay of all proceedings in this litigation against the Released Persons, except as necessary to effectuate the Settlement Agreement or as otherwise agreed to by the Parties; and (7) set a schedule for final approval of the Settlement.

Through this Settlement Agreement, Named Plaintiffs have negotiated a Settlement Amount of \$3,575,000.00 on behalf of a class of consumers who purchased the Covered Products during the Class Period. In reaching this substantial result, Named Plaintiffs navigated and overcame various risks of litigation and considered the risks associated with continued litigation, which had the potential to eliminate the ability for Settlement Class Members to obtain any relief.

¹ Attached as **Exhibit 1** to the Omnibus Declaration of Class Counsel in Support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Settlement, Certification of Settlement Class and Appointment of Settlement Class Counsel (“Class Counsel Decl.”). Unless indicated otherwise, all capitalized terms used herein have the same meaning ascribed to them in the Settlement Agreement.

This Settlement is well within the range of reasonableness required under Federal Rule of Civil Procedure 23. It provides meaningful financial recovery for the Settlement Class and addresses the wrong alleged in the Action.

As detailed herein and in the supporting documents, the Settlement was the product of extensive arm's-length negotiations among the Parties. While Named Plaintiffs believe in the strength of their claims, they have agreed to the Settlement, which addresses all of the claims in the Action and avoids the risk of an adverse outcome during litigation or trial. Defendant has not admitted any liability and continues to deny the legal claims alleged in the Action but has agreed to the Settlement to avoid the cost and burden of litigation and eliminate any risk of an adverse judgment. Accordingly, the Settlement is the product of substantial compromise and reflects the independent decision of the Named Plaintiffs, on the one hand, and Defendant, on the other hand, to resolve the Action.

Moreover, as described below, the Settlement is fair, reasonable and adequate, and satisfies all of the factors necessary for this Court to grant preliminary approval. Named Plaintiffs respectfully request that the Court:

- (a) Grant preliminary approval of the Settlement Agreement;
- (b) Certify the proposed Settlement Class;
- (c) Appoint the Named Plaintiffs as class representatives of the Settlement Class;
- (d) Appoint Melissa S. Weiner of Pearson Warshaw, LLP, Nick Suci III and Rachel Soffin of Milberg Coleman Bryson Phillips Grossman PLLC, Jonas Jacobson of Dovel Luner LLP and William H. Anderson of Handley, Farah & Anderson PLLC as Class Counsel;
- (e) Approve the proposed Class Notice Program;

(f) Grant a stay of all proceedings in this litigation against the Released Persons except as necessary to effectuate the Settlement Agreement or as otherwise agreed to by the Parties; and

(g) Set a schedule for final approval of the Settlement.

II. BACKGROUND

A. Summary of Allegations

This proposed class action arises from Similasan's alleged misleading advertising claims and its mislabeling of the Covered Products during the Class Period. Class Counsel Decl. ¶ 5. In their Consolidated Class Action Complaint, Named Plaintiffs allege that (1) the Covered Products' active ingredients classify them as drugs, (2) the use of ingredients not Generally Recognized as Safe and Effective classify the Covered Products as new drugs, (3) Similasan fails to adhere to the relevant FDA requirements for these kinds of new drugs, including the FDA's Current Good Manufacturing Practices, and thus (4) Similasan unlawfully markets the Covered Products as safe, legal and sterile drugs when they are not. *Id.*

Named Plaintiff Plowden filed his initial complaint in September of 2023, on behalf of consumers who purchased the Similasan Products during the Class Period. *Id.* ¶ 6. An additional case was subsequently filed by Named Plaintiffs Mario Ortega and Kamille Faye Vinluan-Jularbal, and thereafter, the Named Plaintiffs moved to consolidate the *Plowden* Action and *Ortega et al.* Action in the District of Colorado, pursuant to Rule 42(a) and D.C. COLO. LCivR 42.1. *Id.*

On December 19, 2023, Judge Daniel D. Domenico granted Named Plaintiffs' motion to consolidate the cases in the District of Colorado. *Id.* ¶ 7. Named Plaintiffs filed their Consolidated Class Action Complaint on December 22, 2023, alleging Defendant violated state consumer protection statutes, Florida's Unfair & Deceptive Trade Practices Act, Fla. Stat. §501.201, *et seq.*, California's Unfair Competition Law, California Business & Professions Code §§ 17200, *et seq.*, California's Consumer Legal Remedies Act, California Civil Code §§1750, *et seq.*, California's

False Advertising Law, California Business & Professions Code §§ 17500, *et seq.*, other states' consumer protection laws, breached its express and implied warranties, committed fraudulent omission and was unjustly enriched by falsely, deceptively and unlawfully labeling and advertising the Similasan Products as defective and unapproved drugs. *Id.* ¶ 8.

