UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

DAVID STARR, BERNADETTE MAVRIKOS, EDMUND QUIAMBAO, JAMES TETTENHORST, JEREMY HANSEN, KRISTA KARO, ARLENE REED-COSSAIRT, PETER STAVROS, HEATHER FARKAS, on behalf of themselves and all others similarly situated, Plaintiffs, v. VSL PHARMACEUTICALS, INC.; LEADIANT BIOSCIENCES, INC., F/K/A SIGMA-TAU PHARMACEUTICALS, INC.; and ALFASIGMA USA, INC., Defendants.	No. 8:19-cv-02173-LKG

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED
<u>MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT</u>

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TABLE OF CONTENTS

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs and Class Representatives David Starr, Bernadette Mavrikos, Edmund Quiambao, James Tettenhorst, Jeremy Hansen, Krista Karo, Arlene Reed-Cossairt, Peter Stavros and Heather Farkas (collectively, "Plaintiffs") submit this memorandum in support of their unopposed motion for preliminary approval of their proposed class settlement with Defendants VSL Pharmaceuticals, Inc. ("VSL"), Leadiant Biosciences, Inc. ("Leadiant") and Alfasigma USA, Inc. ("Alfasigma") (collectively, "Defendants"). The Settlement Agreement (the "Settlement Agreement" or "Settlement") achieves excellent results for Plaintiffs and the Class in this action and is attached as Exhibit A to the accompanying Declaration of Edward F. Haber (the "Haber Decl.").

I. INTRODUCTION

Defendants have agreed to pay a total of $20 million to settle this class action. That $20 million will create a common fund to pay claims made by Class Members, legal fees and expenses of Class Counsel, as approved by the Court, and the costs of providing notice and administering the Settlement. If the settlement is approved, under no circumstances would any of the $20 million be returned to the Defendants. The Settlement will provide for substantial cash benefits to Class Members.

The Settlement will bring to a close this long and hard-fought litigation, which included motions to dismiss, extensive fact and expert discovery on class issues, a fully litigated class certification motion, and a Rule 23(f) Petition to the Fourth Circuit, which was denied. As discussed below, the Settlement is the product of vigorous, good-faith, arm's-length negotiations between experienced counsel, including at a mediation with Robert Meyer, a nationally recognized JAMS mediator. The Settlement represents a favorable recovery for the Class that falls well within the range of approval for such class actions and satisfies all of the factors required by Federal Rule of Civil Procedure 23(e) and Fourth Circuit precedent.

The proposed Preliminary Approval Order has been agreed to by the Parties and will, among other things: (1) preliminarily approve the Settlement; (2) certify a Settlement Class that is the same as the "Nationwide Class" this Court certified, adding only some agreed upon exclusions from the certified Nationwide Class; (3) approve the form and content of notices to the Class described below and attached as Exhibits 4-6 to the Settlement Agreement; (4) find that the procedures for distribution of the notices constitute the best notice practicable under the circumstances and comply with due process and Rule 23; (5) set deadlines for Class Members to request exclusion from the Class or object to the Settlement; (6) set a date and time for the Settlement Hearing, at which the Court will consider final approval of the Settlement, the plan of distribution, Class Counsel's application for attorneys' fees and litigation expenses and the request for service awards to the Plaintiffs; and (7) appoint Angeion Group, LLC ("Angeion" or the "Settlement Administrator") as the claims administrator, an experienced class action administrator Class Counsel has selected to administer the notice and claims administration process.

If the Court grants this unopposed motion for preliminary approval, Plaintiffs will provide notice of the Settlement's terms and conditions to Class Members in the manner provided for in the proposed Preliminary Approval Order attached as Exhibit 1 to the Settlement Agreement. The Plaintiffs would also file a Motion for Final Approval of the Settlement and an Application for an Award of Class Counsel's Fees and Expenses. A final approval hearing (the "Settlement Hearing") would then be conducted at which the Parties would explain further why the Settlement is fair and adequate and in the interests of the Plaintiffs and the Class and should be approved and objectors, if any, would have the opportunity to oppose it. The Court would then make a final determination as to whether the Settlement is fair, reasonable, and adequate and should be approved. The Court would also be asked to consider and approve Class Counsel's application for an award of attorneys' fees and litigation expenses.

