

1 Michael Louis Kelly (Bar No. 82063)  
mlk@kirtlandpackard.com

2 Behram v. Parekh (Bar No. 180361)  
bvp@kirtlandpackard.com

3 Heather M. Baker (Bar No. 261303)  
hmb@kirtlandpackard.com

4 **KIRTLAND & PACKARD LLP**

5 2041 Rosecrans Avenue  
6 Third Floor  
El Segundo, California 90245  
Telephone: (310) 536-1000  
Facsimile: (310) 536-1001

7 Attorneys for Plaintiff Daniel Garcia and all others  
8 similarly situated

9 **THE WESTON FIRM**

10 GREGORY S. WESTON (239944)  
greg@westonfirm.com

11 JACK FITZGERALD (257370)  
jack@westonfirm.com

12 1405 Morena Blvd., Suite 201  
13 San Diego, CA 92110  
Telephone: (619) 798-2006  
Facsimile: (480) 247-4553

14 **LAW OFFICES OF RONALD A. MARRON, APLC**

15 RONALD A. MARRON (175650)  
ron@consumeradvocates.com

16 SKYE RESENDES (278511)  
skye@consumeradvocates.com

17 3636 4th Street, Suite 202  
18 San Diego, CA 92103  
Telephone: (619) 696-9006  
Facsimile: (619) 564-6665

19 Attorneys for Intervenor  
20 KEVIN BRANCA

21 Scott J. Ferrell (Bar No. 202091)  
sferrell@trialnewport.com

22 Tyler J. Woods (Bar No. 232464)  
twoods@trialnewport.com

23 David W. Reid (Bar No. 267382)  
dreid@trialnewport.com

24 **NEWPORT TRIAL GROUP, APC**

25 4100 Newport Place Drive, Suite 800  
26 Newport Beach, California 92660  
Telephone: (949) 706-6464  
Facsimile: (949) 706-6469

27 Attorneys for Defendant  
28 IOVATE HEALTH SCIENCES U.S.A. INC.

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 COUNTY OF SANTA BARBARA

3 DANIEL GARCIA, on behalf of himself and all  
4 other similarly situated,

5 Plaintiff,

6 v.

7 IOVATE HEALTH SCIENCES U.S.A. INC., a  
8 Delaware corporation, and DOES 1-10, Inclusive,

9 Defendants.

10 KEVIN BRANCA, an individual, on behalf of  
11 himself and all others similarly situated.

12 Intervenor.

Case No. 1402915

Judge: Hon. James E. Herman

Dept.: 6

**STIPULATION AND AGREEMENT OF  
SETTLEMENT**

**CLASS ACTION**

Complaint Filed: July 20, 2012

1 It is hereby stipulated and agreed by and between the undersigned Parties, subject to the  
2 approval of the Court, that the settlement of this Action shall be effectuated pursuant to the terms  
3 and conditions set forth in this Settlement Agreement.

4 **ARTICLE I – PREAMBLE**

5 1. WHEREAS Daniel Garcia (“Garcia”) is the named plaintiff in the above-captioned  
6 action entitled *Daniel Garcia, on behalf of himself and all others similarly situated, Plaintiffs, vs.*  
7 *Iovate Health Sciences U.S.A. Inc.*, Santa Barbara County Superior Court, Case No. 1402915 (“the  
8 Action”);

9 2. WHEREAS Kevin Branca (“Branca”) is the intervenor in the Action and is the  
10 named plaintiff in the action entitled *Kevin Branca, an individual, on behalf of himself and all*  
11 *others similarly situated, Plaintiff, v. Iovate Health Sciences U.S.A. Inc., et al.*, United States  
12 District Court for the Southern District of California, Case No. 12CV1686 LAB WMC, who is a  
13 member of the Settlement Class in the Action;

14 3. WHEREAS Iovate Health Sciences U.S.A. Inc. (“Iovate”) is the defendant in the  
15 Action.

16 4. WHEREAS pursuant to this Settlement Agreement, the Parties hereto agree that  
17 Branca shall be added as a named plaintiff to the Action.

18 5. WHEREAS Garcia and Branca allege that they relied on allegedly false and  
19 misleading statements contained on the labels and in advertisements and marketing materials for  
20 Iovate’s “Pro Clinical Hydroxycut” dietary supplement product regarding the effectiveness of the  
21 product, and that such statements violate state consumer protections laws (including California’s  
22 False Advertising Laws (“FAL”), Bus. & Prof. Code §17500 et. seq., California's Unfair  
23 Competition Laws (“UCL”), and California's Consumer Legal Remedies Act (“CLRA”), Civil Code  
24 §1750 et seq.), as well as the Magnuson Moss Warranty Act and the warranties related to Pro  
25 Clinical Hydroxycut, and that as a direct result of such violations Iovate has been unjustly enriched;

26 6. WHEREAS Garcia and Branca seek to recover monetary and equitable remedies on  
27 behalf of himself and a class of similarly situated persons;

28

1           7.       WHEREAS Garcia and Branca acknowledge that they have not suffered personal  
2 injuries as a result of their personal consumption and use of Pro Clinical Hydroxycut;

3           8.       WHEREAS the Parties have negotiated this Settlement at arm's length from  
4 positions of informed strength, and have had a full and fair opportunity to evaluate the strengths and  
5 weaknesses of their respective positions;

6           9.       WHEREAS Iovate denies the allegations of the Action, denies all allegations of  
7 wrongdoing and of liability, and denies any causation of harm or damage to the Settlement Class;

8           10.      WHEREAS Iovate nevertheless has concluded that, in light of the costs, risks and  
9 disruption of litigation, this Settlement is appropriate on the terms and conditions set forth herein;

10          11.      WHEREAS Garcia and Branca believe that the claims asserted in the Action are  
11 meritorious;

12          12.      WHEREAS Garcia and Branca nevertheless have concluded that, in light of the  
13 costs, delay and risks of litigation of the matters in dispute, the risk that the Court will not certify  
14 their claims as a class action, particularly in complex class action proceedings, the risk of losing on  
15 the merits, and in the desire to provide relief to the class sooner rather than later, this Settlement is  
16 fair, reasonable, adequate, and in the best interests of the Settlement Class;

17          13.      WHEREAS the performance of any act referenced in this Settlement Agreement, or  
18 any other circumstance regarding the Parties' agreement to settle, shall not be considered an  
19 admission of liability or as an admission of any allegations made in any claim or litigation,  
20 including this Action; and

21          14.      WHEREAS the Parties hereto agree that this Settlement Agreement shall not be  
22 deemed or construed to be an admission or evidence of any violation of any federal or state statute,  
23 rule or regulation, principle of common law or equity, or of any liability or wrongdoing whatsoever  
24 by Iovate, or of the truth of any of the Claims asserted in the Action, or elsewhere.

