

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

_____	)	
Jeffrey Worth and Robert Burns,	)	
	)	
Plaintiffs,	)	
	)	Case No. 2:16-cv-0200498-FB-SMG
v.	)	
	)	
CVS Pharmacy, Inc., a Rhode Island Corporation,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
	)	
	)	
_____	)	

**ORDER PRELIMINARILY CERTIFYING SETTLEMENT CLASS,  
GRANTING PRELIMINARY APPROVAL OF SETTLEMENT,  
AND APPROVING CLASS NOTICE**

This matter having been submitted to the Court by plaintiffs Jeffrey Worth and Robert Burns (“Plaintiffs”) and the firms Center for Science in the Public Interest; Kaplan, Fox & Kilsheimer, LLP, Reese LLP; and, Mehri & Skalet, PLLC (collectively “Class Counsel”) on behalf of the Plaintiffs and by CVS Pharmacy, Inc. (“CVS”) by its counsel, by way of Plaintiffs’ motion for preliminary approval of the proposed settlement in the above captioned action;

WHEREAS, the Court having reviewed and considered Plaintiffs’ motion for preliminary approval and supporting materials filed by Class Counsel and CVS’s counsel; and WHEREAS, this Court has fully considered the record and the requirements of law; and good cause appearing;

IT IS THIS 28TH DAY OF MAY, 2019

ORDERED that the Settlement (including all terms of the Settlement Agreement and exhibits thereto) is hereby PRELIMINARILY APPROVED. The Court further finds and orders as follows:

1. The Court has subject matter jurisdiction under 28 U.S.C. § 1332 and venue is proper in this district.

2. The Court has personal jurisdiction over the Class Representatives, Settlement Class Members and CVS.

3. The Settlement is the product of arm's length bargaining conducted by experienced legal counsel. The Settlement Agreement is not the result of collusion.

4. The Settlement falls well within the range of reason. The Settlement has no obvious deficiencies.

5. Because the Settlement meets the standards for preliminary approval, the Court preliminarily approves all terms of the Settlement, including the Settlement Agreement and all of its exhibits.

6. The Court finds, for settlement purposes only, that all requirements of Fed. R. Civ. P. 23(a) and (b)(3) have been satisfied. The Court certifies a Settlement Class of all consumers in the United States who purchased one or more Algal-900 DHA Products, containing, on the label, and/or on the packaging, the claim that it is "clinically shown to improve memory" or offers "clinically shown memory improvement," on or after November 15, 2008, through September 30, 2016. Excluded from the membership are Defendant and its past and present parents, subsidiaries, divisions, affiliates, assignors, predecessors, successors and assigns; the past and present partners, shareholders, managers, members, directors, officers, employees, agents, attorneys, insurers,

accountants and representatives of any and all of the foregoing entities; any government entities; and persons who purchased the Algal-900 DHA Product for the purpose of resale.

7. The Court conditionally certifies the proposed Settlement Class, and finds that the requirements of Rule 23(a) are satisfied, for settlement purposes only, as follows:

(a) Pursuant to Fed. R. Civ. P. 23(a)(1), the members of the Settlement Class are so numerous that joinder of all members is impracticable.

(b) Pursuant to Fed. R. Civ. P. 23(a)(2) and 23(c)(1)(B), the Court determines that there are common issues of law and fact for the Settlement Class.

(c) Pursuant to Fed. R. Civ. P. 23(a)(3), the claims of the Class Representative are typical of the claims of the Settlement Class that he represents.

i. The Court hereby appoints Plaintiffs Jeffrey Worth and Robert Burns as Class Representatives for the Settlement Class.

(d) Pursuant to Fed. R. Civ. P. 23(a)(4), the Class Representatives will fairly and adequately protect and represent the interests of all members of the Settlement Class. The interests of the Class Representatives are not antagonistic to those of the Settlement Class.

8. The Class Representative are represented by counsel who are experienced and competent in the prosecution of complex class action litigation.

9. The Court further finds that the requirements of Rule 23(b)(2) are satisfied in that CVS has acted on grounds that apply generally to the class in its labeling of the Product, so that injunctive relief is appropriate respecting the class as a whole;

10. The Court further finds that the requirements of Rule 23(b)(2) are satisfied in that:

(a) Questions of law and fact common to the members of the Settlement Class predominate over questions that may affect only individual members; and

(b) A class action is superior to all other available methods for the fair and efficient adjudication of this controversy.

11. The Court finds that the content of the Notice and the Claim Form satisfy the requirements of Fed. R. Civ. P. 23(c)(2), Fed. R. Civ. P. 23(e)(1), and due process and accordingly approves the Notice and Claim Form.