In light of the certain, substantial, and immediate benefit of the $20 million Settlement secured for the Class, as well as the significant costs and risks of continuing litigation, including potentially adverse outcomes at summary judgment, trial, or on appeal, Plaintiffs respectfully submit that the proposed Settlement should be preliminarily approved.

II. PROCEDURAL HISTORY

Plaintiffs filed this case in July 2019, alleging claims against Defendants for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–68; breach of express warranty in violation of the Uniform Commercial Code ("UCC"); violations of several state consumer protection statutes; and unjust enrichment. Plaintiffs allege that, from June 2016 – June 2019, Defendants marketed and sold the probiotic VSL#3 as containing a clinically tested and proven formulation developed by Professor Claudio De Simone when it did not. This case followed from prior litigation brought by VSL's competitor, ExeGi Pharma, LLC, ("ExeGi"), in this Court, *De Simone and ExeGi v. VSL Pharmaceuticals*, et al., Case No. 8:15-cv-01356 (D. Md 2015) (the "*ExeGi* Action"), which had resulted in a substantial jury verdict in 2018 against Alfasigma and Leadiant on claims of false advertising of VSL#3.

In the present litigation, this Court (Chuang, J.) denied Defendants' motion to dismiss, upholding Plaintiffs' allegations that Defendants violated RICO. *Starr v. VSL Pharm., Inc*., 509 F. Supp. 3d 417, 433-43 (D. Md. 2020) ("*Starr I*"). The Court also sustained state consumer protection, express warranty claims and/or unjust enrichment claims asserted by Plaintiffs who purchased VSL#3 in Florida, Idaho, Illinois, Kentucky, Massachusetts, Michigan, New Jersey, Washington, and Wisconsin. *Id.* at 443-57.

Following fact discovery and expert discovery relating to class certification, including discovery motion practice, Plaintiffs moved for class certification. On January 28, 2025, the Court issued its Memorandum Opinion on Plaintiffs' Motion for Class Certification. *Starr v. VSL Pharm., Inc.*, 2025 U.S. Dist. LEXIS 81502 (D. Md. Jan. 28, 2025) ("*Starr II*"). In *Starr II* this Court certified the following class for Plaintiffs' federal RICO claims:

> the "Nationwide Class," consisting of "all persons who purchased VSL#3 in the United States from June 1, 2016, through June 19, 2019."

Id. at *56. The Court also certified nine classes of VSL#3 purchasers in nine states who have claims under those states' statutes and common law. *Id.* at *56-57. All members of those classes are also members of the certified Nationwide Class.

Thereafter, the Fourth Circuit denied Defendants' Rule 23(f) Petition seeking interlocutory review of the Court's class certification decision. *VSL Pharmaceuticals, Inc. v. Starr*, Appeal No. 25-115 (4th Cir. Apr. 7, 2025) (Doc. No. 45).

The parties then engaged JAMS mediator Robert Meyer to mediate a possible settlement of this longstanding action. Mr. Meyer is a nationally recognized JAMS mediator. On January 7, 2026, the parties conducted good-faith, arm's-length negotiations at a mediation in New York City with Mr. Meyer. A settlement was not reached at that mediation session. However, after the mediator's numerous communications with the Parties in the days following the mediation session, the parties reached an agreement in principle to settle this action, which they then memorialized in the Settlement Agreement. Haber Decl. ¶ 4.

III. <u>THE SETTLEMENT</u>

The Settlement's terms are detailed in the Settlement Agreement, which Plaintiffs attach as Exhibit A to the Haber Declaration. The proposed forms of notice, claim form, and proposed forms of orders (including a proposed order preliminarily approving the Settlement) are attached as Exhibits 4 through 6 to the Settlement Agreement. A summary of the Settlement's key terms follows:

A. *Definition of the Settlement Class*

The parties have agreed to ask the Court to certify a Settlement Class for purposes of the proposed Settlement. As demonstrated below, the proposed Settlement Class is substantively the same as the Nationwide Class that the Court has already certified, but the definition of the Settlement Class makes clear that certain persons are excluded from the Settlement Class. The proposed Settlement Class is defined as:

> all persons who purchased a VSL#3 Class Product in the United States beginning June 1, 2016, and ending June 19, 2019. The following individuals are excluded from the Settlement Class: officers and directors of Defendants Alfasigma, Leadiant, and VSL, and their parents, subsidiaries, affiliates, and any entity in which they have a controlling interest. Also excluded from the Class are any persons or entities that purchased VSL#3 Class Products exclusively for the purpose of reselling the VSL#3 Class Product to a consumer. Finally, also excluded from the Class are all judges assigned to hear any aspect of the Litigation, as well as their staff and immediate family; and Settlement Class Counsel, their staff members, and their immediate family.