25   **ARTICLE II – DEFINITIONS**

26           As used in this Settlement Agreement and the related documents attached hereto as exhibits,  
27 the terms set forth below shall have the meanings set forth below. The singular includes the plural  
28 and vice versa.

1           1.       “Aggregate Fees, Costs, and Expenses” means the aggregate attorneys’ fees and  
2 costs, the costs of notice, the administrative expenses, and the incentive awards.

3           2.       “Action” means the civil action entitled *Daniel Garcia, on behalf of himself and all*  
4 *others similarly situated, Plaintiffs, vs. Iovate Health Sciences U.S.A. Inc.*, Santa Barbara County  
5 Superior Court, No. 1402915.

6           3.       “Class Counsel” means Michael Louis Kelly and the law firm of Kirtland & Packard  
7 LLP, Jack Fitzgerald and the law firm of The Weston Firm, and Ronald A. Marron and the law firm  
8 of Ronald A. Marron, APLC.

9           4.       “Class Period” means July 20, 2008 through the date the Preliminary Approval Order  
10 is entered.

11          5.       “Class Released Claims” means any and all actions, causes of action, claims,  
12 demands, liabilities, obligations, fees, costs, sanctions, proceedings, and/or rights of any nature and  
13 description whatsoever, including, without limitation, violations of any state or federal statutes,  
14 rules or regulations, or principles of common law, whether liquidated or unliquidated, known or  
15 unknown, in law or in equity, whether or not concealed or hidden, that have been asserted or could  
16 have been asserted in the Action through the date the Preliminary Approval Order is entered,  
17 including but not limited to any claims that are based on, arise out of, or relate to the manufacturing,  
18 marketing, advertisement, sale, labeling, substantiation of, statements regarding, contents of, studies  
19 regarding, advertising, and/or efficacy of the Hydroxycut family of dietary supplement products  
20 (including Pro Clinical Hydroxycut, Hydroxycut Max for Women, Hydroxycut Advanced,  
21 Hydroxycut Hardcore, Hydroxycut Hardcore X, Hydroxycut Acai, Hydroxycut Herbal and  
22 Hydroxycut Hardcore Elite, Hydroxycut Caffeine Free Drink Mix, Hydroxycut Caffeine Free  
23 Caplets, Hydroxycut Acai, Hydroxycut Fiberfull Drink Mix, Hydroxycut 24, Hydroxycut Weight  
24 Loss Drink Mix, Hydroxycut Weight Loss Shot, Hydroxycut Max Caplets, Hydroxycut Max Drink  
25 Mix, Hydroxycut Max Aqua Shed, Hydroxycut Max Cleanse, Hydroxycut Cleanse, Hydroxycut  
26 Complete Cleanse, Hydroxycut Premium Cleanse, Hydroxycut Green Tea, Hydroxycut Gummies,  
27 Hydroxycut Herbal, Hydroxycut Hoodia, Hydroxycut CLA, Hydroxycut Shape, Hydroxycut  
28 Sprinkles, Hydroxycut Drink Mix, Hydroxycut Advanced Drink Mix, Hydroxycut Bar, Hydroxycut

1 RTD, and Hydroxycut Green Coffee). Notwithstanding the above, “Class Released Claims” shall  
2 exclude any claims for personal injury on behalf of the Settlement Class.

3 6. “Class Representatives” means Garcia and Branca.

4 7. “Court” means the Superior Court of the State of California for the County of Los  
5 Angeles.

6 8. “Dismissed Actions” means the actions previously brought against Iovate related to  
7 the claims raised in this Action.

8 9. “Effective Date” means the first date by which all of the following events shall have  
9 occurred: (a) the Court has entered the Preliminary Approval Order; (b) the Court has entered the  
10 Final Approval Order and Judgment; and (c) the Final Approval Order and Judgment have become  
11 Final.

12 10. “Fee and Cost Application” means the written motion or application by which the  
13 Class Representatives and/or Class Counsel request that the Court award attorneys’ fees, costs,  
14 expenses and incentive awards.

15 11. “Final” means that the Court has entered the Final Approval Order and Judgment on  
16 the docket in the Action, and (a) the time to appeal from such order has expired and no appeal has  
17 been timely filed, (b) if such an appeal has been filed, it has finally been resolved and has resulted  
18 in an affirmation of the Final Approval Order and Judgment, or (c) the Court, following the  
19 resolution of the appeal, enters a further order or orders approving settlement on the terms set forth  
20 herein, and either no further appeal is taken from such order(s) or any such appeal results in  
21 affirmation of such order(s). Neither the pendency of the Fee and Cost Application, nor any appeal  
22 pertaining solely to a decision on the Fee and Cost Application, shall in any way delay or preclude  
23 the Final Approval Order and Judgment from becoming Final.

24 12. “Final Approval Hearing” means the hearing scheduled to take place at least ninety  
25 days after the date of entry of the Preliminary Approval Order at which the Court shall: (a)  
26 determine whether to grant final approval to this Settlement Agreement and to certify the Settlement  
27 Class; (b) consider any timely objections to this Settlement and all responses thereto; and (c) rule on  
28 the Fee and Cost Application.

1           13.     “Final Approval Order and Judgment” means the order, substantially in the form of  
2 Exhibit B attached hereto, in which the Court grants final approval of this Settlement Agreement,  
3 certifies the Settlement Class, and authorizes the entry of a final judgment and dismissal of the  
4 Action with prejudice.

