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Class Counsel

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA BARBARA

DANIEL GARCIA, on behalf of himself and all others similarly situated, Plaintiff, v. IOVATE HEALTH SCIENCES U.S.A. INC., a Delaware corporation and DOES 1-10, Inclusive, Defendants.	Case No. 1402915 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT** Date: June 21, 2017 Time: 9:30 a.m. Dept. 6 Judge Pauline Maxwell
KEVIN BRANCA, an individual on behalf of himself and all others similarly situated, Intervenor.	
CHRIS LEATON and LINDSEY DUNN, on behalf of themselves and all others similarly situated, Plaintiff-Intervenors.	

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I. INTRODUCTION

On March 3, 2017, this Court granted preliminary approval to a proposed class action settlement (the "Settlement") between Defendant Iovate Health Sciences U.S.A. Inc. ("Iovate") and a Settlement Class of customers of the Covered Products (the "Class"). 3/3/2017 Preliminary Approval Order. Plaintiff Leaton now respectfully requests that the Court grant final approval of the Settlement and enter the [Proposed] Final Approval Order and Judgment submitted herewith.

The Settlement merits final approval. It creates a monetary benefit of more than $10 million for the Class. Under the terms of the Settlement, Iovate will:

(1) create a Claim Fund of $8 million for the payment of claims submitted by Settlement Class Members;

(2) modify its labels to include a disclaimer agreed to by the Parties and remove certain statements touting the efficacy of the Covered Products from their labels;

(3) pay up to $1.9 million in reasonable attorneys' fees and costs, which will be paid in addition to, and not derogate from, the $8 million Claim Fund;

(4) pay costs of notice to the Class and claims administration up to $288,000, which will be paid in addition to, and not derogate from, the $8 million Claim Fund.

In its Preliminary Approval Order, this Court found that the Settlement fell within the range of possible approval. The Court preliminarily concluded that the Settlement was "fair, reasonable, and adequate," so as to warrant submission to members of the Settlement Class for their consideration. *Id*. ¶ 8. In conformity with the Preliminary Approval Order, notice was emailed to nearly 25,000 class members for whom Iovate had email addresses and was published on a dedicated settlement website. Decl. of Mark Schey ¶¶ 13-14. In addition, the Court-approved Publication Notice was published in five national print publications and in a robust digital notice campaign. *Id*. ¶¶ 9-16. In total, the print publication reached a total audience of about 35 million people and the internet campaign generated a minimum of 48.5 million impressions. *Id*. ¶ 16.

To date, not a single class member has objected to the settlement or requested to be excluded. The Objection Deadline and Request for Exclusion deadlines will pass in 12 days, on May 30, 2017.

The Settlement is a tremendous victory for consumers. It is endorsed by experienced Class Counsel and enjoys strong support of the Settlement Class. The Court should grant final approval and enter the Final Approval Order and Judgment that has been lodged with the Court herewith.

II. CASE HISTORY

A. The Prior Unsuccessful Settlements By Plaintiffs Garcia And Branca

This case commenced on July 20, 2012 when Plaintiff Daniel Garcia filed a class action complaint alleging that Defendant Iovate misrepresented the efficacy of one of its products: Pro Clinical Hydroxycut. On July 31, 2012, Iovate answered just 11 days after Garcia filed his barebones complaint. No further litigation occurred before Garcia noticed a hearing for a motion for preliminary approval of a class action settlement that aimed to release claims related to 27 of Iovate Hydroxycut-branded products. Not only were there no contested motions litigated by Garcia, but there was no evidence that Garcia conducted any formal discovery related to any of the products covered under the proposed settlement. *See* Fisher Decl. ¶¶ 2-4. The Garcia settlement created a non-reversionary fund of $400,000 to pay claims from Hydroxycut purchasers. The settlement also created a $1 million reversionary fund to pay claims of purchasers with receipts, an illusory figure considering that consumers typically do not save receipts of low-cost goods.