Settlement Agreement, § 1.49.

B. *Monetary Settlement Benefits*

The Settlement Agreement provides that Defendants will pay $20 million for the benefit of the Settlement Class. Settlement Agreement, §§ 1.56, 3.2. The plan of distribution provides how the Net Settlement Funds, after the Court's award of Class Counsel's fees and expenses, administrative costs and service awards, would be distributed to the members of the Class. *Id.*, §§ 2.4, 3.2 - 3.3. The plan of distribution contemplates that, upon submission of a valid claim form, Class Members may receive $20 per unit of VSL#3 they purchased, subject to *pro rata* adjustments based on the volume of claims received. Class members who do not have proof of purchase will be limited to submitting a claim for one (1) unit purchased per household. Class members with proof of purchase may seek a settlement benefit for the greater of (3) units of VSL#3 or the total number of units of VSL#3 for which they submit proof of purchase, up to forty (40) units. *Id.*

Those Class Members for whom Plaintiffs have obtained contact and transactional data from retailers and Defendants will receive a claim code with their notice, and the records Plaintiffs have obtained will count as proof of purchase for those Class Members, obviating the need for them to find or submit evidence of their purchases. When those Class Members access the online claim form, their form will be pre-filled with the transactions for which Plaintiffs have obtained data. If those Class Members have proof of purchase for additional purchases that do not appear when they enter the claim code, then they may submit such proof to obtain a greater benefit. *Id.*

If the total value of valid claims, at $20 per unit, is less than the amount of money available to pay such claims, then the amounts paid for valid claims will be increased *pro rata* up to the amount of money available to pay claims, although the amount paid per unit will not be more than $60. If the total value of valid claims, at $20 per unit, exceeds the amount available to pay them, the amount paid for each valid claim will be reduced *pro rata*. *Id.*

C. *Class Releases*

In exchange for payment of the Settlement Amount, upon entry of a final judgment approving the Settlement Agreement, Plaintiffs and those Settlement Class members who do not opt out will release Defendants from any and all claims arising out of or relating to the misrepresentations Plaintiffs allege in this action, as set forth in Section 3.4 of the Settlement Agreement.

D. *Settlement Administration and Notice*

Plaintiffs have obtained records from Defendants and third parties concerning the purchases of VSL#3 for more than 200,000[1] Class Members, which the Settlement Administrator will use to provide personalized notice to such Class Members. The proposed forms of personal notice to known Class Members (attached to the Settlement as Exhibits 5-6) advise Class Members of their rights in connection with the Settlement. Settlement Agreement §§ 1.17, 1.27-1.28, 4.2.

In addition to this individual notice, the Settlement Administrator has designed a media campaign that will reach additional Class Members to inform them about the Settlement. *Id.* § 1.29. The campaign is designed to reach at least 70% of likely Class Members on its own, independent of direct notice. The campaign is described more fully in the Declaration of Steven Weisbrot filed herewith.

Moreover, the Settlement Administrator will establish a settlement website that will provide additional information on the Settlement and this action, including a long-form notice providing additional detail concerning the Settlement and the action (Exhibit 4 to the Settlement Agreement), relevant pleadings from this action, and contact information for Class Counsel.

Defendants will comply (through the Settlement Administrator) with the obligation to give notice of the Settlement to federal and state governmental entities as required pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715.

[1] Because some Class Members may have purchased VSL#3 from more than one seller, this number may somewhat overstate the number of identified Class Members. Haber Decl. ¶ 8.

E. *Opt-Outs and Objections*

Any Class Member wishing to opt out of the Class can do so. To opt out, a Class Member must submit a request in writing to the Settlement Administrator by the date set forth in the Preliminary Approval Order. Settlement Agreement § 4.4.