On or about April 2024, the Parties agreed to participate in early mediation and engage in limited and confidential settlement discovery. *Id.* ¶ 14. On August 1, 2024, the Parties attended mediation with mediator Bruce A. Friedman of JAMS to facilitate settlement discussions, but the Parties did not reach a settlement at that time. *Id.* ¶ 17. After the mediation, Mr. Friedman continued to work with the Parties on resolution and held additional settlement talks with both Parties to facilitate further settlement discussions. *Id.* ¶ 18. During the course of those negotiations, Class Counsel conducted additional mediation discovery regarding the Similasan Products, including discovery of retail sales data and information regarding the frequency of purchase and Similasan's role in manufacturing products substantially similar to the Similasan Products, including the Private Label Products for CVS Pharmacy, Inc. and Walgreens Boots Alliance, Inc. *Id.* On September 16, 2024, the Parties reached agreement as to the material terms that formed the basis of the final Settlement. *Id.* ¶ 19; *see generally* Settlement Agreement.

B. Material Terms of the Settlement Agreement

Class Counsel have extensive experience in consumer class action cases, particularly in cases alleging false advertising of products. Class Counsel Decl. ¶ 38; *see also* Declaration of Melissa S. Weiner; Declaration of Nick Suci III, Declaration of Rachel Soffin, Declaration of Jonas Jacobson and Declaration of William H. Anderson. Thus, the Settlement Agreement was negotiated with the benefit of Class Counsel's substantial collective experience litigating complex consumer class actions. *Id.* The settlement discussions were undertaken with an especially deep understanding of both the applicable law and the relevant facts, which contributed to Class

Counsel's result in securing a favorable settlement for the Settlement Class. Class Counsel Decl. ¶¶ 35, 38.

1. Proposed Class Definition

The proposed Settlement Class is co-extensive with the class alleged in the operative Amended Complaint:

All Persons in the United States, its territories and/or the District of Columbia, who purchased, for personal use and not for resale, any Covered Product from September 11, 2017, until the Preliminary Approval Date.

Settlement Agreement § III(1). Specifically excluded from the Settlement Class are the following persons:

- (i) Defendant and its respective subsidiaries and affiliates, members, employees, officers, directors, agents, and representatives and their family members;
- (ii) Class Counsel;
- (iii) The judge who has presided over the Action;
- (iv) Local, municipal, state, and federal governmental agencies; and
- (v) All persons who have timely elected to become Opt-Outs from the Settlement Class in accordance with the Court's Orders.

Id. § III(1).

2. Monetary Relief to the Settlement Class

Similasan has agreed to provide monetary compensation for the benefit of the Settlement Class in the amount of \$3,575,000.00, which represents significant and guaranteed recovery to the Settlement Class (providing this Court grants final approval). This is a non-reversionary fund; once the Settlement Agreement is finally approved by the Court and after administrative costs, litigation expenses and attorneys' fees are deducted, the net funds will be distributed to Settlement Class

Members with no amount reverting back to Similasan. *Id.* § V(3). Following payment of all amounts due to be distributed under the Settlement Agreement, including any *pro rata* adjustments of Cash Awards, the amount remaining in the Net Settlement Fund, including all uncashed Cash Awards made by check, shall be donated to the *Cy Pres* Recipient, the Public Justice Foundation.² *Id.* § VI(1).

Upon final approval, the Settlement Fund will pay Valid Claims, as defined in the Settlement Agreement. Claimants who submit a Valid Claim shall receive a Cash Award Amount as follows:

Claimants without Valid Proof of Purchase. Claimants without Valid Proof of Purchase shall be eligible to receive \$2.50 for each Covered Product purchased during the Class Period, subject to a maximum Cash Award of \$10.00 per claim (i.e. each Household can claim a Cash Award for a maximum of 4 Covered Products). Claims are limited to one per Household. *Id.* § IV(3)(b)(i).

Claimants with Valid Proof of Purchase. Claimants with Valid Proof of Purchase for each purchase of a Covered Product shall be eligible to receive \$2.50 for each Covered Product purchased during the Class Period with no cap or limitation. Claims are limited to one per Household. *Id.* § IV(3)(b)(ii).

² The Public Justice Foundation (“Public Justice”) is a 501(c)(3) non-profit charitable public foundation dedicated to advancing the public interest in areas such as consumer rights, access to justice, workers’ rights and beyond and has represented consumer interests for misleading marketing and deceptive practices. More extensive background information on Public Justice and its work to protect consumers is available on its website at <https://www.publicjustice.net/what-we-do/consumers-rights/>. Numerous courts have deemed Public Justice an appropriate recipient of *cy pres* funds in consumer and other class actions. *See e.g., Coleman v. Sentry Ins.*, No. 15-CV-01411-SMY-SCW (S.D. Ill.); *Fishbein v. All Mkt., Inc. DBA Vita Coco*, No. 11-Civ-5580 (S.D.N.Y.); *Glover v. Mahrt DBA Petaluma Egg Farm*, No. RG12650058 (Alameda Cnty. Sup. Ct.); *In re: Classmates.com Consol. Litig.*, No. CV09-45RAJ (W.D. Wash.); *Holt et al v. FoodState, Inc.*, No. 15cv78 L (S.D. Cal.); *In Re Sony PS3 “Other OS” Litig.*, No. C 10-1811 RS (N.D. Cal.).