After learning of the *Garcia* settlement, Intervenor Kevin Branca[1] sought leave to intervene. The Court granted Branca's motion to intervene after finding "evidence of collusion in this case." *See* 2/20/2013 Tentative Ruling Granting Kevin Branca's Motion to Intervene, at 5, 8. Instead of actively pursuing their claims following intervention, Branca and Garcia essentially repackaged the same settlement and jointly moved for preliminary approval on February 26, 2014. The 2014 Branca settlement created a non-reversionary fund of $550,000 out of which Branca's and Garcia's lawyers could, and did, request $137,500 in attorney's fees. The new settlement increased the reversionary fund to $1.2 million, which was again limited to those customers with receipts. Attorney's fees could be withdrawn from both funds. Further, the proposed notice consisted entirely of publication in a single magazine – US Weekly – in three issues and the

[1] Branca had brought his own action against Iovate on July 6, 2012 (two weeks before Garcia filed) in the United States District Court for the Southern District of California.

establishment of a settlement website. Ultimately, the notice program reached no more than 14.24 percent of potential class members.

Plaintiffs Leaton and Dunn objected to Branca and Garcia's proposed class settlement and sought leave to intervene. On March 28, 2015, the Court granted plaintiffs Leaton and Dunn's motion for leave to intervene and denied final approval of the class settlement proposed by Plaintiffs Branca and Garcia.

B. Litigation And Discovery By Class Counsel Following Denial Of Garcia/Branca Settlement

Over the next two years following Leaton and Dunn's intervention, the parties participated in protracted and contentious litigation and discovery. Leaton and Dunn served requests for production and the Plaintiffs collectively served interrogatories. *Id*. ¶ 9-10, 18. Class Counsel took the lead on the majority of meet and confer calls with defense calls concerning discovery disputes. *Id*. ¶ 19. Class Counsel also drafted multiple lengthy meet and confer letters concerning a variety of discovery disputes that arose. *Id*. Class Counsel drafted and filed a motion to compel the production of documents by Iovate. *Id*. ¶ 20. The motion was withdrawn after Iovate agreed to make several supplemental productions and to amend its responses to Plaintiffs' discovery requests. *Id*. Ultimately, Class Counsel reviewed over 42,000 pages of documents produced by Defendant, including every study Defendant relied on to substantiate the Covered Products' efficacy claims, internal company communications and emails concerning sales and marketing, sales figures of each of the Covered Products, pricing information for the Covered Products, and advertising and labeling of the Covered Products. *Id*. Further, Class Counsel subpoenaed IRI, a market research company that collects data on point-of-sale transactions for consumer products, and obtained point-of-sale data regarding the Covered Products. *Id*. ¶ 16. Class Counsel also retained an expert economist to analyze the obtained sales data and assist Class Counsel with evaluation of potential damages should this case have gone to trial. *Id*. Leaton and Dunn also deposed Jo-Ann Heikkila, Iovate's person most knowledgeable and obtained confirmatory discovery concerning the similarity of the marketing of the Covered Products and the substantiation for the Covered Products efficacy claims through the declaration of Derek Smith,

Iovate's Director of Compliance. *Id*. ¶¶ 10, 36-37, 42, Ex. 1. Following the aforementioned discovery, Dunn and Leaton filed an Amended Class Action Complaint in Intervention where they assert claims concerning each of the Covered Products at issue in the Settlement. *Id*. ¶¶ 37-43.

Leaton and Dunn also prevailed on a number of contested motions. For instance, Leaton and Dunn defeated Defendant's motion to stay the litigation and motion for protective order concerning Leaton and Dunn's requests for documents. *Id*. ¶ 22. Leaton and Dunn defeated Defendant's demurrer to their complaint in intervention. *Id*. 21. Class Counsel filed a motion for contempt against Iovate and its counsel for its failure to pay Court-ordered sanctions to Class Counsel. *See id*. ¶ 23. The motion for contempt was ultimately withdrawn upon payment. Leaton and Dunn were even forced to file a motion to strike Defendant's response to a request for a joint status conference for the inclusion of foul language and personal attacks on Class Counsel. In short, the litigation was very contentious.