Any Class Member wishing to object to any aspect of the Settlement, including Plaintiffs' application for attorneys' fees, can do so. To object, a Class Member must file with the Court a notice of his or her written objection (by the same deadline as for opt-out requests). Any objector must state the basis for his or her objection. Objectors may appear in Court at the Settlement Hearing. *Id.* § 4.6.

IV. ARGUMENT

A. *The Court Should Grant Preliminary Approval of the Settlement*

1. The Standard for Preliminary Approval

Federal Rule of Civil Procedure 23(e) provides that "[t]he claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval." Before a court may approve a proposed settlement, it must conclude that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).

At the preliminary approval stage, however, the Court does not make a final determination of the merits of the proposed settlement. *See, e.g.*, Fed. R. Civ. P. 23(e)(1); *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983). Full evaluation is made at the final approval stage, after notice of the settlement has been provided to the class members and they have had an opportunity to voice their views on the settlement. *Id.*.; Fed. R. Civ. P. 23(e)(2).

At "the preliminary approval stage, the court's role is to determine whether there exists probable cause to submit the proposal to members of the class and to hold a full-scale hearing on its fairness." *Fire & Police Retiree Health Care Fund v. Smith*, 2020 U.S. Dist. LEXIS 217892, at *6 (D. Md. Nov. 20, 2020). A court should grant preliminary approval "when the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or of segments of the class or excessive compensation for attorneys and appears to fall within the range of possible approval." *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, 2012 U.S. Dist. LEXIS 86474, at *16–17 (D.S.C. June 22, 2012) (citation omitted). "In assessing the fairness and adequacy of a proposed settlement, there is a strong initial presumption that the compromise is fair and reasonable." *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991) (internal quotes and citation omitted).

"The voluntary resolution of litigation through settlement is strongly favored by the courts" and is "particularly appropriate in class actions." *S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990); *see also Curtis v. Genesis Eng'g Sols., Inc.*, 2022 U.S. Dist. LEXIS 65582 *4, at *2 (D. Md. Apr. 8, 2022) ("There is an overriding public interest in favor of settlement, particularly in class action suits."); *see also United States v. Manning Coal Corp.*, 977 F.2d 117, 120 (4th Cir. 1992) (recognizing that it "has long been clear that the law favors settlement").

2. The Settlement is Fair

A court's "fairness analysis is intended primarily to ensure that a "settlement is reached as a result of good-faith bargaining at arm's length, without collusion." *1988 Tr. for Allen Children v. Banner Life Ins. Co.*, 28 F.4th 513, 525 (4th Cir. 2022) (quoting *Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015)). The Fourth Circuit has "identified four factors for determining a settlement's fairness, which are: (1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the area of the class action litigation." *Id.*

(quoting *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 952 F.3d 471, 484 (4th Cir. 2020)).

The first factor—the posture of the case at the time settlement was proposed—strongly favors preliminary approval. The Settlement Agreement was reached after more than six years of adversarial and informative litigation. The prosecution and defense of the action included motion-to-dismiss briefing, discovery-related litigation, expert discovery relating to class certification, and extensive class certification briefing, including in the Fourth Circuit. This litigation also followed from and benefited from the discovery in and trial of the prior *ExeGi* litigation. All of these events clarified the legal and factual strengths and weaknesses of the parties' respective positions and set the stage for their successful settlement negotiations. See Haber Decl. ¶ 5.

The second factor—the extent of discovery—also favors preliminary approval. The parties completed fact discovery, which included Plaintiffs' review of thousands of documents produced to date by Defendants and depositions of Plaintiffs and Defendants. Plaintiffs also negotiated with multiple third-party retailers to obtain records relating to Class members' purchases of VSL#3. The parties also conducted discovery regarding the experts who offered opinions on class certification, including detailed expert reports and expert depositions. Plaintiffs also had the benefit of the extensive discovery produced by Defendants in the related *ExeGi* litigation, which further informed Class Counsel of the benefits and risks of continued litigation here. *Id.* ¶ 6.

