

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

TOMMY ROBBINS, DANIEL CAMEY,
RAYMOND ALVANDI and GERARD BUTLER,
Individually and on behalf of all others similarly
situated,

Civil Action No. 16AC-CC00366

The Hon. Jon E. Beetem

Plaintiffs,

v.

GENCOR NUTRIENTS, INC., GENCOR
PACIFIC, INC., GE NUTRIENTS, INC., DIRECT
DIGITAL, LLC, PHARMAFREAK HOLDINGS,
INC., FORCE FACTOR, LLC, DREAMBRANDS,
INC., GENERAL NUTRITION CENTERS, INC.,
GENERAL NUTRITION CORPORATION, GNC
CORPORATION, S&G PROPERTIES, LLC, KING
FISHER MEDIA, LLC, PREVENTION, LLC d/b/a
NATURADE,

Defendants.

**PLAINTIFFS’ SUGGESTIONS IN SUPPORT OF PLAINTIFFS’ UNOPPOSED
MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

Plaintiffs Tommy Robbins, Daniel Camey, Raymond Alvandi, and Gerard Butler (“Plaintiffs”), Individually and as Class Representatives on Behalf of All Similarly Situated Persons and a proposed Settlement Class, respectfully request that the Court preliminarily approve the class action Settlement that is described in detail in the *Class Action Settlement Agreement* and exhibits attached thereto and filed contemporaneously herewith; grant conditional certification of the proposed Settlement Class for the purposes of the Settlement; approve the provision of Notice to the Settlement Class; and appoint the Plaintiffs as Class Representatives and their counsel as Class Counsel.¹

¹ Capitalized terms used herein but not defined herein shall have the meaning ascribed to such terms in the Settlement Agreement.

At this preliminary approval stage, the Court need only review the proposed settlement to determine whether it is within the permissible “range of possible judicial approval” and thus, whether the notice to the class and the scheduling of the formal fairness hearing is appropriate. (See FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION, § 21.632 (4th ed. 2004); 4 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 11:25 (4th ed. 2002); see also *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 377 (Mo. Ct. App. 1997) (stating that the purpose of a preliminary approval hearing is for the court to make a “preliminary examination of the record before it and make a preliminary determination as to whether it appears that a settlement class should be tentatively certified.”))

I. BACKGROUND OF THE LITIGATION

This case arises out of Defendants advertising and marketing of Testofen and/or supplements containing Testofen—a proprietary botanical ingredient designed to boost testosterone levels (the “Testofen Products”). Defendants Gencor Nutrients, Inc., Gencor Pacific Inc., and GE Nutrients, Inc. (collectively, “Gencor”); Direct Digital, LLC (“Direct Digital”); PharmaFreak Holdings, Inc. (“Pharmafreak”); Force Factor, LLC (“Force Factor”); Dreambrands, Inc. (“Dreambrands”); General Nutrition Centers, Inc., General Nutrition Corporation, GNC Corporation, S&G Properties, LLC (collectively, “GNC”); KingFisher Media, LLC (“Kingfisher”); and Prevention LLC d/b/a Naturade (“Naturade”) (collectively, “Defendants”) manufacture, distribute, market, brand, and/or sell Testofen® and/or Testofen Products. Through a marketing campaign, Defendants promoted the Testofen Products as an effective testosterone booster. Moreover, as a result of this purported increase in testosterone, users would experience a number of benefits, including: improved orgasms, improved cognition, the promotion of fat loss, heightened libido, enhanced sexual performance,

strengthened blood flow, promote or build muscle mass, improved power and/or stamina. Lastly, that these claims were backed by clinical studies and/or research. However, Plaintiffs allege that the studies do not support the marketing claims associated with products containing Testofen®. On this basis, the Amended Petition includes claims for violations of the Missouri Merchandising Practices Act (“MMPA”), breaches of express and implied warranty of merchantability, unjust enrichment, and violations of the California’s Consumers Legal Remedies Act, Cal. Civ. Code § 1750, et seq.; California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq.; and California’s False Advertising Law, Cal. Bus. & Prof. Code § 17500, et seq.