C. Events Leading To The Current Settlement

On May 28, 2015, counsel for Defendant Iovate and counsel for Plaintiffs Leaton and Dunn attended a mediation before the Honorable Judge Edward A. Infante (Ret.) at JAMS. Fisher Decl. ¶ 15. The mediation did not result in a settlement. *Id*.

Subsequently, Class Counsel undertook to coordinate with the other four firms representing Plaintiffs in this action to reach agreement on a joint discovery strategy, joint preparation of a mediation statement, and agreement on a coordinated and joint strategy for settlement and negotiation. *Id*. ¶ 25. Class Counsel and the Clarkson Law Firm participated in several conference calls among Plaintiffs' counsel to reach agreement on a negotiation strategy for a second mediation with Judge Infante. *Id*. They prepared a single joint mediation statement to submit to Judge Infante, which was joined by all Plaintiffs' counsel. *Id*. And Class Counsel convened an in-person meeting of Plaintiffs' counsel to review the status of the case, to review the discovery received to date, and to discuss case strategy prior to the mediation. *Id*. Lawyers from Bursor & Fisher and the four other firms representing Plaintiffs in this action all participated and contributed to that meeting. *Id*.

On September 15, 2015, Plaintiffs' counsel (with the exception of Ronald A. Marron) attended a second mediation with Judge Infante. *Id.* ¶ 26. Counsel for all Plaintiffs attended and negotiated jointly, including Scott A. Bursor and Annick M. Persinger of Bursor & Fisher, Ryan Clarkson of Clarkson Law Firm, Behram V. Parekh of Kirtland & Packard, LLP, and David Elliot of the Weston Firm. *Id.* However, Ronald A. Marron did not attend because of a scheduling conflict. *Id.* Defendant Iovate's counsel Scott J. Ferrell and David W. Reid attended, along with Iovate's general counsel Roch Vaillancourt. *Id.* This second mediation also did not result in a settlement. *Id.*

Following the second failed mediation, the parties continued to litigate and engaged in formal discovery, as discussed above. *Id.* ¶ 27. In January 2016, as discovery was ongoing, Iovate approached Class Counsel (Scott A. Bursor) to discuss the possibility of making a further attempt at agreeing to a class settlement. *Id.*

Thereafter, in late February of 2016, Mr. Bursor and Mr. Marchese had an in-person meeting with Mr. Ferrell and Mr. Reid in New York City to further explore potential resolution. *Id.* ¶ 28. Their meeting was productive and resulted in a framework for the current proposed settlement. *Id.* The parties agreed to continue negotiating a term sheet for a class-wide settlement after the February 23, 2016 meeting. *Id.* As such, counsel continued their negotiations by telephone for the next two-and-a-half months. *Id.* Settlement negotiations were challenging and contentious. *Id.* Ultimately, on May 11, 2016, the parties executed a Memorandum of Understanding to resolve this case on a class-wide basis. *Id.*

Following the execution of the Memorandum of Understanding, Class Counsel and Iovate continued to negotiate the Settlement Agreement for more than five months. *See id.* ¶ 29. The negotiations were intense and several times it appeared that a formal settlement would not be reached. *Id.* In fact, when it appeared that the parties could not agree on a settlement agreement, Class Counsel filed a motion to enforce the Memorandum of Understanding. *Id.* Finally, on October 20, 2016, Class Counsel and Iovate executed the Settlement Agreement. *Id.*

III. THE TERMS OF THE SETTLEMENT

The Settlement executed by Class Counsel and Iovate provides outstanding relief to the Class. First, it creates a Claim Fund of $8 million for the payment of claims submitted by Settlement Class Members. Settlement Class Members who do not have an original receipt can submit a claim for $14.00 per bottle of the Covered Products with a limit of two bottles per household. Settlement Class Members with original receipts can obtain a full cash refund of the amounts shown on the receipts.

