CARPENTER LAW GROUP
Todd D. Carpenter (CA 234464)
402 West Broadway, 29th Floor
San Diego, California 92101
Telephone: 619.756.6994
Facsimile: 619.756.6991
todd@carpenterlawyers.com

PATTERSON LAW GROUP
James R. Patterson (CA 211102)
402 West Broadway, 29th Floor
San Diego, California 92101
Telephone: 619.756.6990
Facsimile: 619.756.6991
jim@pattersonlawgroup.com

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ED HAZLIN and KAREN ALBENCE on Behalf of Themselves and All Others Similarly Situated,

Plaintiff,

v.

BOTANICAL LABORATORIES, INC., a Washington Corporation, SCHWABE NORTH AMERICA, INC., a Wisconsin Corporation and BOTANICAL LABORATORIES, L.L.C., a Delaware Limited Liability Company and Does 1-20,

Defendants.

Case No. 13cv00618 KSC

CLASS ACTION

PLAINTIFFS' RESPONSE TO BRIEF OF AMICUS CURIAE TRUTH IN ADVERTISING, INC. IN OPPOSITION TO PROPOSED SETTLEMENT

Judge: Hon. Karen S. Crawford
Location: Courtroom 1C
Date: March 19, 2015
Time: 11:00 a.m.

Amicus Curiae Truth in Advertising ("TINA") opposes the approval of the proposed settlement on the sole grounds that it believes the injunctive relief component does not live up to its ideals. The settlement, however, fairly and adequately provides the substantial injunctive relief of barring Defendants from making key alleged false representations on its Wellesse product labels for three years. TINA has failed state a proper basis to deny final approval of the proposed settlement.

"[W]hether a settlement is fundamentally fair within the meaning of Rule 23(e) is different from the question whether the settlement is perfect in the estimation of the reviewing court." *Lane v. Facebook*, *Inc*., 696 F.3d 811, 819 (9th Cir. 2012). "[A] district court's only role in reviewing the substance of that settlement is to ensure that it is 'fair, adequate, and free from collusion.'" *Id.*; *see also Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) ("The court's intrusion upon what is otherwise a private consensual arrangement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties."). Settlement is the offspring of compromise, and as such, is not "to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Dennis v. Kellogg,* No. 09–CV–1786–L (WMc), 2013 U.S. Dist. LEXIS 163118, at *6 (S.D. Cal. Nov. 14, 2013) (citation omitted).

No single settlement term should be considered in isolation. Rather, the court must evaluate the fairness and adequacy of the proposed settlement "as a whole, rather than assessing its individual components." *Lane*, 696 F.3d at 819; *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). In addition to the injunctive relief, this settlement provides excellent monetary benefits. Defendants have agreed to pay a $3.1 million Settlement Fund without any reversion to them. Class members can obtain close to a full refund of the retail purchase price for up to six bottles purchased, without having to take the risk of not succeeding at class certification or at trial.

With these principles in mind, it is clear that this Court should approve the

proposed settlement. The substance of the labeling changes is entirely reasonable. In addition to prohibiting the very claims that Plaintiffs relied upon in purchasing the products, the settlement also prohibits ***any*** statements ***related to*** "improving joint health" and ***any*** statements ***concerning*** the protection or rebuilding of cartilage. TINA's criticism of the duration of the injunction should not be given credence. Defendants have already made a substantial concession by agreeing to remove this broad scope of language from its product labels, given that there has been no Court ruling as to the merits of Plaintiffs' claims. And several California district courts have approved similar limited duration injunctions. Finally, the settlement requires Defendants to remove the challenged statements from the product labeling: the most important place given that consumers rely on these claims at the point of sale.

A. The Substance of the Injunctive Relief Prohibiting Language Is Fair and Reasonable

The settlement fairly and reasonably prohibits Defendants from making the very joint-health benefit claims on their labeling that Plaintiffs relied upon in deciding to purchase a Wellesse JMG product:

1. "Start to feel it in 7 days;"
2. "improves joint health;"
3. "less joint discomfort;"
4. "protects and rebuilds cartilage;"
5. "for healthy joint support & mobility;"
6. "for healthy joint support and flexibility;"
7. "Glucosamine is necessary to protect and rebuild cartilage tissue and keep joints strong & healthy;" and
8. "mobility, flexibility, & lubrication."