3. Notice

After a competitive bidding process, the Parties selected Angeion Group, LLC (“Angeion Group”) as the Claims Administrator that, in the Parties’ opinion, will provide the best service to the Settlement Class Members during the notice and administration of the Settlement. Class Counsel Decl. ¶ 29; *see also* Class Notice Program, attached as Exhibit C to the Settlement Agreement (hereinafter, “Class Notice Program”). Angeion Group is a recognized leader in class action settlement administration and has administered numerous settlements in Illinois state courts. *See generally* Class Notice Program. Accordingly, Named Plaintiffs request that the Court appoint Angeion Group as the Claims Administrator to provide notice to Settlement Class Members and to collect, process, approve or deny and pay out claims while being jointly overseen by the Parties. Settlement Agreement § IX.

Angeion Group has designed a robust Class Notice Program that aims to reach as many Members of the Settlement Class as possible. *See, e.g.*, Class Notice Program. Pursuant to the Class Notice Program, Angeion Group will provide notice to Settlement Class Members through a robust media campaign and includes the following components: (1) social media advertising through Facebook, Instagram and X; (2) state-of-the-art targeted internet banner notice; (3) paid search campaign; (4) establishment of an informational Settlement Website that will contain a summary of the Settlement, important dates and deadlines, copies of important Settlement documents, answers to frequently asked questions and information pertaining to Settlement Class Members’ rights under the Settlement; and (5) establishment of a toll-free informational telephone line for Settlement Class Members. *See* Class Notice Program; *see also* Settlement Agreement § IX (9). The Class Notice Program is estimated to reach over 70.17% of potential Settlement Class Members with an average frequency of 3.05 times. *See* Class Notice Program.

The Settlement Website will be designed to be ADA-compliant and optimized for mobile visitors so that information loads quickly on mobile devices. *Id.* Additionally, the Settlement Website will be designed to maximize search engine optimization through Google and other search engines. Keywords and natural language search terms will be included in the Settlement Website's metadata to maximize search engine rankings. *Id.* The full Notice and Administration Costs and effectuation of the Settlement Agreement, including the payments of Attorneys' Fees, Costs and Service Awards, shall be paid from the Settlement Amount. Settlement Agreement § I (53).

The proposed Class Notice Program meets all notice requirements. It effectively reaches the Settlement Class Members who can be identified through a reasonable effort and fits the unique circumstances of the Action. Class Counsel Decl. ¶¶ 29-31; *see also* Class Notice Program. The Class Notice Program describes the case and clearly explains the rights of the Settlement Class Members. *See* Class Notice Program. The Class Notice also explains to Settlement Class Members their rights to choose to participate in the Settlement, be excluded from the Settlement Class or to object to the Settlement. *See* Class Notice, attached as Exhibit B to the Settlement Agreement (hereinafter, "Class Notice"). Therefore, the Class Notice Program comports in every respect. Specifically, the Class Notice Program includes the following components: (1) social media advertising through Facebook, Instagram and X; (2) state-of-the-art targeted internet banner notice; (3) paid search campaign; (4) establishment of an informational Settlement Website that will contain a summary of the Settlement, important dates and deadlines, copies of important Settlement documents, answers to frequently asked questions and information pertaining to Settlement Class Members' rights under the Settlement; and (5) establishment of a toll-free informational telephone line for Settlement Class Members. *See* Class Notice Program.

4. Opt-Outs and Objectors

The Settlement Agreement provides mechanisms by which Settlement Class Members may Opt-Out of, or object to, the proposed Settlement Agreement. Settlement Agreement § X. Any Settlement Class Member who intends to object to the Settlement Agreement must do so on or before the Opt-Out and Objection Date. *Id.* §§ I(40), X(7). In order to object, the Settlement Class Member must file with the Court (or mail to the Clerk of Court) a document that includes all of the following:

- the Settlement Class Member’s printed name, address and telephone number;
- whether the Settlement Class Member is represented by counsel and, if so, contact information for their counsel;
- evidence showing that the objector is a Settlement Class Member;
- whether the objection applies to that Settlement Class Member or to a specific subset of the Settlement Class, or to the entire Settlement Class, and state with specificity the grounds for the objection;
- any other supporting papers, materials or briefs that the Settlement Class Member wishes the Court to consider when reviewing the objection;
- the actual written or electronic signature of the Settlement Class Member making the objection; and
- a statement on whether the objecting Settlement Class Member and/or their counsel intend to appear at the Fairness Hearing.