The Settlement also includes injunctive relief whereby Iovate will modify its labels to include an appropriate disclaimer agreed upon by the Parties. Iovate will also remove from its product labeling the statements: "I highly recommend Pro Clinical Hydroxycut™. The key ingredients in this dietary supplement are clinically proven to help people lose weight." Iovate will also remove from its product labeling the word "significantly" from the statement: "Test subjects also significantly reduced BMI versus the placebo group (10.2% vs 0.9%)."

The parties also agreed to a robust notice plan that has a calculated reach of 70% to ensure that Settlement Class Members learn about the Settlement and have an opportunity to submit a claim. Finally, the Settlement provides that Class Counsel may apply to the Court for payment of an award of attorneys' fees and costs up to $1.9 million. Importantly, the attorneys' fees and costs will be paid separate and in addition to the monetary relief for the Settlement Class.

The Settlement is a clear and marked improvement over the prior Branca and Garcia settlement that this Court rejected on March 28, 2015. The following chart summarizes the significant differences between the two settlements:

Term	Disapproved Settlement	Current Settlement	Improvement
Total $ For Class	$556,002.81	$8,000,000	> 1,439%
$ Per Claim	$5.85 to $7.83 per bottle	$14 per bottle	179%
Notice & Admin. Costs	Derogates from settlement fund	Paid in addition to class relief	

Term	Disapproved Settlement	Current Settlement	Improvement
Reach of Publication Notice	14.24%	70% or greater	491%
Attorneys' Fees	Derogates from settlement fund	Paid in addition to class relief	

IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. Applicable Legal Standards

A class action settlement requires court approval, after notice to the class members. *Malibu Outrigger Bd. of Governors v. Superior Court* (1980) 103 Cal. App. 3d 573, 578-79; Fed. R. Civ. P. 23 (e).[2] California has a well-established and strong policy in favor of the settlement of litigation. *Stambaugh v. Superior Court* (1976) 62 Cal. App. 3d 231, 236. Settlement is particularly favored in class actions, given the costs and uncertainties inherent in complex litigation. *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F. 2d 1268, 1276, *cert. denied*, 506 U.S. 953 (1992) ("strong judicial policy ... favors settlements, particularly where complex class action litigation is concerned"); Alba Conte & Herbert Newberg, *Newberg On Class Actions* (4th ed. 2002) §11.41. Accordingly, whether a class action settlement should receive final approval is committed to the broad discretion of the trial court. *Mallick v. Superior Court* (1979) 89 Cal. App. 3d 434, 438; *Rebney v. Wells Fargo Bank* (1990) 220 Cal. App. 3d 1117, 1138; Cal. Civ. Code §1781(f).

The purpose of the final approval hearing is not to rework a settlement that is the result of complex and hard-fought negotiations. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 246 ("[T]he proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial.").

On final approval, a number of factors may be relevant to a determination that a settlement is, or is not, "fair, adequate and reasonable":

[2] In resolving issues relating to class actions, the California courts frequently look to Rule 23 of the Federal Rules of Civil Procedure, and to federal cases decided thereunder, for guidance. *Green v. Obledo* (1981) 29 Cal.3d 126; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821.

> [The Court] should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

Dunk v. Ford Motor Company (1996) 48 Cal. App. 4th 1794, 1801 (citing *Officers for Justice v. Civil Service Comm'n* (9th Cir. 1982) 688 F. 2d 615, 624).

When the settlement results from arm's length bargaining by experienced counsel who performed sufficient discovery, and the percentage of objectors is small, there is a "presumption of fairness" that applies. *Dunk*, 48 Cal. App. 4th at 1801. That presumption was summarized as follows by in *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 723:

> At the same time, the trial court should give "[d]ue regard ... to what is otherwise a private consensual agreement between the parties." Such regard limits its inquiry "'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, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" The trial court operates under a presumption of fairness when the settlement is the result of arm's-length negotiation, investigation and discovery that are sufficient to permit counsel and the court to act intelligently, counsel are experienced in similar litigation, and the percentage of objectors is small.

Id. (citations and footnote omitted).