5           14.     “Hydroxycut” shall mean Iovate’s Hydroxycut family of dietary supplement  
6 products (including Pro Clinical Hydroxycut, Hydroxycut Max for Women, Hydroxycut Advanced,  
7 Hydroxycut Hardcore, Hydroxycut Hardcore X, Hydroxycut Acai, Hydroxycut Herbal and  
8 Hydroxycut Hardcore Elite, Hydroxycut Caffeine Free Drink Mix, Hydroxycut Caffeine Free  
9 Caplets, Hydroxycut Acai, Hydroxycut Fiberfull Drink Mix, Hydroxycut 24, Hydroxycut Weight  
10 Loss Drink Mix, Hydroxycut Weight Loss Shot, Hydroxycut Max Caplets, Hydroxycut Max Drink  
11 Mix, Hydroxycut Max Aqua Shed, Hydroxycut Max Cleanse, Hydroxycut Cleanse, Hydroxycut  
12 Complete Cleanse, Hydroxycut Premium Cleanse, Hydroxycut Green Tea, Hydroxycut Gummies,  
13 Hydroxycut Herbal, Hydroxycut Hoodia, Hydroxycut CLA, Hydroxycut Shape, Hydroxycut  
14 Sprinkles, Hydroxycut Drink Mix, Hydroxycut Advanced Drink Mix, Hydroxycut Bar, Hydroxycut  
15 RTD, and Hydroxycut Green Coffee).

16           15.     “Individual Released Claims” means any and all of the Class Representatives’  
17 actions, causes of action, claims, demands, liabilities, obligations, fees, costs, sanctions,  
18 proceedings, and/or rights of any nature and description whatsoever, including, without limitation,  
19 violations of any state or federal statutes, rules or regulations, or principles of common law, whether  
20 liquidated or unliquidated, known or unknown, in law or in equity, whether or not concealed or  
21 hidden, that are based on, arise out of, or are related to Class Representatives’ personal purchase,  
22 use, and consumption of any products manufactured, sold, or otherwise distributed by Iovate,  
23 including but not limited to any claims relating to (i) physical, mental, or emotional injury or  
24 disability; (ii) the manufacturing, marketing, sale, labeling and/or advertising of any products  
25 manufactured, sold, or otherwise distributed by Iovate; and (iii) the efficacy of any products  
26 manufactured, sold, or otherwise distributed by Iovate.

27           16.     “Iovate” means Iovate Health Sciences U.S.A. Inc.

28           17.     “Iovate’s Counsel” means Scott Ferrell and the law firm of Newport Trial Group.

1           18.    “Non-Reversionary Fund” means the non-reversionary \$550,000 Iovate will pay to  
2 settle all claims by consumers who do not have a Purchase Receipt pursuant to this Settlement;

3           19.    “Notice” shall mean Publication Notice.

4           20.    “Notice Provider” means Hilsoft Notifications for purposes of internet and  
5 publication notice.

6           21.    “Notice Response Deadline” means the deadline for all members of the Settlement  
7 Class to respond to the Notice, which shall be twenty-one (21) days prior to the Final Approval  
8 Hearing.

9           22.    “Participating Claimant” means a Settlement Class Member who submits a  
10 Qualifying Settlement Claim Form in response to the Notice.

11          23.    “Parties” means Class Representatives Garcia and Branca and Defendant Iovate.

12          24.    “Person” means any natural person, firm, corporation, unincorporated association,  
13 partnership, or other form of legal entity or government body, including its agents and  
14 representatives.

15          25.    “Preliminary Approval Order” means the order, substantially in the form of Exhibit  
16 A attached hereto, in which the Court grants its preliminary approval to this Settlement Agreement  
17 and preliminarily certifies the Settlement Class, authorizes dissemination of Notice to the  
18 Settlement Class, and appoints the Settlement Administrator and Notice Provider.

19          26.    “Publication Notice” means the long-form and short-form notices, substantially in  
20 the form of Exhibits C and D attached hereto. The long-form Publication Notice and the short-form  
21 Publication Notice will be published as set forth in the Preliminary Approval Order, pursuant to  
22 California Rule of Court 3.771(b).

23          27.    “Purchase Receipt” means the actual receipt provided at the time of the purchase of  
24 the Hydroxycut product(s) or a genuine copy thereof.

25          28.    A “Qualifying Settlement Claim Form” shall mean a Settlement Claim Form that: (a)  
26 is fully completed, properly executed and timely returned to the Settlement Administrator, *i.e.*,  
27 returned with a postmark on or before the Notice Response Deadline; and (b) confirms that the  
28



1 Settlement Class Member purchased one or more of the Hydroxycut products identified in the  
2 Claim Form during the Class Period.

3 29. "Released Parties" means Iovate and its past and present officers, directors,  
4 employees, stockholders, investors, owners, agents, representatives, attorneys, administrators,  
5 successors, subsidiaries, assigns, affiliates, joint-ventures, partners, members, divisions,  
6 predecessors, spokespersons, public relations firms, advertising and production agencies,  
7 manufacturers, distributors, suppliers, wholesalers, retailers, vendors, licensees and licensors.

8 30. "Releasing Parties" means all Settlement Class Members.

9 31. "Request for Exclusion" means a valid request for exclusion from a Settlement Class  
10 Member. To be valid, a request for exclusion must (a) be submitted by the Settlement Class  
11 Member; (b) be submitted to the Settlement Administrator and postmarked by a date not later than  
12 21 days before the Final Approval Hearing; (c) contain the submitter's name, address and telephone  
13 number; and (d) otherwise comply with the instructions set forth in the Notice.

14 32. "Settlement Administrator" means the third-party agent(s) or administrator(s) agreed  
15 to by the Parties and appointed by the Court. The Parties agree that Hilsoft Notifications shall be  
16 retained as Settlement Administrator.

17 33. "Settlement Agreement," "Settlement," or "Agreement" means this Stipulation and  
18 Agreement of Settlement, including the attached exhibits.

19 34. "Settlement Claim" or "Claim" means a claim for reimbursement submitted by a  
20 Settlement Class Member to the Settlement Administrator as provided in this Agreement.

21 35. "Settlement Claim Form" or "Claim Form" means a claim form, in the form to be  
22 determined by the Settlement Administrator, that a Settlement Class Member seeking  
23 reimbursement must submit to the Settlement Administrator as provided in this Agreement.