The third factor—the circumstances surrounding the negotiations—heavily favors preliminary approval. When, as here, "a settlement is the result of genuine arm's-length negotiations, there is a presumption that it is fair." *Gaston v. LexisNexis Risk Sols., Inc.*, 2021 U.S. Dist. LEXIS 12872, at *18 (W.D.N.C. Jan. 25, 2021); *see also ADESSO*, 2017 U.S. Dist. LEXIS 224941, at *33 ("[A] proposed class action settlement is considered presumptively fair where there is no evidence of collusion and the parties, through capable counsel, have engaged in arms' length negotiations."). Here, as explained above, the parties engaged in good faith but arm's-length negotiations, with the assistance of a highly experienced mediator, Robert A. Meyer. The outcome of those negotiations and mediation was clearly not the product of collusion. See Haber Decl. ¶ 4.

Finally, the fourth factor—the experience of counsel—also favors preliminary approval. The lawyers who have represented the Plaintiffs and the Class throughout this litigation are Jeremy Schulman and Jeffrey Gavenman of Hughes Hubbard & Reed LLP[2] and Edward F. Haber, Michelle Blauner, Ian McLoughlin and Patrick Vallely of Shapiro Haber & Urmy LLP. The lawyers at Shapiro Haber & Urmy are highly experienced and nationally recognized class action practitioners, particularly in consumer class actions. *See* Haber Decl., ¶ 7 and Ex. B. And attorneys Schulman and Gavenman are highly regarded, experienced litigators nationwide and in this District, who successfully represented the plaintiffs in the prior, related *ExeGi* litigation. *Id.* "[T]he opinion of experienced and informed counsel in favor of settlement should be afforded due consideration in determining whether a class settlement is fair and adequate." *Gaston*, 2021 U.S. Dist. LEXIS 12872, at *19 (citing *Jiffy Lube,* 927 F.2d at 159). Class Counsel have the knowledge and understanding to competently evaluate the risks and the benefits of the proposed Settlement. Based on this evaluation, Class Counsel strongly believes that the proposed settlement confers a significant benefit to Class Members. *See* Haber Decl., ¶ 7.

In sum, the proposed Settlement Agreement is fair. It was the product of genuine arm's-length negotiations by experienced counsel and was reached only after an informed analysis of the strengths and weaknesses of the claims.

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[2] Attorneys Schulman and Gavenman, along with certain of their colleagues from the Schulman Bhattacharya, LLC law firm, recently joined the law firm Hughes Hubbard & Reed LLP.

3. The Settlement is Adequate

In determining whether a proposed settlement is adequate, courts consider the following factors: "(1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement." *Lumber Liquidators*, 952 F.3d at 484.[3]

"The most important factors in [the adequacy] analysis are the relative strength of the plaintiffs' claims on the merits and the existence of any difficulties of proof or strong defenses." *Sharp Farms v. Speaks*, 917 F.3d 276, 299 (4th Cir. 2019). An evaluation of the relative strength of Plaintiffs' claims in light of the risks and costs of continued litigation supports a finding that the Settlement Agreement is adequate. Plaintiffs believe that they have presented a strong case. But this is a complex RICO class action, and Defendants had mounted several defenses, including that "indirect purchasers," which comprised a significant percentage of the Class, could not recover damages under RICO. Defendants planned to move for summary judgment on that issue. ECF No. 365. The parties also needed to complete expert discovery regarding damages. This case involved complex issues regarding the calculation of damages suffered by Plaintiffs and the Class, presenting risks both in proving damages at trial and in establishing such damages on a class-wide basis. Plaintiffs also expected Defendants to seek to decertify the Class following expert discovery, arguing that such discovery revealed that damages could not be established class wide. While

[3] Factor (5) is not relevant to preliminary approval because, "[d]ue to the preliminary nature of this motion," opposition to the Settlement Agreement, if any, has not yet emerged. *Temp. Servs.*, 2012 U.S. Dist. LEXIS 86474, at *36. And this Court "places little weight upon" factor (4). *Mid-Atl. Toyota*, 564 F. Supp. at 1386.

Plaintiffs expected they would be able to defeat those arguments, as they did on their successful motion for class certification, such defenses nonetheless presented real risks and costs to Plaintiffs and the Class. "[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. Est. of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985) (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975)).