Id. §§ X(7)(a)-(g).

A Settlement Class Member who wishes to Opt-Out of the Settlement Class must do so on, or before, the Opt-Out and Objection Date. *Id.* §§ I(40), X(9). To Opt-Out, a Settlement Class Member must inform the Claims Administrator in writing that they wish to be excluded from the Settlement Class and must send that request to the Claims Administrator by United States mail, post-marked no later than the Opt-Out and Objection Date. *Id.* § X(9). The request for exclusion must be personally signed by the Settlement Class Member requesting exclusion and contain the Settlement Class Member's name, address, telephone number, a brief statement explaining the Covered Products the Settlement Class Member purchased to confirm membership in the Settlement Class and a statement that indicates a desire to be excluded from the Settlement Class. *Id.* A Settlement Class Member may Opt-Out on an individual and personal basis only; so-called "mass" or "class" Opt-Outs shall not be allowed. *Id.*

5. Attorneys' Fees, Costs and Class Representative Service Awards

Class Counsel seek attorneys' fees in an amount not to exceed one-third (1/3) of the Settlement Amount and, in addition to fees, seek reimbursement of verifiable litigation costs. Settlement Agreement §§ XI(1), (2). No later than sixty (60) days after the Preliminary Approval Order, Class Counsel will submit to the Court an application seeking an award of Attorneys' Fees and Costs (the "Fee and Cost Application"). *Id.* §§ XI(1). Class Counsel shall move for Service Awards of two thousand and five-hundred dollars (\$2,500.00) to each of the Named Plaintiffs in the Action for their efforts in pursuing the Action, effectively and diligently pursuing the claims in extensive litigation and achieving the benefits of the Settlement Agreement on behalf of the Settlement Class. Class Counsel Decl. ¶ 28; Settlement Agreement § XI(3).

The procedure for, and the allowance or disallowance by the Court of, any application for Attorneys' Fees and Costs is not a material term of the Settlement or Agreement and is not a condition of this Agreement that any particular application for Attorneys' Fees and Costs be

approved. Settlement Agreement § XI(1). If the Court denies, in whole or part, Class Counsel's motion and/or the motion is the subject of any appeal, the remainder of the terms of the Settlement Agreement shall remain in effect provided that the entire amount to be paid by Defendant as an award of Attorneys' Fees will not, under any circumstances, exceed one-third (1/3) of the Settlement Amount plus verifiable litigation costs. *Id.* In addition, no interest will accrue on such amounts at any time. *Id.* The notice documents will inform the Settlement Class as to this information regarding Attorneys' Fees and Costs and Service Awards. *See* Class Notice. Class Counsel will provide further detail and explanation in their subsequent filings; however, these amounts are more than adequately supported by precedent in this Court and Class Counsel's actual expenses and lodestar (measured as hours spent multiplied by reasonable and accepted hourly rates). Class Counsel Decl. ¶ 28.

6. Release and Final Judgment

Pursuant to the schedule set by the Court in its Preliminary Approval Order and no later than sixty (60) days after the Preliminary Approval Date, Class Counsel shall file a motion and supporting papers requesting that the Court grant final approval of the Settlement Agreement and for entry of a Final Order and Judgment. Settlement Agreement § XIV(1). As set forth more fully in Section XIV(2), the Settlement Agreement contains a release and discharge of the Released Persons, including from "any and all claims . . . that were asserted, or could have been asserted, in the Action . . . relating to the alleged mislabeling of Covered Products and based on the same factual predicate as the claims asserted in the Action." *Id.* § I(46).

The Settlement Agreement expressly excludes from the Released Claims "any claims for personal injuries." *Id.*

III. ARGUMENT

Settlement is strongly favored as a method for resolving disputes.³ When evaluating the fairness and adequacy of a proposed settlement, courts keep in mind the “important public policy concerns that support voluntary settlements.”⁴ This is particularly true in large, complex class actions, such as this case.⁵

Under Federal Rule of Civil Procedure 23(e), before a court may approve a proposed settlement, it must conclude that the settlement is “fair, reasonable, and adequate.”⁶ However, the review at the preliminary approval stage is not “as stringent as [that] applied for final approval.”⁷ This is because “[p]reliminary approval of a class action settlement is a provisional step.”⁸ At preliminary approval, the court is tasked with determining whether there is “any reason not to notify the class members of the proposed settlement and to proceed with a fairness hearing.”⁹ The analysis is at most a determination that there is “‘probable cause’ to submit the proposal to class members and hold a full-scale hearing as to its fairness.”¹⁰ “A proposed

³ See *Sears v. Atchison, Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451, 1455 (10th Cir. 1984).

⁴ *Trujillo v. State of Colo.*, 649 F.2d 823, 826 (10th Cir. 1981).