On May 15, 2014, Brian O’Toole, Robert Sokolove, and Michael Bitton filed a class action complaint in the United States District Court, Central District of California, Western Division, Case No. 2:14-cv-03754-R-E (as amended or otherwise modified, the “C.D. California Action”).²

On December 23, 2014, Plaintiffs Daniel Camey and Raymond Alvandi filed a class action complaint in the United States District Court for the District of Massachusetts, Western Division, Case No. 1:14-cv-14717-RWZ (the “Massachusetts Action”). On September 3, 2015, Plaintiffs in the Massachusetts Action filed an amended class action complaint. On May 16, 2016, after extensive briefing and oral argument, the Massachusetts Action was dismissed with prejudice. On June 15, 2016, Plaintiffs in the Massachusetts Action filed a notice of appeal.

² On July 23, 2014, after briefing, the C.D. California Action was dismissed in its entirety, with prejudice. On June 28, 2016, the C.D. California Action was partially reversed on appeal before the Ninth Circuit. On remand, plaintiff filed an amended complaint, which was subsequently dismissed with prejudice on August 17, 2017. The C.D. California Action is currently on appeal before the United States Court of Appeals for the Ninth Circuit.

On December 31, 2014, counsel for the C.D. California Action filed an identical action in the Northern District of California, titled Robert Baker, Thomas Korves, Marco Garza, Michael Ryan, Russ Ruhnke, Michael Aguero, Steven Berger, Luis Flores, Odell Cowans, Eligio Torres, and Brett Erion, Case No. 3:14-cv-05682 and subsequently numbered: Case No. 2:15-cv-01209-R-E (as amended or otherwise modified, the “N.D. California Action”). This case was subsequently transferred to the Central District of California and stayed.

On January 7, 2015, counsel for the C.D. and N.D. California Actions filed a motion to transfer pursuant to 28 U.S.C. § 1407 before the United States Judicial Panel on Multi-District Litigation (“JPML”), seeking to transfer any related action to the Northern District of California and/or the District of Massachusetts. The JPML denied the motion.

On August 30, 2016, Plaintiff Tommy Robbins filed a class action complaint in The Circuit Court of Cole County, Missouri, Case No. 16AC-CC00366 (as amended or otherwise modified, the “Missouri Action”).

Subsequent to the dismissal of the Massachusetts Action, the Parties initiated discussions about the prospect of opening settlement discussions to resolve the litigation, and since that date, the Parties have had a series of negotiations about terms of a settlement. The Parties have conducted informal discovery, reviewed documents, and conducted a thorough factual and legal investigation and analysis into the claims and defenses asserted in the litigation. Among other document, Defendants produced clinical studies and protocols related to the advertising claims at issue. In addition, proposed Class Counsel conducted extensive research into the claims made in this case; the substantiation therefor, and insurance available.

On September 26, 2016, the Parties (including counsel for the Massachusetts Action, the N.D. California Action, the C.D. California Action and the Missouri Action) appeared for an in-

person settlement conference before the Honorable Patrick King (Ret.) in an attempt to resolve the Testofen Litigation. During this conference, the Parties reached a tentative settlement.

In the subsequent months, the Parties continued to work diligently to finalize the terms of the Settlement, which is the subject of the present Motion.³ Between October 24, 2016 and January 23, 2018, the Parties participated in various telephonic settlement conferences before Judge King in an attempt to resolve the Testofen Litigation. Judge King's guidance and the negotiations between counsel for the Parties resulted in a Settlement Agreement, which Plaintiffs and proposed Class Counsel believe provides benefits to the Settlement Class, is fair, reasonable and adequate, and is in the best interests of Plaintiffs and Settlement Class Members. The Settlement Agreement was reached after extensive review of the underlying facts and after extensive arm's length negotiations between proposed Class Counsel and counsel for Defendants.

II. NATURE OF THE SETTLEMENT

As explained in the proposed settlement, Defendants have agreed to provide both monetary and injunctive relief that will address the issues identified in the Amended Complaint. Defendants have agreed to a four-tiered structure for monetary relief to class members, under which Defendants will provide cash benefits to Settlement Class Members who timely file Claims by the Claims Deadline, up to \$7,000,000, inclusive of costs of Valid Claims, Administrative Costs, Attorneys' Fees and Expense Award, and Incentive Awards. Defendants will simply refund consumers for their purchases pursuant to the four-tier structure set forth in the Settlement Agreement and described below. In the event the sum of Valid Claims, Administrative Costs, Attorneys' Fees and Expense Award, and Incentive Awards exceeds the

³ Although counsel for the N.D. California Action and the C.D. California Action participated in the mediation, he subsequently decided not to participate in the proposed settlement.