It is inherently challenging for any plaintiffs to prove the various technical elements of a RICO violation, and hence here there were "significant risks associated with continued litigation," *Temp. Servs.*, 2012 U.S. Dist. LEXIS 86474, at *35, including as to Plaintiffs' ability to establish the existence of a RICO "enterprise" as well as a causal connection between Defendants' alleged pattern of racketeering activity and Plaintiffs' injury, including on a class-wide basis. "Regardless of the strength of a claim on the merits, one can never ensure a finding of liability in complex litigation like this. Similarly, all parties to this litigation face significant difficulties and risks in establishing liability and defending against the claims." *US Airline Pilots Ass'n v. Velez*, 2016 U.S. Dist. LEXIS 54239, at *16 (W.D.N.C. Apr. 22, 2016).

In summary, continuing to litigate against Defendants would have exposed Plaintiffs and the Class to significant risks. Plaintiffs would have: (1) faced a motion for summary judgment by Defendants arguing that indirect purchasers could not recover under RICO; (2) had to complete expert discovery and prevail over Defendants' anticipated *Daubert* motions; (3) needed to defeat any future motion by Defendants to decertify the Class or obtain summary judgment on any remaining claims; (4) needed to prevail at trial; and (5) had to defeat any appeals by Defendants.

In light of the above risk assessment, the terms of the proposed Settlement Agreement provide the Class with more than adequate relief. Under the Settlement Agreement, Defendants will pay $20 million into a settlement fund that will provide meaningful, tangible, and immediate financial benefits to the Class. Class Members will receive a substantial cash settlement benefit, with or without proof of purchase (although the benefit will be greater if a Class Member has proof of purchase). Moreover, if the claims submitted do not exhaust the fund created by the Settlement, the cash benefit per approved claim would increase so that the proceeds of the Settlement go to Class Members.

In sum, the proposed Settlement Agreement is more than adequate in light of the strength of the claims and the risks and expense of continued litigation. The immediate cash recovery provided by the Settlement is an excellent result given the risks inherent in this litigation and the delay that would necessarily result from further protracted litigation. Based on their experience as counsel in similar complex class actions and other sophisticated commercial litigation, Class Counsel believes the substantial $20 million Settlement is outstanding, both given the complexity of the litigation and the significant risks and barriers that would have continued to loom in the absence of the Settlement. Accordingly, the proposed Settlement Agreement is fair and should be preliminarily approved.

B. *The Court Should Certify the Proposed Settlement Class*

Plaintiffs request that the Court certify the Settlement Class so that it may receive the benefits of the Settlement. Specifically, Plaintiffs seek certification of a Settlement Class consisting of:

> all persons who purchased a VSL#3 Class Product in the United States beginning June 1, 2016, and ending June 19, 2019. The following individuals are excluded from the Settlement Class: officers and directors of Defendants Alfasigma, Leadiant, and VSL, and their parents, subsidiaries, affiliates, and any entity in which they have a controlling interest. Also excluded from the Class are any persons or entities that purchased VSL#3 Class Products exclusively for the purpose of reselling the VSL#3 Class Product to a consumer. Finally, also excluded from the Class are all judges assigned to hear any aspect of the Litigation, as well

> as their staff and immediate family; and Settlement Class Counsel, their staff members, and their immediate family.

As explained above, the proposed Settlement Class is substantially the same as the Nationwide Class that the Court has already certified. "A settlement class, like a litigation class, must satisfy the requirements" of Federal Rule of Civil Procedure 23(a) and one of the categories of Rule 23(b). *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 566 (E.D. Va. 2016). The Fourth Circuit practice is to "give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application [that] will in the particular case 'best serve the ends of justice for the affected parties and . . . promote judicial efficiency.'" *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (quoting *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989)).

The proposed Settlement Class meets the prerequisites of Rule 23(a) as well as the prerequisites of Rule 23(b)(3) for the same reasons as the Classes this Court certified satisfied the requirements of Rule 23 (which ruling the Fourth Circuit declined to disturb on Defendants' Rule 23(f) petition). ECF No. 339. The definition of the Settlement Class is substantively the same as the Class definition from the Court's class certification decision, but excludes certain individuals from the Settlement Class, i.e., officers and directors of the Defendants and their affiliates, persons who purchased VSL#3 for resale to consumers, as well as court personnel and settlement counsel and their respective families. Accordingly, the Court should certify the proposed Settlement Class.