⁵ *Acevedo v. Southwest Airlines Co.*, No. 1:16-cv-00024-MV-LF, 2019 WL 6712298, at *2 (D.N.M. Dec. 10, 2019) (internal citations omitted) (noting that particularly in complex class actions, settlement “minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources”), *report and recommendation adopted*, 2020 WL 85132 (D.N.M. Jan. 7, 2020).

⁶ Fed. R. Civ. P. 23(e)(2).

⁷ *Ross v. Convergent Outsourcing, Inc.*, 323 F.R.D. 656, 659 (D. Colo. 2018) (quoting *In re Motor Fuel Temperature Sales Pracs. Litig.*, 286 F.R.D. 488, 492 (D. Kan. 2012)).

⁸ *Blanco v. Xtreme Drilling and Coil Servs., Inc.*, No. 16-cv-00249-PAB-SKC, 2020 WL 3833412, at *1 (D. Colo. Mar. 8, 2020).

⁹ *Id.* (quoting *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006)).

¹⁰ *In re Molycorp, Inc. Sec. Litig.*, No. 12-cv-00292-RM-KMT, 2017 WL 4333997, at *3 (D. Colo. Feb. 15, 2017) (quotation and alteration marks omitted), *report and recommendation adopted*, 2017 WL 4333998 (D. Colo. Mar. 6, 2017).

settlement of a class action should therefore be preliminarily approved where it appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, and does not improperly grant preferential treatment to class representatives.” *Id.*

“Although the standards for preliminary approval of a class action settlement are not as stringent” as the standards for final approval, “the standards used in the [final] stage inform the Court’s preliminary inquiry. Therefore, it is appropriate to review those standards.” *Id.* Final approval will be granted if a settlement is “fair, reasonable, and adequate” under the Rule 23(e)(2) factors.¹¹ In the Tenth Circuit, this assessment requires courts to consider whether “(1) the settlement was fairly and honestly negotiated, (2) serious legal and factual questions placed the litigation’s outcome in doubt, (3) the immediate recovery was more valuable than the mere possibility of a more favorable outcome after further litigation, and (4) [the parties] believed the settlement was fair and reasonable.”¹² “If the settling parties can establish these factors, courts usually presume that the proposed settlement is fair and reasonable.”¹³ Named Plaintiffs address both the Rule 23 factors and the unique Tenth Circuit factors.¹⁴ Each of these factors support preliminary approval.

¹¹ *Paulson v. McKowen*, No. 19-CV-02639-PAB-NYW, 2022 WL 168708, at *3 (D. Colo. Jan. 19, 2022) (citing Fed. R. Civ. P. 23(e)(2)).

¹² *Tennille v. W. Union Co.*, 785 F.3d 422, 434 (10th Cir. 2015) (quotation omitted).

¹³ *Martinez v. Reams*, No. 20-CV-00977-PAB-SKC, 2020 WL 7319081, at *7 (D. Colo. Dec. 11, 2020).

¹⁴ *Chavez Rodriguez v. Hermes Landscaping, Inc.*, No. 17-2142-JWB-KGG, 2020 WL 3288059, at *2 (D. Kan. June 18, 2020).

A. The Agreement was Fairly and Honestly Negotiated

This factor requires courts to look for “indicia that the settlement negotiations in this case have been fair, honest and at arm’s length.”¹⁵ Here, all Parties are represented by sophisticated counsel who have played active roles in many consumer class action cases across the country. Class Counsel Decl. ¶ 38; *see also* Weiner Decl.; Suciu Decl., Soffin Decl., Jacobson Decl. and Anderson Decl. The negotiations lasted for several months. Class Counsel Decl. ¶¶ 16-19. During those intensive negotiations, the Parties exchanged settlement discovery, (Settlement Agreement § II(79)), and the Parties undertook a robust discussion of the strengths and weaknesses of the Action. Class Counsel Decl. ¶ 18. The negotiations were adversarial throughout, and at no time was there any collusion which might compromise the interests of the Settlement Class. *See id.* ¶¶ 22, 32-38. Thus, because the Parties—advised by sophisticated counsel with expertise on consumer deception matters and complex class litigation—engaged in good faith negotiations, this “support[s] the integrity of the [P]arties’ settlement.”¹⁶

B. The Immediate Relief Provided to the Class is Adequate

The analysis under Rule 23(e)(2)(C) looks at whether “the relief provided for the class is adequate.” The Tenth Circuit’s factors regarding “whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt” and “whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation”

¹⁵ *Lucas*, 234 F.R.D. at 693.