\$7,000,000 Settlement Amount, then the benefit payable to Class Members shall be reduced, pro rata. As to the injunctive relief, Defendants have agreed that by the Effective Date or 12 months from the execution of this Settlement Agreement, whatever is later, the Brand Defendants shall complete certain marketing reforms to ensure that all marketing claims remain properly substantiated. The Brand Defendants will also make information about the science behind these claims available on their own website or at a separate URL. Moreover, the Brand Defendants shall provide a statement on Product Labeling which states in form or substance that consumers can ascertain additional information about the science by visiting a referenced website or URL. New labels for United States distribution of the Products reflecting those label modifications will begin to be implemented by the Brand Defendants in the ordinary course following the entry of the Final Approval Order as new product packaging is made. More specifically, the Brand Defendants shall cease utilizing the advertising claims that Testofen: (1) “Improves Orgasm”; (2) “Improves Cognition”; (3) “Burns Fat”; and (4) “Promotes Fat Loss”. Moreover, Prior to the marketing of a Product by the Brand Defendants, the general efficacy and safety of the remedy will be substantiated to the extent required by state and federal law.

III. MATERIAL TERMS OF THE SETTLEMENT

The key terms of the Settlement Agreement are detailed below.

A. Definitions

1. Section II. (2.47) of the Settlement Agreement defines the “Settlement Class” as follows: All Persons who bought Products or received a Trial Offer between January 1, 2010 through, and the date of entry of the Preliminary Approval Order (the “Class Period”). The Settlement Class consists of the following four Subclasses:

Subclass Number 1: All Persons who purchased any Products during the Class Period which were sold by, through or under any retailer, distributor, person, or entity in the stream of commerce other than the Brand Defendants.

Subclass Number 2: All Persons who paid for shipping of Trial Offer during the Class Period which were distributed by, through, or under any of the Brand Defendants.

Subclass Number 3: All Persons who purchased Products during the Class Period which were sold in retail by the Brand Defendants.

Subclass Number 4: All Persons who purchased Products during the Class Period which were sold by, through, or under any of the Brand Defendants directly to Class Members.

Excluded from the Settlement Class are: (a) all Persons who purchased or acquired the Products for resale; (b) Defendants and their employees, principals, affiliated entities, legal representatives, successors and assigns; (c) any Person who files a valid, timely request to Opt-Out; (d) federal, state, and local governments (including all agencies and subdivisions thereof, but excluding employees thereof); and (e) the judges to whom the Testofen Litigation is assigned and any member of their immediate family.

2. Paragraph II. (2.7) of the Settlement Agreement defines “Brand Defendants” as Direct Digital; PharmaFreak; Force Factor; Dreambrands; KingFisher; and Naturade.

3. Paragraph II. (2.40) of the Settlement Agreement defines “Released Claims” as follows: “Released Claims” means any and all actual, potential, filed, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, claims, demands, liabilities, rights, causes of action, contracts or agreements, extra contractual claims, damages, punitive, exemplary or multiplied damages, expenses, costs, attorneys’ fees and or obligations (including “Unknown Claims”), whether in law or in equity, accrued or unaccrued,

direct, individual or representative, of every nature and description whatsoever, based on any federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside the United States, against the Released Parties, or any of them, that arose during the Class Period and arise, in any manner whatsoever, out of the same factual predicate as the claims asserted in the Testofen Litigation and that: (a) are based on any act, omission, inadequacy, misstatement, representation, harm, matter, cause or event, (b) involve legal claims that have been asserted in the Testofen Litigation, or (c) involve legal claims about Testofen or the Products or the marketing, advertising, promoting, packaging, or Labeling of Testofen or the Products. The Parties acknowledge and agree that personal injury claims are not part of any of the facts alleged in this Testofen Litigation and that personal injury claims are not included within the Released Claims. Nothing herein is intended to release: any claims that any governmental agency or governmental actor has against the Defendants, any claims asserted for acts or omissions outside of the Class Period or on behalf of any other entity other than the Released Parties.

4. Section II (2.41) of the Settlement Agreement defines “Released Parties” to mean and include Defendants, Defendants, their owners, parents, subsidiaries, affiliates, joint-ventures, partners, members, divisions, distributors, wholesalers, retailers, re-sellers, licensors, licensees, suppliers, officers, directors, employees, shareholders, agents, attorneys, administrators, successors, predecessors, insurers, spokespersons, public relations firms, advertising agencies, as well as the Additional Released Parties.