C. *The Court Should Approve the Class Notice*

The threshold requirement for the approval of class notice is whether the proposed notice program is the best notice practicable under the circumstances and reasonably calculated to apprise the class of the pendency of the action, the proposed settlement, and the class members' rights to opt out of the Class or object. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974);

McAdams v. Robinson, 26 F.4th 149, 157 (4th Cir. 2022); Fed. R. Civ. P. 23. The mechanics of the notice process are left to the discretion of the Court. *See Simer v. Rios*, 661 F.2d 655, 686 (7th Cir. 1981) ("The type of notice to be given is a matter left to the discretion of the district court, 'subject only to the broad reasonableness standards imposed by due process.'"); *Beaulieu v. v. EQ Indus. Servs.*, 2009 U.S. Dist. LEXIS 133023, at *80 (E.D.N.C. Apr. 20, 2009) ("While [Rule 23] does not spell out the required contents of the settlement notice, it must 'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings.'"). The contents of the notice should describe the settlement and class members' ability to seek exclusion "clearly and concisely . . . in plain, easily understood language." *In re LandAmerica 1031 Exch. Servs. Inc. IRS 1031 Tax Deferred Exch. Litig.*, 2012 U.S. Dist. LEXIS 97933, at *24 (D.S.C. July 12, 2012).

The proposed Long-Form Notice, E-mail Notice, and Mailed Notice attached as Exhibits 4, 5 and 6 to the Settlement satisfy these requirements and would be the best notice practicable. The proposed notice program includes personalized, individual notification by e-mail and mail to that would be sent to the 200,000 Class members for whom Settlement Counsel has contact information.[4] The notice program also includes a Media Campaign designed to provide notice of the Settlement to Class Members through online advertising, including programmatic display advertising, social media advertising, and search engine advertising, as described in the Declaration of Steven Weisbrot filed herewith. The Notice Plan will also include posting the Long-Form Notice on the Settlement Administrator's website. The Notices will provide important

[4] As noted, the number of identified Class members may be somewhat less because some Class Members may have purchased VSL#3 from more than one seller. Haber Decl. ¶ 8. In addition, some contact information for Class Members may be outdated or invalid.

information regarding the Settlement and the rights of Class Members and will direct recipients to the Settlement Administrator's website for more detailed information.

Collectively, the proposed forms of notice describe, in plain, easily understood English, *inter alia*: (i) the terms of the Settlement and the recovery; (ii) the reasons for the Settlement; (iii) the maximum attorneys' fees and expenses that may be sought by Class Counsel; (iv) the procedures for requesting exclusion from the Class and objecting; (v) the proposed plan of allocation and distribution of the Settlement Fund; and (vi) the date, time and place of the Settlement Hearing.

The manner of providing notice, *i.e.*, individual notice by e-mail and mail supplemented by additional publication and internet notice through a Media Campaign, represents the best notice practicable under the circumstances, and satisfies the requirements of Rule 23 and due process. *See Eisen*, 417 U.S. at 173 (finding notice program to be the "best notice practicable under the circumstances" where it includes "individual notice to all members who can be identified through reasonable effort"); *see also In re NeuStar, Inc. Secs. Litig.*, 2015 U.S. Dist. LEXIS 129463, at *29-30 (E.D.Va. Sept. 23, 2015) (same); *In re Tiktok Inc., Consumer Priv. Litig.*, 617 F. Supp. 3d 904, 927 (N.D. Ill. 2022) (quoting William B. Rubenstein, Newberg on Class Actions § 8:36 (5th ed. 2011) (updated 2021)) ("Neither Rule 23 nor due process requires that every class member receive notice. Instead, 'notice suffices if it is reasonably calculated to reach the absent parties.'").