¹⁶ *Acevedo*, 2019 WL 6712298, at *2; *see also In re Urethane Antitrust Litig.*, No. 04-MD-1616-JWL, 2006 WL 2983047, at *1 (D. Kan. Oct. 17, 2006) (finding the settlement “fairly and honestly negotiated” when it results from “negotiations which were undertaken in good faith by counsel with significant experience litigating [relevant subject matter] class actions”).

both “largely overlap” with Rule 23(e)(2)(C)(i), the first subfactor of this analysis, and thus these analyses are combined and subsumed into the analysis below.¹⁷

As an initial matter, “the parties could reasonably conclude that there are serious questions of law and fact that exist such that they could significantly impact this case if it were litigated.”¹⁸ For example, there is serious disagreement by the Parties about whether the Covered Products were legally marketed as new drugs, whether they complied with CGMPs and whether they were legal and safe to sell. Class Counsel Decl. ¶¶ 20-22. As in most consumer class cases, questions of predominance and impact are certain to arise, with Defendant disputing the expert analyses Named Plaintiffs will use to show the class was harmed. *Id.* The Settlement cuts short these questions and ensures that the Settlement Class will be entitled to some financial relief in this Action.¹⁹ *Id.* ¶ 32. Because the serious, disputed legal issues here render the outcome of the Action uncertain, this factor weighs heavily in favor of the Settlement.²⁰ *Id.* ¶¶ 20-22.

In addition, the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation. As in most cases, if “this case were to be litigated, in all probability it would be many years before it was resolved.”²¹ It is inherently difficult to prove a complex class action, and there are “significant risks associated with continued litigation.”²² In contrast, “the proposed settlement agreement provides the class with substantial, guaranteed

¹⁷ See *Chavez Rodriguez*, 2020 WL 3288059, at *3 (citation omitted).

¹⁸ *Lucas*, 234 F.R.D. at 693-94.

¹⁹ *In re Qwest Commc’ns Int’l, Inc. Sec. Litig.*, 625 F. Supp. 2d 1133, 1138 (D. Colo. 2009).

²⁰ See *Tennille*, 785 F.3d at 435 (affirming final approval of settlement where “serious disputed legal issues” rendered “the outcome of th[e] litigation . . . uncertain and further litigation would have been costly”).

²¹ *Lucas*, 234 F.R.D. at 694.

²² *Temp. Servs., Inc. v. Am. Int’l Grp., Inc.*, No. 3:08-cv-00271-JFA, 2012 WL 13008138, at *11 (D.S.C. July 31, 2012).

relief.”²³ Continuing to litigate this Action against Defendant would have required significant additional resources and materially increased the complexity of the case. *Id.* ¶¶ 32, 34. The Settlement Class will be provided with substantial guaranteed relief, without the need and attendant risks of protracted litigation.

In addition, “[a]n evaluation of the benefits of the settlement also must be tempered by the recognition that any compromise involves concessions on the part of the parties.”²⁴ Here, the Parties reached a Settlement Agreement that necessitated compromise by both sides. *Id.* ¶ 33. Thus, the immediate, substantial relief offered by the Settlement Agreement outweighs the “mere possibility of a more favorable outcome after protracted and expensive litigation over many years in the future.”²⁵ Accordingly, the relief provided to the Settlement Class is adequate and satisfies both the Tenth Circuit requirements and those of Rule 23(e)(2)(C).

C. Class Counsel Believes the Settlement is Fair and Reasonable

“Counsel’s judgment as to the fairness of the agreement is entitled to considerable weight.”²⁶ Here, Class Counsel—attorneys with substantial experience in complex class action and consumer fraud litigation—unanimously support the Settlement.²⁷ Class Counsel Decl. ¶ 38; *see also* Weiner Decl.; Suciu Decl., Soffin Decl., Jacobson Decl. and Anderson Decl. Courts recognize that “the recommendation of a settlement by experienced plaintiff[s]’ counsel is entitled

²³ *Lucas*, 234 F.R.D. at 694.

²⁴ *Acevedo*, 2019 WL 6712298, at *3.

²⁵ *In re Syngenta AG MIR162 Corn Litig.*, No. 14-MD-2591-JWL, 2018 WL 1726345, at *2 (D. Kan. Apr. 10, 2018).

²⁶ *Lucas*, 234 F.R.D. at 695.

²⁷ *See, e.g., id.* (finding unanimous approval by experienced counsel supports settlement approval).

to great weight.”²⁸ Under the Settlement Agreement, Similasan will pay, or cause to be paid, the Settlement Amount of \$3,575,000.00 into the Escrow Account that will provide tangible financial benefits to the Settlement Class.²⁹ Settlement Agreement § IV. And the Parties’ negotiation of the Settlement Agreement allowed Named Plaintiffs to secure important confirmatory evidence from Defendant. Class Counsel Decl. ¶ 18.

In sum, the Settlement Agreement is fair, reasonable and adequate in light of the strength of the claims and the risks and expense of continued litigation. Accordingly, under the Rule 23(e)(2) and Tenth Circuit factors, preliminary approval should be granted.