B. The Proposed Settlement Is Fair, Adequate And Reasonable

1. <u>The Settlement Is Entitled To A Presumption Of Fairness</u>

As noted in *Microsoft I-V*, *supra,* proposed class action settlements are presumed fair where the settlement is the result of arm's-length negotiation, discovery has been sufficient, counsel are experienced in similar litigation, and the percentage of objectors is small. Each of those criteria is met here. Therefore, when the Court reviews the settlement, it should begin with a presumption that the settlement is fair and reasonable from the class's standpoint.

a. <u>The Settlement Was Negotiated At Arm's Length</u>

The Settlement resulted from arm's length negotiations after two mediations led by an experienced mediator, Honorable Judge Edward A. Infante (Ret.) at JAMS, and more than seven

and a half months of negotiations between Class Counsel and Iovate. *See* Fisher Decl. ¶¶ 15, 25-29. The negotiations were contentious to the point that Class Counsel filed a motion to enforce an initial Memorandum of Understanding prior to the execution of the Settlement. *Id*. ¶ 29. There is not, and could not be, any evidence hinting at collusion.

b. *The Settlement Was Negotiated After Extensive Litigation And Discovery*

There can be no question that the Settlement was negotiated after extensive litigation and discovery. Class Counsel obtained significant discovery from Iovate and third parties, including (1) responses to interrogatories and document requests, (2) sales information from IRI, (3) deposition of Iovate's PMQ, Ms. Heikkila, (4) and over 42,000 pages of documents produced by Iovate, including sales, marketing, internal communications, and substantiation documents concerning the Covered Products' efficacy claims. Fisher Decl. ¶¶ 9-10, 16-24. Class Counsel and the Clarkson Law Firm defended the depositions of Plaintiffs Leaton and Dunn. *Id*. ¶ 8. Class Counsel consulted with an economic expert regarding sales of the Covered Products and potential damages at trial. *Id*. ¶ 16. Class Counsel also defeated Iovate's demurrer, a motion to stay, and a motion for a protective order and litigated motions for contempt, sanctions, and other discovery motions. *Id*. ¶¶ 21-23. In sum, at the time the settlement was reached, Class Counsel was fully informed about the case, the evidence, the relevant witnesses, and Iovate's contentions.

c. *Class Counsel Are Experienced In Similar Litigation*

Class Counsel has decades of experience in class action litigation and has won five of five class actions jury trials since 2008. *See* Fisher Ex. 3 (Bursor & Fisher, P.A. firm resume).

d. *The Are No Objections*

There are hundreds of thousands, if not millions, of Class Members. Indeed, Iovate's PMK testified that Iovate sold roughly 42 million units of the Covered Products. *Id*. ¶ 10. However, not a single class member has objected to the Settlement.[3] The Court may properly infer from that fact that the Settlement is fair, adequate and reasonable. *7-Eleven Owners for Fair Franchising v.*

[3] The deadline the Court set for submitting objections to the Settlement, May 30, 2017, is only 12 days away. Should any objections be filed in the interim, Class Counsel will update the Court at the appropriate time.

Southland Corp. (2000) 85 Cal. App. 4th 1135, 1153.

2. Review Of The Relevant Considerations Demonstrates That The Settlement Is Fair, Reasonable, And Adequate

The non-exclusive list of factors that the Court may consider when reviewing a proposed class action settlement includes (1) the consideration obtained in the settlement, (2) the risk, expense, complexity and duration of further litigation as a class action, (3) the extent of discovery completed and the stage of the proceedings, (4) the experience and views of counsel, and (5) the reaction of class members to the proposed settlement. *Microsoft I-V*, *supra*. Each of these factors favors approval of the Settlement.

a. Consideration Provided By The Settlement And The Risk, Expense, Complexity And Duration Of Further Litigation Faced By Plaintiff