The Notice Plan that Plaintiffs propose—combining direct mailed/emailed notice, a media campaign, and a public website—is commonplace in consumer class actions. The fact that not all Class Members will receive direct notice by email or regular mail does not affect the adequacy of the Notice Plan, as Angeion has designed the Media Campaign to reach Class Members independently of any direct notice. Courts routinely approve similar notice plans that rely on direct notice and a media campaign, including similar notice plans that Angeion has designed and implemented. *See, e.g., McAdams*, 26 F.4th at 157 (affirming notice plan where an "administrator emailed notice to class members for whom it had an email address," "mailed notice to class members for whom it had a physical address"); *Dickey v. Advanced Micro Devices, Inc.*, 2020 U.S. Dist. LEXIS 30440, at *8, 11-12 (N.D. Cal. Feb. 21, 2020) (approving Angeion-designed notice plan involving media campaign to reach 6.7 million class members plus email notice to several hundred thousand of those class members); *Reppert v. Marvin Lumber & Cedar Co., Inc.*, 359 F.3d 53, 57 (1st Cir. 2004) (notice by mail and by publication was reasonably calculated to reach absent class members); *In re Allura Fiber Cement Siding Litig.*, 2021 U.S. Dist. LEXIS 96931 (D.S.C. May 21, 2021) (approving Angeion notice plan involving media campaign plus direct notice to some class members by U.S. mail and email); *Cameron v. Apple Inc.*, 2022 U.S. Dist. LEXIS 256383, at *17-18 (N.D. Cal. June 20, 2022) (approving Angeion notice plan involving combination of email, regular mail, and a targeted social media campaign).

Moreover, given the ubiquity of internet communications (indeed, many Class Members purchased VSL#3 online), email notice and online media campaigns are commonplace and acceptable, as reflected in Rule 23's express endorsement of notice by "electronic means." Fed. R. Civ. P. 23(c)(2); *see also Pollard v. Remington Arms Co., LLC,* 896 F.3d 900, 905-06 (8th Cir. 2018) (affirming sufficiency of notice program that included email notice); *Knox v. John Varvatos Enters. Inc.*, 282 F. Supp. 3d 644, 667 (S.D.N.Y. 2017) ("Notice of class actions by email [has] now become commonplace."); 5 Moore's Fed. Prac. – Civil § 23.102 ("[E]mail notice may be the best practicable notice even though it is not perfect."); *id.* ("Publication of notice is often the best notice…. Publication is also possible via the internet. Class members may be reached through paid advertisements or notice placed on sites that the class members are likely to visit.").

The Media Campaign will be designed to reach more than 70% of Class Members, even before accounting for the Email Notice and Mailed Notice that will reach many Class Members, further demonstrating the Notice Plan satisfies Due Process. *TikTok*, 617 F. Supp. 3d at 928 (affirming notice plan involving a combination of email notice and media notice, which together were projected to reach 70% of class).

The maintenance of a Settlement Website with a long-form notice, key pleadings, and contact information for Class Counsel, among other content helpful to Class Members, further amplifies the adequacy of the Notice Plan. *Id*.

Accordingly, Plaintiffs respectfully submit that the proposed notices and the related procedures are appropriate and should be approved.

D. *The Court Should Approve Class Counsel's Choice of Angeion Group LLC as the Settlement Administrator.*

Plaintiffs also request that the Court appoint Angeion as the Settlement Administrator to provide all notices approved by the Court, and to administer the Settlement. Angeion is a nationally recognized notice and claims administration firm that has successfully and efficiently administered numerous class action settlements. *See* cases cited at pages 17-18 above and Firm Resume of Angeion, Weisbrot Decl.

E. *The Court should Schedule a Final Approval Hearing*

Plaintiffs request that the Court adopt and enter the schedule proposed in the proposed Preliminary Approval Order filed herewith. If the Court agrees with the proposed schedule, Plaintiffs respectfully request that the Court schedule the Final Settlement Approval Hearing for a date at least 165 days after entry of the Preliminary Approval Order, or at the Court's earliest convenience thereafter.

V. **CONCLUSION**

For the foregoing reasons, Plaintiffs and Class Counsel respectfully request the Court:

1. grant preliminary approval to the Settlement;

2. certify the Settlement Class defined above;

3. approve the method of notice set forth in the Settlement and the forms of notice attached as Exhibits 4, 5, and 6 to the Settlement;

4. approve and order the opt-out and objection procedures set forth in the Settlement;

5. continue to stay the non-settlement proceedings in this litigation pending final approval of the Settlement; and

6. schedule a final approval hearing no sooner than 165 days from the date the Court grants preliminary approval of the Settlement.

For the Court's convenience, Plaintiffs and Class Counsel submit with the Motion a proposed Order granting Preliminary Approval of the Settlement (this same proposed order is attached as Exhibit 1 to the Settlement Agreement).

Respectfully submitted,

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