IV. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

A. The Settlement Class Satisfies Rule 23(a)

1. The Settlement Class is sufficiently numerous

Rule 23(a)(1) requires that the class membership be sufficiently large to warrant a class action because the alternative of joinder is impracticable.³⁰ Here, the precise number of Settlement Class Members is unknown, but will number in at least the tens of thousands, and joinder of tens of thousands of people would be impracticable.³¹ Accordingly, the requirements of Rule 23(a)(1) are met.

²⁸ *O’Dowd v. Anthem, Inc.*, No. 14-cv-02787-KLM-NYW, 2019 WL 4279123, at *14 (D. Colo. Sept. 9, 2019).

²⁹ *See McKeon v. Integrity Pizza LLC*, No. 18-CV-0932-WJM-KLM, 2020 WL 8679852, at *2 (D. Colo. Aug. 6, 2020) (A *cy pres* award is appropriate “if the beneficiary is the next best use for indirect class benefit” and the “*cy pres* beneficiary ... [is] related to the nature of a plaintiff’s claims.”).

³⁰ Fed. R. Civ. P. 23(a)(1).

³¹ *In re Core Bond Fund*, No. 09-cv-1186-JLK-KMT, 2011 WL 13223585, at *1 (D. Colo. Sept. 30, 2011); *see also In re Oppenheimer Champion Fund Sec. Fraud Class Actions*, No. 09-cv-386-JLK-KMT, 2011 WL 13217495, at *1 (D. Colo. Sept. 30, 2011).

2. Questions of law and fact are common to the Settlement Class

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.”³² Courts recognize that “[e]ven a single [common] question will” satisfy the commonality requirement.³³ Here, the core issue of the Action—whether or not the Covered Products were illegal to sell—is a question common to all Settlement Class Members. Class Counsel Decl. ¶ 8. Thus Rule 23(a)(2) is satisfied.

3. Named Plaintiffs’ claims are typical of the Settlement Class Members’ claims

Rule 23(a)(3) requires that the class representatives’ claims be “typical” of class members’ claims. Fed. R. Civ. P. 23(a)(3). “The typicality requirement ensures that the absent class members are adequately represented by the lead plaintiff such that the interests of the class will be fairly and adequately protected in their absence.”³⁴ In consumer class action cases, typicality is established by plaintiffs and all class members alleging they were harmed by the same practice.³⁵ Here, typicality is satisfied because Named Plaintiffs’ claims and the claims of members of the Settlement Class arise out of the same alleged deceptive mislabeling and legal violations. Class Counsel Decl. ¶ 36. Accordingly, Rule 23(a)(3) is satisfied.

³² Fed. R. Civ. P. 23(a)(2).

³³ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 359 (2011) (quotation omitted); *see also Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 914 (10th Cir. 2018) (“A finding of commonality requires only a single question of law or fact common to the entire class.” (citation omitted)).

³⁴ *Paulson*, 2022 WL 168708, at *5.

³⁵ *See Daye v. Cmty. Fin. Serv. Centers, LLC*, 313 F.R.D. 147, 176 (D.N.M. 2016) (commonality requirement met where defendant “uniformly failed to comply with [underlying regulations governing the defendant’s product]”).

4. Named Plaintiffs David Plowden, Mario Ortega and Kamille Faye Vinluan-Jularbal and Class Counsel are adequate

Rule 23(a)(4) requires that, for a case to proceed as a class action, a court must find that “the representative parties will fairly and adequately protect the interests of the class.”³⁶ The Tenth Circuit requires that the named plaintiffs and their counsel: (1) do not have any conflicts of interest with other class members and (2) will prosecute the action vigorously.³⁷ Here, the adequacy requirement is met. The Named Plaintiffs have no material conflict with other Settlement Class members, and each Named Plaintiff shares an overriding interest in establishing Defendant’s liability and maximizing class-wide damages.³⁸ The Named Plaintiffs and their experienced Class Counsel have prosecuted, and will continue to prosecute, the Action vigorously on behalf of the Settlement Class. Class Counsel Decl. ¶¶ 35, 36, 38. The interests of the Settlement Class are fairly and adequately protected by the representative Named Plaintiffs and their Class Counsel, satisfying Rule 23(a)(4).

B. The Requirements of Rule 23(b)(3) are Satisfied

Under Rule 23(b)(3), plaintiffs must show that “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 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Both of these requirements are satisfied here.

³⁶ Fed. R. Civ. P. 23(a)(4).

³⁷ *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002); *see also* Fed. R. Civ. P. 23(a)(4).

³⁸ *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) (“Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members.”).

1. Common issues predominate

The “Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”³⁹ It is a test readily met where the claims at issue “rest upon a theory that even putting the products for sale on the marketplace is an implicit representation that they are being legally sold and comply with the FDA.”⁴⁰ The common and predominate issues with respect to this Settlement Class, for settlement purposes only, is whether the Covered Products are illegal and mislabeled homeopathic drugs that were sold in violation of the FDCA and similar state laws such that reasonable consumers were misled and paid a premium price. Class Counsel Decl. ¶ 8.