First, the nature and scope of the relief obtained in the Settlement plainly supports final approval. The Settlement makes available $8,000,000 for the payment of all claims, including for the anticipated vast majority of claimants that do not have proof of purchase. The $8 million sum is more than **14 times** greater than the $556,002.81 recovery that would have been available under the disapproved Branca/Garcia settlement.[4] Further, any attorneys' fees approved by the Court and notice and administrative costs will be paid out separately by Iovate, and will not derogate from the $8 million fund. Therefore, should the Court award Class Counsel's fee award in full, the total amount provided by the Settlement will be more than $10 million, an outstanding result. *See, e.g., Hartless v. Clorox Co*. (S.D. Cal. 2011) 273 F.R.D. 630, 645 (finding that "the entire settlement fund is at least $9.25" million where the settlement created a $7 million fund for claimants and a separate $2.25 million fund for attorneys' fees and notice and claim administration costs); Manual for Complex Litig. § 21.7 (4th ed. 2004) ("If an agreement is reached on the amount of a settlement

[4] The Claim Deadline has not passed, and, accordingly, Class Counsel does not yet know the final amount of claims that will be submitted and the total amount of money that will be paid out to class members. As of May 15, 2017, Digital Settlement Group, LLC ("DSG") reports that 65,185 claims have been submitted. Schey Decl. ¶ 22. In Class Counsel's experience, the amount of claims tends to increase as the Claim Deadline approaches and Class Counsel expects to see an increase in the final number of claims submitted. Class Counsel will update the Court as to the total number of claims once the Claim Deadline passes.

fund and a separate amount for attorney fees and expenses … *the sum of the two amounts ordinarily should be treated as a settlement fund for the benefit of the class*) (emphasis added).

In addition, the $10 million figure does not account for the value of the injunctive relief provided by the Settlement, which is significant. Pursuant to the Settlement, Iovate has agreed to include disclaimers on the Covered Products' labels and remove key statements from the Covered Products' labels touting that test subjects experienced "significant" weight loss.

Further, the $10 million made available by this settlement is certainly "within the range of reasonableness in light of the risks of further litigation." *Hendricks v. Starkist Co*. (N.D. Cal. Sept. 29, 2016) 2016 WL 5462423, at *5. In false or misleading advertising cases concerning food and supplement products, plaintiffs are typically foreclosed from full-refund theories of damages at class certification where the products at issue provide some benefit to the consumer, such as calories, vitamins, or minerals. *See gen. In re Tobacco Cases II* (2015) 240 Cal. App. 4th 779, 798-802 (full refund unavailable where product provides *any* benefit to the consumer); *In re POM Wonderful LLC* (C.D. Cal. Mar. 25, 2014) 2014 WL 1225184, at *2-*3 (explaining that a full refund damages model is unavailable where the product at issue provided class members with benefits in the form of calories, hydration, vitamins, and minerals); *Red v. Kraft Foods, Inc.* (C.D. Cal. Apr.12, 2012) 2012 WL 8019257, at *1. Here, although the Covered Products are marketed as weight-loss aids, Iovate would have a strong argument that full-refund damages are inappropriate because each of the Covered Products provides non-weight loss benefits, such as calories, minerals, protein, and vitamins. Fisher Decl. ¶ 45. Thus, even if Plaintiffs were able to certify a class and prevail at trial, putative class members would likely stand to recover only the price premium attributable to Iovate's weight-loss representations, *a fraction of the sales price*. *Id.*

Iovate's person most knowledgeable, Ms. Heikkila, testified that Iovate sold roughly 42 million units of the Covered Products. *Id*. ¶ 10. Because Iovate typically sells its products to distributors and not directly to consumers, that number appears to be far greater than the units of the Covered Products actually purchased by class members. *See id*. ¶ 16. Based on Class Counsel's and their economic expert's review of IRI point-of-sale data, $131.6 million worth of the Covered Products were sold nationwide from the beginning of the class period through March