24 36. "Settlement Class" means, collectively, all persons in the United States who  
25 purchased Hydroxycut during the Class Period for personal or household use, and not for resale or  
26 distribution purposes. Excluded from the Settlement Class are any officers, directors, or employees  
27 of Iovate, and the immediate family member of any such person, as well as any individual who  
28

1 received remuneration from Iovate in connection with that individual’s use or endorsement of  
2 Hydroxycut. Also excluded is any judge who may preside over this case.

3 37. “Settlement Class Member” or “Class Member” means any member of the  
4 Settlement Class who does not submit a timely and valid Request for Exclusion.

5 38. “Valid Claim” means a claim for reimbursement submitted by a Settlement Class  
6 Member that satisfies all the criteria for submission of a Qualifying Settlement Claim Form.

7 **ARTICLE III – SETTLEMENT CLASS RELIEF**

8 In consideration of a full, complete, and final settlement of the Action, and the Releases in  
9 Article VII below, and subject to the Court’s approval, the Parties agree to the following relief:

10 1. Non-Reversionary Fund

11 The amount of the Non-Reversionary Fund is Five Hundred Fifty Thousand Dollars  
12 (\$550,000). The Non-Reversionary Fund shall be used exclusively to pay claims for purchasers  
13 without a Purchase Receipt. Any unused monies from the Non-Reversionary Fund shall be donated  
14 to *cy pres*. The Non-Reversionary Fund shall be funded in two parts, as follows:

- 15 • No later than three (3) business days after entry of the Preliminary Approval Order,  
16 Iovate shall make an initial deposit of One-Hundred Thousand Dollars (\$100,000)  
17 into an escrow account with a mutually agreeable escrow institution [To be  
18 determined by the parties].
- 19 • No later than thirty (30) business days after entry of the Preliminary Approval Order,  
20 Iovate shall deposit Four-Hundred Fifty Thousand Dollars (\$450,000) into the  
21 above-referenced escrow account.

22 The amounts deposited by Iovate into the Non-Reversionary Fund are to be released from escrow  
23 for funding the Settlement only upon the Court’s final approval of the Settlement Agreement. If for  
24 some reason the Court does not approve the Settlement Agreement, the entirety of the Non-  
25 Reversionary Fund shall be returned to Iovate within fifteen (15) business days of the Court’s order  
26 denying Final Approval.

27 2. Reserved Fund

28

1 Iovate shall internally reserve a minimum of One Million Two Hundred Thousand Dollars  
2 (\$1,200,000) for purposes of the Settlement over and above the Non-Reversionary Fund, but this  
3 reserved fund shall not be paid or deposited into escrow, and remain Iovate property. These monies  
4 shall be available to pay costs associated with the administration of the Settlement, notice, payment  
5 for claims from class members with Purchase Receipts, incentive awards, and attorneys' fees and  
6 costs awarded by the Court. Any reserved amounts not actually used to pay the items identified in  
7 this paragraph shall cease to be internally reserved by Iovate upon the Effective Date. If for some  
8 reason the Court does not approve the Settlement Agreement, all such funds shall cease to be  
9 internally reserved by Iovate, within fifteen (15) business days of the Court's order denying Final  
10 Approval.

11 3. Distributions from the Non-Reversionary and Reserved Funds

12 Distribution of funds from the Non-Reversionary Fund and the Reserved Fund to the  
13 Settlement Class shall commence as soon as practicable after the Effective Date, but in no event  
14 later than 60 days after the Effective Date.

15 4. Settlement Class Member Claims

16 a. Relief to the Settlement Class

17 The entire \$550,000 from the Non-Reversionary Fund shall be available to pay Valid Claims  
18 submitted by Settlement Class Members who purchased Hydroxycut for personal consumption, and  
19 not for re-sale, during the Class Period and who do not have a Purchase Receipt. Settlement Class  
20 Members who do not have a Purchase Receipt will be entitled to reimbursement of Twenty-Five  
21 Dollars (\$25.00) per bottle of Hydroxycut purchased. Settlement Class Members who submit a  
22 Claim without a Purchase Receipt(s) will be entitled to a maximum refund of two bottles of  
23 Hydroxycut.

24 Settlement Class Members who submit a Claim with a Purchase Receipt(s) will be refunded  
25 the full amount documented, with no limit on the number of bottles of Hydroxycut refunded. These  
26 refunds will be paid from the Reserved Fund, will not count against available in the Non-  
27 Reversionary Fund, and will not be capped.  
28

1 All Settlement Class Members who submit a Claim must provide an affirmation, signed  
2 under penalty of perjury, that the Class Member personally purchased and consumed Hydroxycut  
3 during the Class Period. Settlement Class Members who submit a Claim without a Purchase  
4 Receipt(s) will also be required to provide information relating to the purchase of Hydroxycut  
5 sufficient to satisfy the reasonable requests of the Settlement Administrator for the purpose of  
6 determining whether the Settlement Class Member has made a Valid Claim, including where  
7 Hydroxycut was purchased, the quantity purchased, and the approximate purchase date.

8 b. Claim Forms

9 Settlement Class Members will be able to obtain a Settlement Claim Form by calling the  
10 toll-free number established for purposes of administering this Agreement, by requesting one by  
11 mail at the address established by the Settlement Administrator, or by downloading the form from  
12 the Internet website established by the Settlement Administrator. The Claim Form shall include  
13 instructions for the submission process. Settlement Class Members may submit a Claim Form  
14 online or by mail to the Settlement Administrator at the address provided.

15 c. Waiver

16 If a Qualifying Settlement Claim Form is not actually received by the Settlement  
17 Administrator from a Settlement Class Member via the internet or with a postmark on or before the  
18 Notice Response Deadline, then that Settlement Class Member will be deemed to have forever  
19 waived his or her right to be a Participating Claimant and to receive payment under this Settlement.  
20 As long as they do not properly submit a Request for Exclusion, Settlement Class Members who do  
21 not become Participating Claimants shall be deemed Members of the Settlement Class and shall be  
22 subject to the Judgment. Only Participating Claimants shall be entitled to payment pursuant to the  
23 Judgment.