5. Section II (2.2)) of the Settlement Agreement defines “Additional Released Parties” to mean and include all entities in the Brand Defendants’ supply and distribution chain and/or stream of commerce of the products at issue and includes the Brand

Defendants' customers, clients, persons, or entities in privity to the Additional Released Parties, including but not limited to: Amazon.com, Inc.; American Fitness Wholesalers, LLC; Body Energy Club USA, Inc.; BodyBuilding.com, LLC; Europa Sports Products, Inc.; Twin Associates, LC d/b/a eVitamins; Golden Trainer Performance Studio Inc.; HD Nutraceuticals, LLC; Healthland Center; Lonestar Distribution, LLC; Max Muscle Sports Nutrition; Muscle & Strength, LLC; NovaCare; NovaMark; Nutrition Rite Corporation; R & R Health & Fitness Inc.; Rite Aid Corp.; Supplement Central, Inc.; Total Fitness Warehouse, LLC; Vitamin Shoppe, Inc.; Vitamin World, Inc.; Green Living LLC d/b/a Vitamins2You.com; H&L World Wide Inc.; GNC; and Walgreen Co.

B. The Requested Settlement Class

The Parties stipulate to and request the certification of the Class as defined in the Settlement Agreement, for settlement purposes only, pursuant to Rules 52.08(a), (b)(2) and (b)(3) of the Missouri Rules of Civil Procedure. "Among current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device." *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 377 (Mo. Ct. App. 1997), quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). *Amchem* specifically approved of the use of a temporary settlement class in order to facilitate settlement. *Id.*

C. Monetary Relief

The Settlement Agreement provides that Defendants shall pay all Valid Claims, Administrative Costs, Attorneys' Fees and Expense Award, and Incentive Awards up to a maximum amount of \$7,000,000.00. The Settlement provides cash payments to Settlement Class Members of between \$1.99 and \$14.52, depending on which Subclass they belong. Specifically, Settlement Class Members may elect certain Benefits under Subclass Number 1, Subclass

Number 2, Subclass Number 3, or Subclass Number 4 for Products or the Trial Offer purchased between January 1, 2010 and the date of preliminary approval as indicated below:

- Subclass Number 1 (Class Members who purchased any Products during the Class Period which were sold by, through, or under any retailer, distributor, person, or entity in the stream of commerce other than the Brand Defendants): \$1.99 per Household.
- Subclass Number 2 (Settlement Class Members who paid for shipping of Trial Offer during the Class Period which were distributed by, through, or under any of the Brand Defendants): \$5.26 per Household.
- Subclass Number 3 (Settlement Class Members who purchased Products during the Class Period which were sold in retail by the Brand Defendants): \$5.26 per Household
- Subclass Number 4 (Settlement Class Members who purchased Products during the Class Period which were sold by, through, or under any of the Brand Defendants directly to Class Members): \$7.26 per Unit for a maximum of two Units or \$14.52 per Household.

In the event that the sum of Valid Claims, Administrative Costs, Attorneys' Fees and Expense Award, and Incentive Awards exceeds the \$7,000,000 Settlement Amount, then the benefit payable to Class Members shall be reduced, pro rata. The monetary relief shall be administered by the Settlement Administrator.

D. Non-Monetary Relief

In addition to the payments described above, Defendants will also provide the following relief pursuant to the Settlement Agreement: By the Effective Date or 12 months from the

execution of this Settlement Agreement, whatever is later, the Brand Defendants shall complete certain marketing reforms to ensure that all marketing claims remain properly substantiated. The Brand Defendants will make information about the science behind these claims available on their own website or at a separate URL. Moreover, the Brand Defendants shall provide a statement on Product Labeling which states in form or substance that consumers can ascertain additional information about the science by visiting a referenced website or URL. New labels for United States distribution of the Products reflecting those label modifications will begin to be implemented by Defendants in the ordinary course following the entry of the Final Approval Order as new product packaging is made. Moreover, by the Effective Date or 12 months from the execution of this Settlement Agreement, whatever is later, the Brand Defendants shall cease utilizing the advertising claims that Testofen: (1) “Improves Orgasm”; (2) “Improves Cognition”; (3) “Burns Fat”; and (4) “Promotes Fat Loss”. Lastly, prior to the marketing of a Product by Defendants, the general efficacy and safety of the remedy will be substantiated to the extent required by state and federal law.