2014. *Id*. Assuming that Iovate's sales remained constant through March of 2017 (the cut-off for the class period), Class Counsel estimates that class members purchased roughly $211 worth of the Covered Products throughout the class period. *Id*. Thus, if Plaintiffs were to obtain full-refund damages at trial, which they almost certainly would not be able to do, the total fund made available by the Settlement ($10 million) would represent 4.73% of potential recovery at trial. This is well within the range of reasonableness considering the risks of continued litigation. *Hendricks*, 2016 WL 5462423, at *5 ("The $12,000,000 settlement amount, while consisting only a single-digit percentage of the maximum potential exposure, is reasonable given the stage of the proceedings and the defenses asserted in this action."); *Stovall-Gusman v. W.W. Granger, Inc*. (N.D. Cal. June 17, 2015) 2015 WL 3776765, at *4 (granting final approval of a net settlement amount representing 7.3 % of the plaintiffs' potential recovery at trial); *Balderas v. Massage Envy Franchising, LLC* (N.D. Cal. July 21, 2014) 2014 WL 3610945, at *5 (granting preliminary approval of a net settlement amount representing 5 % of the projected maximum recovery at trial); *Ma v. Covidien Holding, Inc*. (C.D. Cal. Jan. 31, 2014) 2914 WL 360196, at *5 (finding a settlement worth 9.1 % of the total value of the action "within the range of reasonableness"); *Downey Surgical Clinic, Inc. v. Optuminsight, Inc*. (C.D. Cal. May 16, 2016) 2016 WL 5938722 at *5 (granting final approval where recovery was 3.21 % of potential recovery at trial). More realistically, however, Plaintiffs would only be able to recover a fraction of the $211 million at trial because they would be limited to presenting a price premium theory of damages. Even assuming that the weight-loss representations command a robust 50 percent price premium of the total value of the Covered Products, the total recovery at trial would be roughly $105.5 million. Thus, the $10 million available here more likely represents about 9.4 percent of total recovery available at trial. In any case, both the 4.73 percent and the 9.4 percent figures are "within the 'ballpark' of reasonableness." *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal. App. 4th 116, 133.

The $10 million made available by the Settlement is also reasonable in light of the substantial risks that Plaintiffs faced at class certification and trial. While Plaintiffs remain confident in their claims that the Covered Products' efficacy and weight loss claims are misleading, Iovate was able to produce four studies concerning the key weight loss ingredients in the Covered

Products. *See* Fisher Decl. ¶ 44. Although Plaintiffs would be able to attack the design of each of these studies, Iovate would likely present expert testimony showing that participants taking the active ingredients in the Covered Products lost weight as compared to placebos. *Id*. In this "battle of experts," it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which expert version would be accepted by the jury. *Id*. The experience of Class Counsel has taught them that these considerations can make the ultimate outcome of a trial highly uncertain. *Id*.

Plaintiffs would also face risks in certifying a class and maintaining class status through trial. Since the Ninth Circuit's decision in *Mazza v. Am. Honda Motor Co*., plaintiffs in consumer class actions face an uphill battle in certifying multi-state classes, let alone nationwide classes. *Mazza v. Am. Honda Motor Co*. (9th Cir. 2012) 666 F. 3d 581, 593-94 (finding lack of predominance at class certification because each class member's claim was governed by consumer protection laws of jurisdiction in which transaction took place). Thus, even if Plaintiffs were able to certify a class here, there would be a risk that the class (and potential recovery) would be limited to California purchasers. Even assuming that the Court were to grant a motion for class certification, the class could still be decertified at any time. *See In re Netflix Privacy Litig.* (N.D. Cal. Mar. 18, 2013) 2013 WL 1120801, at *6 ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement.") (internal citations omitted); *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal. App. 4th 1440 (affirming decertification order); *Kight v. CashCall, Inc.* (2014) 231 Cal. App. 4th 112 (same); *Grogan-Beall v. Ferdinand Roten Galleries, Inc*. (1982) 113 Cal. App. 3d 969 (same). Indeed, this Court has already noted that "there is some risk of failing to obtain class certification in a contested action." 3/16/2015 Tentative Ruling at 10 (noting that there are risks concerning the "implied ascertainability requirement, the superiority requirement, and the manageability component of class certification"). The Settlement eliminates these risks by ensuring Class Members a recovery that is "certain and immediate, eliminating the risk that class members would be left without any recovery … at all." *Fulford v. Logitech, Inc.* (N.D. Cal. Mar. 5, 2010) 2010 U.S. Dist. LEXIS 29042, at *8.