24 5. Insufficient or Excess Funds

25 If the aggregate value of Valid Claims submitted by Settlement Class Members without a  
26 Purchase Receipt(s) exceeds the amount in the Non-Reversionary Fund, then the amount of  
27 reimbursement per bottle will be adjusted downward on a per bottle basis.  
28

1 If the aggregate value of Valid Claims submitted by Settlement Class Members without a  
2 Purchase Receipt(s) is less than the amount of the Non-Reversionary Fund, Settlement Class  
3 Members will receive a pro rata addition to the amounts to be refunded to them, up to the amount of  
4 One-Hundred Dollars (\$100.00) per Settlement Class Member. In the event that, even after a pro  
5 rata addition to the amounts refunded to Settlement Class Members, the aggregate value of Valid  
6 Claims is still less than the amount remaining in the Non-Reversionary Fund, and Expenses, then  
7 the unclaimed balance of the Non-Reversionary Fund shall be distributed *cy pres* to a charitable  
8 organization that benefits the Settlement Class, to be mutually agreed on by the Parties subject to  
9 Court approval. Any remaining funds shall be paid out of the Non-Reversionary Fund not later than  
10 one-hundred and eighty (180) days after the Effective Date, provided that the Effective Date occurs.

11 6. Equitable Relief and Future Conduct by Iovate

12 To the extent Iovate still markets or sells Hydroxycut in the United States after the Effective  
13 Date, Iovate shall revise the labels on Hydroxycut manufactured ninety (90) days after the Effective  
14 Date to conform substantially to the exemplar labels attached as Exhibit F. Hydroxycut will include  
15 an appropriate disclaimer agreed upon by the Parties. Iovate shall remove from its product labeling  
16 the following statement: “**I highly recommend *Pro Clinical Hydroxycut*™. The key ingredients**  
17 **in this dietary supplement are clinically proven to help people lose weight.**” Iovate shall also  
18 remove from its product labeling the word “significantly” from the following statement: “Test  
19 subjects also significantly reduced BMI versus the placebo group (10.2% vs 0.9%).” Nothing in  
20 this provision shall prevent Iovate from making changes to Hydroxycut labels not inconsistent with  
21 the foregoing, or as necessary to comply with governmental or regulatory requirements.

22 **ARTICLE IV – NOTICE AND REQUESTS FOR EXCLUSION**

23 1. Publication Notice

24 Publication Notice to the Settlement Class shall be provided in the forms approved by the  
25 Court in the Preliminary Approval Order, in that media as set forth in the Preliminary Approval  
26 Order. The Publication Notice shall be substantially in the same forms as the exemplars submitted  
27 as Exhibits C and D. The Publication Notice shall be published promptly after entry of the  
28 Preliminary Approval Order on dates to be agreed upon by the Parties so as to provide the best

1 practical notice to the Settlement Class. The Parties, the Settlement Administrator and the Notice  
2 Provider shall use best efforts to cause the Publication Notice to commence online at an internet  
3 website to be established by the Settlement Administrator within thirty (30) days after the date of  
4 entry of the Preliminary Approval Order. Publication Notice will also commence in print in a large-  
5 circulation sports magazine within thirty (30) days after the date of entry of the Preliminary  
6 Approval Order. Publication Notice will extend to additional print magazines within seventy-five  
7 (75) days after the date of entry of the Preliminary Approval Order. The online and print  
8 publication of the Publication Notice shall be administered by the Settlement Administrator and the  
9 Notice Provider. The cost of publishing the Publication Notice shall be paid for by Iovate.

10 2. Declarations Of Compliance

11 The Settlement Administrator and the Notice Provider shall prepare declarations attesting to  
12 compliance with the publication requirements set forth above. Such declarations shall be provided  
13 to Class Counsel and Iovate's Counsel and filed with the Court no later than 10 days prior to the  
14 Final Approval Hearing.

15 3. Best Notice Practicable

16 The Parties agree, and the Preliminary Approval Order shall state, that compliance with the  
17 procedures described in this Article is the best notice practicable under the circumstances and shall  
18 constitute due and sufficient notice to the Settlement Class of the pendency of the Action,  
19 certification of the Settlement Class, the terms of the Settlement Agreement, and the Final Approval  
20 Hearing, and shall satisfy the requirements of the California Rules of Court, the California Code of  
21 Civil Procedure, the Constitution of the State of California, the United States Constitution, and any  
22 other applicable law.

23 4. Report On Requests For Exclusion and Valid Claims

24 Not later than ten days before the Final Approval Hearing, the Settlement Administrator  
25 shall prepare and deliver to Class Counsel, who shall file it with the Court, and Iovate's Counsel, a  
26 report stating: (1) the total number of Persons that have submitted timely and valid Requests for  
27 Exclusion from the Settlement Class, and the names of such Persons; and (2) the total number of  
28 Persons that have submitted timely Valid Claims, and the aggregate value of those Valid Claims.

1 Any Person that has submitted a timely and valid Request for Exclusion will not be entitled to  
2 receive any relief under this Settlement Agreement.

3 5. Inquiries From Settlement Class Members

4 It shall be the responsibility of Class Counsel to establish procedures for receiving and  
5 responding to all inquiries from Settlement Class Members with respect to this Settlement. Iovate  
6 and Iovate's Counsel may respond, but are not required to respond, to such inquiries.

7 **ARTICLE V – COURT APPROVAL OF SETTLEMENT**

8 1. Preliminary Approval

9 As soon as practicable after the execution of this Settlement Agreement, Class Counsel shall  
10 apply for entry of the Preliminary Approval Order in the form of Exhibit A hereto. The Preliminary  
11 Approval Order shall include provisions: (a) preliminarily certifying the Settlement Class for  
12 settlement purposes only; (b) preliminarily approving this Settlement and finding this Settlement  
13 sufficiently fair, reasonable and adequate to allow Notice to be disseminated to the Settlement  
14 Class; (c) approving the form, content, and manner of the Notice; (d) setting a schedule for  
15 proceedings with respect to final approval of this Settlement; (e) providing that, pending entry of a  
16 Final Approval Order and Judgment, no Settlement Class Member (either directly, in a  
17 representative capacity, or in any other capacity) shall commence or continue any action against the  
18 Released Parties asserting any of the Class Released Claims; and (f) staying the Action, other than  
19 such proceedings as are related to this Settlement.