2. Proceeding as a class is a superior method for resolving this Action fairly and effectively

In addition to the predominance of common questions, Rule 23(b)(3) requires a finding that “a class action is superior to other available methods for fairly and efficiently adjudicating of the controversy.” In this Action, settlement “is a superior method for resolving this dispute” as it “avoids duplicative litigation, saving both plaintiffs and defendants significant time and legal costs to adjudicate common legal and factual issues.”⁴¹ Additionally, no other potential Settlement Class Members have filed an analogous claim against Similasan. Class Counsel Decl. ¶ 36. Further, proceeding as a class action, rather than a host of separate individual trials, would provide significant economies in time, effort and expense and permit Settlement Class Members to seek

³⁹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

⁴⁰ *Corbett v. PharmaCare U.S., Inc.*, No. 21CV137-JES (AHG), 2024 WL 1356220, at *15 (S.D. Cal. Mar. 29, 2024).

⁴¹ *In re Crocs, Inc. Secs. Litig.*, 306 F.R.D. 672, 689-90 (D. Colo. 2014).

damages that would otherwise be too costly to pursue.⁴² For those reasons, the superiority requirement is met. Accordingly, the Court should certify the Settlement Class.

V. THE CLASS NOTICE SHOULD BE APPROVED

A. The Content of the Proposed Class Notice Complies with Rule 23(c)(2)

Rule 23(e) requires that, prior to final approval of a settlement, notice of that settlement must be distributed to all class members who would be bound by it. Rule 23(c)(2)(B) requires that notice of a settlement be “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” The best practicable notice is that which “is reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁴³ Here, the Class Notice provides detailed information about the Settlement, including: (i) a comprehensive summary of its terms; (ii) Class Counsel’s intent to request Attorneys’ Fees, Costs and Service Awards for the Named Plaintiffs; and (iii) detailed information about the Released Claims. *See generally* Class Notice. In addition, the Class Notice provides information about the final approval hearing date, the right of Settlement Class Members to seek exclusion from the Settlement Class or to object to the proposed Settlement (as well as the deadlines and procedure for doing so), and the procedure to receive additional information. *Id.*

In short, the Class Notice fully informs Settlement Class Members of the Action, the proposed Settlement and the information they need to make informed decisions about their rights. *See generally id; see also* Class Notice Program. This information is adequate to put Settlement

⁴² *See Pliego v. Los Arcos Mexican Rest., Inc.*, 313 F.R.D. 117, 127 (D. Colo. 2016) (“Courts in this District have repeatedly recognized that a class action is superior where the small claims of parties with limited resources are otherwise unlikely to be pursued.”).

⁴³ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Class Members on notice of the proposed Settlement and is well within the requirements of Fed. R. Civ. P. 23(c)(2)(B).

B. The Plan for Distribution of the Class Notice Will Comply with Rule 23(c)(2)

The Parties have agreed upon a Class Notice Program that satisfies the requirements of both Fed. R. Civ. P. 23 and Due Process. *See generally* Class Notice Program. The Claims Administrator will provide Notice to Settlement Class Members via a robust media campaign consisting of state-of-the-art targeted internet banner notice, social media notice, a paid search campaign and toll-free telephone line. *Id*; Settlement Agreement §§ IX(9)(a)-(c). In addition, the Claims Administrator will establish a Settlement Website that shall contain all salient Settlement documents, as well as access to important Court documents, upcoming deadlines and the ability to file claim forms online. *See* Class Notice Program; Settlement Agreement § IX. Finally, Defendant will cause notice of the Settlement to the appropriate state and federal officials as required by the Class Action Fairness Act, 28 U.S.C. § 1715.

VI. CONCLUSION

Named Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement Agreement; (2) certifying the Settlement Class; (3) appointing Melissa S. Weiner of Pearson Warshaw, LLP, Nick Suci III and Rachel Soffin of Milberg Coleman Bryson Phillips Grossman PLLC, Jonas Jacobson of Dovel Luner LLP and William H. Anderson of Handley, Farah & Anderson PLLC as Class Counsel; (4) appointing Named Plaintiffs David Plowden, Mario Ortega and Kamille Faye Vinluan-Jularbal as representatives of the Settlement Class; (5) approving the Class Notice Program; (6) ordering a stay of all proceedings against the Released Persons, except as necessary to effectuate the Settlement Agreement or as otherwise agreed to by the Parties; and (7) setting a schedule for final approval of the Settlement.

Dated: November 6, 2024

Respectfully submitted,

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I hereby certify that the foregoing pleading complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1).

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2024, I electronically filed the foregoing with the Clerk of the Court using the Court's CM/ECF system, which will send notice to counsel for all parties that have appeared in this case.

/s/ William H. Anderson
WILLIAM H. ANDERSON