Further, due to the uncertainties and risk attendant to litigating this case through trial, mounting expenses also weigh in favor of final approval. To date, Class Counsel and the Clarkson Firm already incurred $59,992.13 in total expenses. Fisher Decl. ¶ 65. If Plaintiffs were to litigate this case through trial, expert costs alone would easily exceed $100,000. In sum, the consideration obtained in the Settlement and the risk, expense, complexity and duration of further litigation as a class action all favor a finding that the Settlement is fair and reasonable.

b. *Extent Of Discovery Completed And The Stage Of The Proceedings*

As discussed above, Class Counsel negotiated the Settlement after two years of intense, hard-fought litigation. Class Counsel had the benefit of over 42,000 pages of documents produced by Iovate, deposition testimony from Iovate's witness, deposition testimony of Plaintiffs Leaton and Dunn, IRI data regarding sales records, and consultations with an economic expert. Further, the Settlement was reached after briefing on several contested motions, including a demurrer, motion to stay, motions for protective orders, motion for contempt and sanctions, a motion to strike, and a motion to enforce the Memorandum of Understanding. Given the history of this case, there is no question that the extent of discovery and the stage of the proceedings fully support final approval.

c. *Class Counsel Recommend Approval Of Settlement*

The Settlement is also fully supported and recommended by Class Counsel, who have litigated many class actions similar to this one. Fisher Decl. ¶ 46. After significant discovery and motion practice, Class Counsel have carefully gauged the risks involved with this case, and are in the best position to evaluate those risks. Their judgment should be accorded great weight in determining whether to grant final approval. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528 ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."); *Boyd v. Bechtel Corp.*, (N.D. Cal. 1979) 485 F. Supp. 610, 622 ("Attorneys, having an intimate familiarity with a lawsuit after spending years in litigation, are in the best position to evaluate the action, and the Court should not without good cause substitute its judgment for theirs."). Their acceptance of

the Settlement is strong evidence of its reasonableness in light of their extensive knowledge and investigation of the case.

d. *The Settlement Enjoys The Support Of Class Members*

Although there are likely millions of class members, not a single class member is objecting to the Settlement. Schey Decl. ¶ 20. This indicates that the Class overwhelmingly supports the settlement. That is particularly significant where two prior settlements in this case failed to obtain approval due to objections from class members.

e. *Notice To Class Members Is Adequate*

In granting preliminary approval, the Court approved of the Settlement's Notice Plan and ordered Digital Settlement Group, LLC ("DSG"), the Settlement Administrator, to issue notice pursuant to its terms. The Settlement Administrator has done so, and, after reviewing the progress of notice distribution, remains confident that the notice of the Settlement has reached at least 70 percent of class members. *See gen*. Schey Decl. ¶ 16. *See Wershba*, 91 Cal. App. 4th at 251 ("The standard is whether the notice has 'a reasonable chance of reaching a substantial percentage of the class members.'"); *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, Federal Judicial Center (2010), at 1 ("The percentage of the class that will be exposed to a notice based on a proposed notice plan can always be calculated by experts. A high percentage (e.g., between 70-95%) can often reasonably be reached by a notice campaign.). In fact, notice has been more robust than indicated in the initial Notice Plan. For instance, while DSG expected "a minimum of 40 million targeted impression advertising the class action settlement" through the internet media portion of the Notice Plan, to date, DSG's records show more than 48 million impressions. Schey Decl. ¶ 16.

V. CONCLUSION

The Settlement in this matter is fair, adequate, and reasonable. It was negotiated at arm's length, is recommended by experienced counsel and enjoys the strong support of the members of the Settlement Class. Plaintiff Leaton therefore requests that this Court enter the Final Approval Order and Judgment submitted herewith.

Dated: May 18, 2017

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