E. Notice

The Settlement Agreement provides for a Settlement Notice, Publication Notice, a Settlement Website, and telephonic support of the notice campaign. The full cost of notice and administration and effectuation of the Settlement Agreement shall be paid by Defendants from the Settlement Amount.

F. Opt-Outs and Objectors

The Settlement Agreement provides mechanisms by which members of the Class may opt-out of, or object to, the proposed settlement. Any Settlement Class Member who intends to object to the Settlement must do so on or before the objection deadline, which shall be 60 days

after the Notice Date (the “Objection Deadline”). In order to object, the Settlement Class Member must file with the Court, and provide a copy to the Settlement Administrator, Class Counsel, and Defendants’ counsel, a document that includes all of the following:

- a. a reference at the beginning to this case *Tommy Robbins, et al, Individually and On Behalf of All Other Similarly Situated Persons vs. Gencor Nutrients, Inc. et al*, Case No.: 16AC-CC00366 in the Circuit Court of Cole County, Missouri;
- b. the objector’s full name, address, and telephone number (and the objectors’ lawyer’s name, address and telephone number if they are objecting through counsel);
- c. a written statement of all grounds for the objection, accompanied by any legal support for such Objection;
- d. copies of any papers, briefs, or other documents upon which the Objection is based;
- e. a list of all persons who will be called to testify in support of the Objection;
- f. a statement of whether the objector intends to appear at the Final Approval Hearing. If the objector intends to appear at the Final Approval Hearing through counsel, the Objection must also state the identity of all attorneys representing the objector who will appear at the Final Approval Hearing;
- g. a statement of his/her membership in the Settlement Class, including all information required by the Claim Form; and
- h. a detailed list of any other Objections submitted by the Settlement Class Member, or his/her counsel, to any class actions submitted in any court, whether state or federal, in the United States in the previous five (5) years. If the Settlement Class

Member or his/her counsel has not objected to any other class action settlement in any court in the United States in the previous five (5) years, he/she shall affirmatively state so in the written materials provided in connection with the Objection to this settlement.

A Settlement Class Member who wishes to opt-out of the Settlement Class must do so on or before 60 days after the Notice D (the "Opt-Out Deadline"). In order to opt out, a Settlement Class Member must complete and mail to the Settlement Administrator, Class Counsel and Defendants' Counsel a Request for Exclusion that is postmarked no later than the Opt-Out Deadline.

G. Service Award

Class Counsel shall submit to the Court an application seeking leave to pay Plaintiffs, as Class Representatives, a Service Award in an amount of not more than \$2,500 for each of the Class Representatives, for their efforts in bringing the Action and achieving the benefits of this Agreement on behalf of the Settlement Class. The Service Awards shall be paid from the Settlement Amount.

H. Attorneys' Fees

Class Counsel will submit to the Court an application seeking a Fee and Expense Award of not more than six-hundred-thousand-dollars-and-zero-cents (\$600,000.00) payable in the amount of fifty-thousand-dollars-and-zero-cents (\$50,000.00) per month for twelve (12) consecutive months, commencing the later of December 2018 or thirty (30) days after the Effective Date, whichever is later. Such payment shall be made solely by Force Factor which shall issue a corporate guarantee for the payment of the Attorneys' Fees and Expenses and will include a pledge against the assets of the company's assets to secure the payment obligation.

I. Release

Upon the entry of a final order approving this settlement and following the expiration of the time for appeal or the entry of a decision on such appeal, the Class Representatives and each and every member of the Settlement Class who has not timely filed a request to be excluded from the Settlement Class will release and forever discharge Defendants as further explained in the attached Settlement Agreement.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully asks that the Court grant preliminary approval of the proposed Settlement Agreement and enter the proposed order separately submitted herewith (a copy of which is attached as Exhibit E to the Settlement Agreement), and grant such further relief as the Court deems reasonable and just.

Dated: May 14, 2018

Respectfully submitted,

TOMMY ROBBINS, DANIEL CAMEY,
RAYMOND ALVANDI AND GERARD BUTLER,
Individually, and on Behalf of a Class of Similarly Situated
Individuals, Plaintiffs

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was delivered on this 14th day of May 2018, via the Missouri Court System's Electronic Filing System to all counsel of record.

By: /s/ Stephen F. Gaunt
Stephen F. Gaunt