12. This Court further approves the proposed methods for giving notice of the Settlement to the Members of the Settlement Class, as reflected in the Stipulation of Settlement and Plaintiffs' motion for preliminary approval. The Court has reviewed the notice, and the notice procedures, and finds that the Members of the Settlement Class will receive the best notice practicable under the circumstances. This Court also approves the parties' proposal to: 1) publish the notice once in *AARP Magazine* and twice in *USA Today*, as well as 30 days of Internet banner notifications which contain links to the Settlement Website during the Claims Period; and 2) send direct notice through a combination of electronic and postal mail and notice on in-store receipts. The Court also approves payment of notice costs as provided in the Settlement. The Court finds that these procedures, carried out with reasonable diligence, will constitute the best notice practicable under the circumstances and will satisfy the requirements of Fed. R. Civ. P. 23(c)(2), Fed. R. Civ. P. 23(e)(1), and due process.

13. The Court preliminarily finds that the following counsel fairly and adequately represent the interests of the Settlement Class and hereby appoints Kaplan, Fox & Kilsheimer, Center for Science in the Public Interest; LLP; Reese LLP; and Mehri & Skalet, PLLC as Settlement Class Counsel pursuant to Rule 23(g).

14. The Court further approves the appointment of KCC LLC, or equivalent class action administrator identified by the Parties to administer and oversee, among other things, the

processing, handling, reviewing, and approving of claims made by Claimants; communicating with Claimants; and distributing payments to qualified Claimants.

15. The Court directs that pursuant to Fed. R. Civ. P. 23(e)(2) a hearing will be held at 2:00 p.m. on September 26, 2019, to consider final approval of the Settlement (the “Final Approval Hearing” or “Fairness Hearing”), including, but not limited to, the following issues: (a) whether the Class should be finally certified, for settlement purposes only; (b) the fairness, reasonableness, and adequacy of the Settlement; (c) Class Counsel’s application for an award of attorneys’ fees and costs; and (d) approval of an award of a service payment to the Class Representative. The Final Approval Hearing may be adjourned by the Court and the Court may address the matters set out above including final approval of the Settlement, without further notice to the Settlement Class other than notice that may be posted at the Court and on the Settlement Website.

16. Persons wishing to object to the proposed Settlement and/or be heard at the Fairness Hearing shall follow the following procedures:

(a) To object, a member of the Settlement Class, individually or through counsel, must file a written objection with the Court, with a copy delivered to and received by Class Counsel and CVS’s Counsel at the addresses set forth below, by September 13, 2019:

**Settlement Class Counsel:**

Maia Kats  
**KAPLAN FOX & KILSHEIMER, LLP**  
6109 32<sup>nd</sup> Place, N.W.  
Washington, D.C. 20015  
Telephone: (202) 669-0658  
*MKats@kaplanfox.com*

Michael R. Reese  
**REESE LLP**  
100 West 93<sup>rd</sup> Street, 16<sup>th</sup> Floor  
New York, New York 10025  
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*mreese@reesellp.com*

Steven A. Skalet  
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Matthew Simon  
**CENTER FOR SCIENCE IN THE PUBLIC INTEREST**  
1220 L Street, NW, Suite 300  
Washington, D.C. 20005  
Telephone: (202) 777-8361  
*msimon@cspinet.org*

**Counsel for CVS:**

Frank Spano, Esq.  
**POLSINELLI PC**  
600 Third Avenue  
New York, New York 10016  
Telephone: (212) 413-2848  
*fspano@polsinelli.com*

(b) Any objection regarding or related to the Stipulation of Settlement shall be in letter form, and shall contain: (1) the Class Member's name, current address and telephone number; (2) the name, address and telephone number of the Class Member's lawyer if the Class Member is objecting through counsel; (3) the name of the lawsuit, *Worth v. CVS Pharmacy, Inc.*, Case Number 16-cv-00498; (4) proof of the Class Member's membership in the Settlement Class (such as verification under oath as to the date and location of purchase of a CVS Algal-900 DHA Product, or Proof of Purchase); (5) a statement of the Class Member's objections and the reasons for each; (6) a list of any documents the Class Member plans to give to the Court to support the Class Member's objection, if any; (7) a list of legal authorities the Class Member wants the Court to consider; (8) the names and addresses of any witness the Class Member wants to call to testify; (9) a statement indicating whether the Class Member (or the Class Member's lawyer) wants to

appear and speak at the Fairness Hearing; and (10) the Class Member's signature (or Class Member's lawyer's signature).

(c) Any member of the Settlement Class who files and serves a timely written objection in accordance with this Order may also appear at the Fairness Hearing, to the extent permitted by the Court, either in person or through an attorney hired at the Settlement Class member's expense, to object to the fairness, reasonableness or adequacy of the proposed Settlement. Any attorney representing a member of the Settlement Class for the purpose of making objections must also file a "Notice of Appearance" with the Clerk, and must also serve copies by mail to the counsel listed above.