See Joint Stipulation of Settlement ¶ IV.B.2; Second Amended Complaint ¶ 62. And the settlement goes beyond those specific statements, prohibiting any claims which would

1 convey a similar message. The settlement prohibits Defendants from using any
2 statements ***related to*** the phrase "improves joint health" and any statements ***concerning***
3 the protection or rebuilding of cartilage." *See* Joint Stipulation of Settlement ¶ IV.B.2.
4 *Pearson v. NBTY, INC.*, 772 F.3d 778 (7th Cir. 2014) is distinguishable. There, the
5 parties actually agreed to specific substitute wording that the defendant could use in place
6 of the prohibited language. *See Pearson*, 772 F.3d at 784. For example, "'works by
7 providing the nourishment your body needs to build cartilage, lubricate, and strengthen
8 your joints,' [was] to be substituted for 'works by providing the nourishment your body
9 needs to support cartilage, lubricate, and strengthen your joints.'" *Id.* at 785. The
10 Seventh Circuit found those settlement terms were problematic because, by approving the
11 settlement, the court would also implicitly be approving the new labeling, which was
12 "purely cosmetic changes in wording[.]" *Id.* The same issue is not present here because
13 Plaintiffs have not agreed to substitute "purely cosmetic changes in wording." To the
14 contrary, the settlement prohibits Defendants from making any claims relating to
15 "improves joint health" and any statements concerning the protection or rebuilding of
16 cartilage.
17 **B. The Duration of the Injunction Is Fair and Reasonable**
18 The settlement fairly and reasonably limits Defendants from using the challenge
19 language for a period of three years. TINA fails to cite to any Ninth Circuit authority that
20 such an agreement is inappropriate. Indeed, several California district courts have
21 approved similar time periods for injunctions. *See, e.g. Dennis v. Kellogg Co.*, 2013 U.S.
22 Dist. LEXIS 163118, *4-5, *15-16 (approving settlement prohibiting defendant from
23 making challenged statements for three years and overruling objector's challenges to
24 injunctive relief); *Arnold v. Fitflop USA, LLC*, No. No. 11–CV–0973 W(KSC), 2014 U.S.
25 Dist. LEXIS 58800, *15 (S.D. Cal. April 28, 2014) (approving settlement prohibiting
26 defendant from making allegedly deceptive claims for five years); *Guerrero v. Wells*
27 *Fargo Bank, N.A.*, No. C 12–04026 WHA, 2014 U.S. Dist. LEXIS 122791, at *5-6 (N.D.
28 Cal. Sept. 2, 2014) (approving settlement enjoining defendant from allegedly unlawful

conduct for three years).

Although Plaintiffs strongly believe in the merits of their claims, defendants strongly dispute them and the Court has not ruled on the lawfulness of the challenged advertising. The fact that Defendants have agreed to stop making all statements relating to "improves joint health" and concerning the protection or rebuilding of cartilage for a period of three years is a "substantial concession." *Dennis*, 2013 U.S. Dist. LEXIS 163118, at *16.

Further, Plaintiffs have achieved tremendous relief for the Class by providing members an opportunity to obtain close to a full refund of up to six purchased Wellesse JMG products. Plaintiffs do not, and cannot, represent future consumers who purchase Wellesse JMG products based on different future claims on the product labeling. If, in fact, Defendants decide to subject themselves to liability again in three years by making claims in its advertising not subject to this settlement, those future consumers can seek to hold them liable at that time.

C. The Settlement Prohibits Defendants From Making the Challenged Claims On the Most Important Place, the Product Labels

Settlements are not required to be perfect; both sides must make concessions. Here, Plaintiffs reasonably and fairly decided that it was more important to require Defendants to remove the challenged claims from the product labels, where consumers undoubtedly view it at the point of purchase. This is also consistent with Plaintiffs' experiences. Both Plaintiffs relied on the joint health benefit claims on the product labeling in deciding to purchase the Wellesse JMG products. Second Amended Complaint ¶¶ 13-14.

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II. CONCLUSION

Based on the foregoing, the Parties respectfully request that the Court overrule TINA's opposition and grant final approval of the Settlement.

Dated: March 4, 2015

CARPENTER LAW GROUP

By: */s/ Todd D. Carpenter*

Todd D. Carpenter (CA 234464)
402 West Broadway, 29th Floor
San Diego, California 92101
Telephone: 619.756.6994
Facsimile: 619.756.6991
todd@carpenterlawyers.com

PATTERSON LAW GROUP
James R. Patterson (CA 211102)
402 West Broadway, 29th Floor
San Diego, California 92101
Telephone: 619.756.6990
Facsimile: 619.756.6991
jim@pattersonlawgroup.com

Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I, Todd D. Carpenter, hereby certify that on March 4, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record registered with the CM/ECF system.

/s/ Todd D. Carpenter