20 2. Objections To Settlement

21 Any Settlement Class Member wishing to object to or to oppose the approval of this  
22 Settlement and/or the Fee and Cost Application shall file a written objection (with a statement of  
23 reasons) with the Court and serve it on the Parties at least twenty-one (21) days before the date of  
24 the Final Approval Hearing. Any Settlement Class Member that fails to do so shall be foreclosed  
25 from making such objection or opposition. Garcia and Branca will file with the Court their brief(s)  
26 in support of final settlement approval, in support of final certification of the Settlement Class, and  
27 in response to any objections at least seven (7) days before the date of the Final Approval Hearing.  
28

1 Any Settlement Class Member that fails to file a timely written objection and to appear at the final  
2 approval hearing shall have no right to file an appeal relating to the approval of this Settlement.

3 3. Final Approval Hearing

4 The Parties shall request that the Court, on the date set forth in the Preliminary Approval  
5 Order, or on such other date that the Court may set, conduct a Final Approval Hearing to:

6 (a) determine whether to grant final approval to this Settlement Agreement and to certify the  
7 Settlement Class; (b) consider any timely objections to this Settlement and the Parties' responses to  
8 such objections; and (c) rule on the Fee and Cost Application. At the Final Approval Hearing, the  
9 Parties shall ask the Court to give final approval to this Settlement Agreement. If the Court grants  
10 final approval to this Settlement Agreement, then the Parties shall ask the Court to enter a Final  
11 Approval Order and Judgment, substantially in the form of Exhibit B attached hereto, which  
12 approves this Settlement, certifies the Settlement Class, and authorizes entry of a final judgment.

13 4. Disapproval, Cancellation, Termination, Or Nullification Of Settlement

14 a. This Settlement Agreement shall terminate automatically if either (i) the  
15 Court denies preliminary approval or final approval to this Settlement Agreement, or (ii) the Final  
16 Approval Order and Judgment does not become Final by reason of a higher court reversing final  
17 approval by the Court, and the Court thereafter declining to enter a further order or orders approving  
18 settlement on the terms set forth herein.

19 b. Iovate shall have the right to terminate this Settlement Agreement if, prior to  
20 the date of the Final Approval Order and Judgment, the total number of Persons that have submitted  
21 timely and valid Requests for Exclusion from the Settlement Class constitutes greater than 500. If  
22 Iovate elects to terminate this Settlement Agreement under this paragraph, Iovate must provide  
23 written notice to the other Parties' counsel on or before the date of the Final Approval Order and  
24 Judgment. Such written notice shall be provided by hand delivery or mail to the Parties' counsel.

25 c. If this Settlement Agreement is terminated pursuant to its terms, then: (i) this  
26 Settlement Agreement shall be rendered null and void; (ii) this Settlement Agreement and all  
27 negotiations and proceedings relating hereto shall be of no force or effect, and without prejudice to  
28 the rights of the Parties; and (iii) all Parties shall be deemed to have reverted to their respective



1 status in the Action, the Dismissed Actions, or Related Disputes as of the date and time immediately  
2 preceding the execution of this Settlement Agreement and, except as otherwise expressly provided,  
3 the Parties shall stand in the same position and shall proceed in all respects as if this Settlement  
4 Agreement and any related orders had never been executed, entered into, or filed, except that the  
5 Parties shall not seek to recover from one another any costs incurred in connection with this  
6 Settlement.

7 **ARTICLE VI – ADMINISTRATIVE EXPENSES, ATTORNEYS’ FEES, COSTS**

8 1. Costs Of Notice

9 All costs of providing the Notice as provided herein, including the costs of publishing the  
10 Notice, shall be paid for by Iovate.

11 2. Costs Of Administering Settlement

12 All costs of administering this Settlement, including all fees of the Settlement Administrator  
13 and the costs of generating and mailing any checks to be issued as part of this Settlement, shall be  
14 paid for by Iovate. In the event that this Settlement Agreement is terminated pursuant to its terms,  
15 Iovate shall bear any costs of administering this Settlement already incurred.

16 3. Attorneys’ Fees And Costs

17 Garcia, Branca, and/or Class Counsel will make a Fee and Cost Application to be heard at  
18 the Final Approval Hearing seeking an award of attorneys’ fees and costs consistent with California  
19 law. Iovate will not oppose a request that is up to \$350,000 in total attorneys’ fees and costs  
20 payable from the Reserved Fund referenced in Article III (2) above. In addition, Iovate will not  
21 oppose a request that is up to twenty-five (25) percent of the Non-Reversionary Fund. Attorneys’  
22 fees and costs that are approved by the Court shall be paid by Iovate no later than fifteen (15) days  
23 after the Effective Date, and only in the event that the Effective Date occurs. Class Counsel shall be  
24 solely responsible for further distributing any payments made under this provision.

25 4. Incentive Award

26 Garcia, Branca, and/or Class Counsel on their behalf, may make an application to be heard  
27 at the Final Approval Hearing for an incentive award to be paid out of the Common Fund in an  
28 amount not to exceed \$5,000. Incentive award shall be paid out of the Common Fund as approved

1 by the Court no later than fifteen (15) days after the Effective Date, and only in the event that the  
2 Effective Date occurs. These payments shall be compensation and consideration for the efforts of  
3 Garcia and Branca as the Class Representatives in the Action.

4 5. Effect On Settlement

5 The Parties agree that the rulings of the Court regarding the amount of attorneys' fees or  
6 costs and any incentive award, and any claim or dispute relating thereto, will be considered by the  
7 Court separately from the remaining matters to be considered at the Final Approval Hearing as  
8 provided for in this Settlement Agreement and any determinations in that regard will be embodied  
9 in a separate order. Any order or proceedings relating to the amount of attorneys' fees or incentive  
10 award, including any appeals from or modifications or reversals of any order related thereto, shall  
11 not operate to modify, reverse, terminate, or cancel the Settlement Agreement, affect the releases  
12 provided for in the Settlement Agreement, or affect whether the Final Approval Order and  
13 Judgment becomes Final as defined herein.