(d) Members of the Settlement Class or their attorneys intending to appear at the Fairness Hearing must, by September 13, 2019, serve on Settlement Class Counsel and counsel for CVS, and file with the Court, a Notice of Appearance, which includes: (1) the title of the lawsuit, *Worth v. CVS Pharmacy, Inc.*, Case No. 16-00498; (2) a statement that the Class Member wishes to appear at the Fairness Hearing; (3) a statement that the Class Member would like to speak at the Court's Fairness Hearing; and (4) the Class Member's signature or the Class Member's lawyer's signature. Any member of the Settlement Class who does not timely file and serve a Notice of Appearance, and any witness not identified in the Objection that the Class Member wishes to call to testify, shall not be permitted to appear at the Fairness Hearing, except for good cause shown.

17. Members of the Settlement Class who elect not to participate in the Settlement (i.e., "opt-out") must submit an online or written Request for Exclusion that is postmarked or submitted electronically online through the Settlement Website no later than September 13, 2019. To opt-out, a Class Member's Request for Exclusion must contain: (1) the name of this lawsuit, *Worth v.*

*CVS Pharmacy, Inc.*, Case Number 16-cv-00498; (2) the Class Member's full name, current address and telephone number; (3) a clear statement of the Class Member's intention to exclude his or herself such as "I wish to be excluded from the Class"; and (4) the Class Member's signature. CVS shall compile a list of all Opt-Outs to be filed with the Court no later than the Fairness Hearing.

18. Any member of the Settlement Class failing to properly and timely mail and/or submit online through the Settlement Website such a written notice of exclusion shall be automatically included in the Settlement Class and shall be bound by all the terms and provisions of the Stipulation of Settlement and the Settlement, including the Release, and Order of Final Judgment. The Court shall resolve any disputes concerning the Opt-Out provisions of the Stipulation of Settlement.

19. In order to participate in the Settlement and receive a refund or reimbursement from CVS, members of the Settlement Class must mail to the Claims Administrator or submit electronically online through the Settlement Website, a properly executed Claim Form. To be effective, any such Claim Form must be postmarked or submitted electronically online through the Settlement Website no later than December 12, 2019 and must otherwise comply with the procedures and instructions set forth in the Claim Form.



20. The following are the deadlines for the following events:

<u>EVENT</u>	<u>DATE</u>
Deadline for commencement of publishing print Notice	June 24, 2019
Deadline for (1) commencement of 30 days of Internet banner notifications and (2) dissemination of direct E-mail Notice	July 3, 2019
Filing of papers in support of Final Approval and Class Counsel's Application for Attorneys' Fee and Expenses	September 6, 2019
Deadline for submitting exclusion requests or objections	September 13, 2019
Filing of response to objections	September 20, 2019
Deadline for submitting claims forms	December 12, 2019
Final Approval Hearing	at 2:00 p.m. on September 26, 2019

21. To the extent not otherwise defined herein, all defined terms in this order shall have the meaning assigned in the Stipulation of Settlement.

22. In the event that the Settlement does not become effective for any reason, this Preliminary Approval Order shall be rendered null and shall be vacated, and all orders entered in connection herewith shall be null and void to the extent provided by and in accordance with the Agreement. If the Settlement does not become effective, CVS and any other released persons shall have retained any and all of their current defenses and arguments thereto (including but not limited to arguments that the requirements of Fed. R. Civ. P. 23(a), (b)(2) and (b)(3) are not satisfied for purposes of continued litigation). This action shall thereupon revert immediately to its respective procedural and substantive status prior to the date of execution of the Settlement Agreement and shall proceed as if the Settlement Agreement and any related order had not been executed.

23. Nothing in this Preliminary Approval Order, the Settlement Agreement, or any documents or statements related thereto, is or shall be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by CVS, or an admission of the propriety of class certification for any purposes other than for purposes of the current proposed Settlement.

24. All other proceedings in the Action are hereby stayed until such time as the Court renders a final decision regarding approval of the proposed Settlement. No discovery with regards to this Action, or with respect to this Settlement, shall be permitted other than as may be directed by the Court upon a proper showing by the party seeking such discovery by motion properly noticed and served in accordance with this Court's Local Rules. In addition, pending a determination on final approval of the Settlement, all Settlement Class Members are hereby barred and enjoined from commencing or prosecuting any action involving any Released Claims.

25. The Court shall retain continuing jurisdiction over the Action, the Parties and the Settlement Class, and the administration, enforcement, and interpretation of the Settlement. Any disputes or controversies arising with respect to the Settlement shall be presented by motion to the Court, provided, however, that nothing in this paragraph shall restrict the ability of the parties to exercise their rights under Paragraphs 21 and 23 above.

**SO ORDERED.**

Dated: May 28, 2019

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Steven M. Gold  
United States Magistrate Judge