14 **ARTICLE VII – RELEASES UPON EFFECTIVE DATE**

15 1. Binding and Exclusive Nature of Settlement Agreement

16 On the Effective Date, if it occurs, the Parties and each and every Settlement Class Member  
17 shall be bound by this Settlement Agreement and shall have recourse exclusively to the benefits,  
18 rights, and remedies provided hereunder. No other action, demand, suit or other claim may be  
19 pursued against the Released Parties with respect to the Class Released Claims.

20 2. Class Releases

21 On the Effective Date, if it occurs, the Releasing Parties shall be deemed to have, and by  
22 operation of this Settlement Agreement shall have, fully, finally and forever released, relinquished  
23 and discharged the Released Parties from any and all of the Class Released Claims.

24 3. Class Representatives' Individual Releases

25 On the Effective Date, if it occurs, the Class Representatives shall be deemed to have, and  
26 by operation of this Settlement Agreement shall have, fully, finally and forever released,  
27 relinquished and discharged the Released Parties from any and all of the Class Representatives'  
28 Individual Released Claims.

1           4.     Stay Of The Action

2           The Parties agree to request that the Court, in connection with Preliminary Approval, issue  
3 an immediate stay of the Action.

4           5.     Waiver of Unknown Claims

5           On the Effective Date, if it occurs, the Releasing Parties shall be deemed to have, and by  
6 operation of this Settlement Agreement shall have, with respect to the subject matter of the Class  
7 Released Claims and Individual Released Claims, expressly waived the benefits of any statutory  
8 provisions or common law rule that provides, in sum or substance, that a general release does not  
9 extend to claims which the party does not know or suspect to exist in its favor at the time of  
10 executing the release, which if known by it, would have materially affected its settlement with any  
11 other party. In particular, but without limitation, the Releasing Parties waive the provisions of  
12 California Civil Code § 1542 (or any like or similar state or federal statute or common law  
13 doctrine), and do so understanding the significance of that waiver. Section 1542 provides:

14                   **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**  
15                   **WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT**  
16                   **TO EXIST IN HIS OR HER FAVOR AT THE TIME OF**  
17                   **EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM**  
18                   **OR HER MUST HAVE MATERIALLY AFFECTED HIS OR**  
19                   **HER SETTLEMENT WITH THE DEBTOR.**

20           The releases provided for in this Settlement Agreement are limited to the Class Released Claims as  
21 defined in Article II(5) above and the Individual Released Claims as defined in Article II (14)  
22 above.

23           6.     Assumption of Risk

24           In entering into this Settlement Agreement, each of the Parties assumes the risk of any  
25 mistake of fact or law. If either Party should later discover that any fact which the Party relied upon  
26 in entering this Settlement Agreement is not true, or that the Party's understanding of the facts or  
27 law was incorrect, the Party shall not be entitled to modify, reform, or set aside this Settlement  
28 Agreement, in whole or in part, by reason thereof. The Parties agree that at the time this Settlement

1 Agreement was executed, there were unsettled issues of law, and the Parties agree to honor this  
2 Agreement regardless of developments in the law after execution; specifically, the Class  
3 Representatives and Class Counsel recognize and agree that, given these uncertainties in the law,  
4 the Class Representatives and Class Counsel are receiving valuable consideration for the settlement  
5 of the Action at this time and per the terms of this Agreement. The Parties will advocate for Court  
6 approval of this Settlement Agreement.

7 **ARTICLE VIII – LIMITATIONS ON USE OF SETTLEMENT AGREEMENT**

8 1. No Admission

9 Neither the acceptance by Iovate of the terms of this Settlement Agreement nor any of the  
10 related negotiations or proceedings constitutes an admission with respect to the merits of the claims  
11 alleged in the Complaint, the validity of any claims that could have been asserted by any of the  
12 Settlement Class Members in the Complaint, or the liability of Iovate in the Action. Iovate  
13 specifically denies any liability or wrongdoing of any kind associated with the claims alleged in the  
14 Action. Neither the acceptance by Garcia and Branca of the terms of this Settlement Agreement,  
15 nor any of the related negotiations or proceedings constitutes an admission with respect to the  
16 merits of the claims alleged in the Action.

17 2. Limitations on Use

18 This Settlement Agreement shall not be used, offered, or received into evidence in the  
19 Action for any purpose other than to enforce, to construe, or to finalize the terms of the Settlement  
20 Agreement or to obtain the preliminary and final approval by the Court of the terms of the  
21 Settlement Agreement. Neither this Settlement Agreement nor any of its terms shall be offered or  
22 received into evidence in any other action or proceeding except that Iovate may file this Settlement  
23 Agreement or the Judgment in any action that may be brought against a Released Party in order to  
24 support a defense or counterclaim based on principles of res judicata, collateral estoppel, release,  
25 good faith settlement, judgment bar, reduction, or any other theory of claim preclusion or issue  
26 preclusion or similar defense or counterclaim.

1           3.       No Public Statements Without Agreement of the Parties

2           The Parties and their counsel agree that no Party or counsel who is a signatory to this  
3 Settlement Agreement will comment publicly in any form regarding this Settlement or litigation  
4 without prior approval of all Parties and counsel, other than to issue a press release substantially in  
5 the form of Exhibit E attached hereto. Any disputes among the Parties regarding publicity  
6 associated with this Settlement shall be submitted to this court for expedited review and  
7 determination.

8           **ARTICLE IX – FILING OF AMENDED CLASS ACTION COMPLAINT ADDING KEVIN**  
9                                       **BRANCA AS ADDITIONAL NAMED PLAINTIFF**

10          1.       Filing of Amended Class Action Complaint

11          Pursuant to this Settlement Agreement, the Parties hereto agree that Branca shall be added as  
12 a named plaintiff to the Action via an amended class action complaint that shall be submitted to the  
13 Court for filing via a stipulation between the Parties hereto.

14                                       **ARTICLE X – MISCELLANEOUS PROVISIONS**

15          1.       No Assignment

16          Each Party represents, covenants, and warrants that she or it has not directly or indirectly  
17 assigned, transferred, encumbered, or purported to assign, transfer, or encumber any portion of any  
18 liability, claim, demand, cause of action, or rights that she or it herein releases.

19          2.       Binding On Assigns

20          This Settlement Agreement shall be binding upon and inure to the benefit of the Parties and  
21 their respective heirs, trustees, executors, successors, and assigns.

22          3.       Captions

23          Titles or captions contained herein are inserted as a matter of convenience and for reference,  
24 and in no way define, limit, extend, or describe the scope of this Settlement Agreement or any  
25 provision hereof. Each term of this Settlement Agreement is contractual and not merely a recital.

26          4.       Settlement Class Member Signatures

27          It is agreed that, because the Settlement Class Members are so numerous, it is impractical to  
28 have each Settlement Class Member execute this Settlement Agreement. The Notice will advise all

1 Settlement Class Members of the binding nature of the Releases and of the remainder of this  
2 Settlement Agreement, and in the absence of a valid and timely Request for Exclusion, such Notice  
3 shall have the same force and effect as if each Settlement Class Member executed this Settlement  
4 Agreement.

5 5. Construction

6 The Parties agree that the terms and conditions of this Settlement Agreement are the result  
7 of arms-length negotiations between the Parties and that this Settlement Agreement shall not be  
8 construed in favor of or against any Party by reason of the extent to which any Party, or his or its  
9 counsel, participated in the drafting of this Settlement Agreement.

10 6. Counterparts

11 This Settlement Agreement and any amendments hereto may be executed in one or more  
12 counterparts, and either Party may execute any such counterpart, each of which when executed and  
13 delivered shall be deemed to be an original and both of which counterparts taken together shall  
14 constitute but one and the same instrument. A facsimile or portable data file (PDF) signature shall  
15 be deemed an original for all purposes.

16 7. Governing Law

17 Construction and interpretation of the Settlement Agreement shall be determined in  
18 accordance with the laws of the State of California, without regard to the choice-of-law principles  
19 thereof.

20 8. Integration Clause

21 This Settlement Agreement, including the exhibits referred to herein, which form an integral  
22 part hereof, contains the entire understanding of the Parties with respect to the subject matter  
23 contained herein. There are no promises, representations, warranties, covenants, or undertakings  
24 governing the subject matter of this Settlement Agreement other than those expressly set forth in  
25 this Settlement Agreement. This Settlement Agreement supersedes all prior agreements and  
26 understandings among the Parties with respect to the settlement of the Action. This Settlement  
27 Agreement may not be changed, altered or modified, except in a writing signed by the Parties and  
28

1 approved by the Court. This Settlement Agreement may not be discharged except by performance  
2 in accordance with its terms or by a writing signed by the Parties.

3 9. Jurisdiction

4 The Court shall retain jurisdiction, after entry of the Final Approval Order and Judgment,  
5 with respect to enforcement of the terms of this Settlement, and all Parties and Settlement Class  
6 Members submit to the exclusive jurisdiction of the Court with respect to the enforcement of this  
7 Settlement and any dispute with respect thereto.

8 10. No Collateral Attack

9 This Settlement Agreement shall not be subject to collateral attack by any Settlement Class  
10 Member at any time on or after the Effective Date. Such prohibited collateral attacks shall include,  
11 but shall not be limited to, claims that a Settlement Class Member's claim was improperly denied,  
12 that the payment to a Settlement Class Member was improperly calculated, and/or that a Settlement  
13 Class Member failed to receive timely notice of the Settlement Agreement.

14 11. Parties' Authority

15 The signatories hereto represent that they are fully authorized to enter into this Settlement  
16 Agreement and bind the Parties to the terms and conditions hereof.

17 12. Receipt Of Advice Of Counsel

18 The Parties acknowledge, agree, and specifically warrant to each other that they have read  
19 this Settlement Agreement, have received legal advice with respect to the advisability of entering  
20 into this Settlement, and fully understand its legal effect.

21 13. Waiver Of Compliance

22 Any failure of any Party to comply with any obligation, covenant, agreement, or condition  
23 herein may be expressly waived in writing, to the extent permitted under applicable law, by the  
24 Party or Parties entitled to the benefit of such obligation, covenant, agreement, or condition. A  
25 waiver or failure to insist upon compliance with any representation, warranty, covenant, agreement,  
26 or condition shall not operate as a waiver of, or estoppel with respect to, any subsequent or other  
27 failure.  
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14. Settlement Conditioned on Certain Matters

This entire Settlement Agreement is contingent upon the Parties reaching agreement on the contents of the exhibits and ancillary agreements hereto.

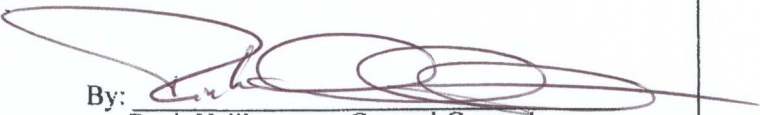
Dated: October 25 2013

By:   
Daniel Garcia

Dated: October 25, 2013

By:   
Kevin Branca

Dated: October 31, 2013

By:   
Roch Vaillancourt, General Counsel  
On behalf of Iovate Health Sciences U.S.A. Inc.




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**APPROVED AS TO FORM:**

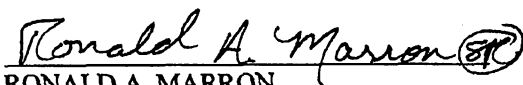
Dated: October 25, 2013

KIRTLAND & PACKARD LLP

By:  for MLK  
MICHAEL LOUS KELLY  
Attorneys for Plaintiff Daniel Garcia, and the  
proposed class

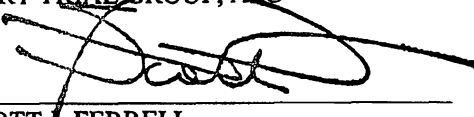
Dated: October \_\_, 2013

LAW OFFICES OF RONALD A. MARRON

By:  (RM)  
RONALD A. MARRON  
Attorneys for Plaintiff Kevin Branca, and the  
proposed class

Dated: October 31, 2013

NEWPORT TRIAL GROUP, APC

By:   
SCOTT FERRELL  
Attorneys for Iovate Health Sciences U.S.A.  
Inc.