IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PAMELA MILLER, RANDY HOWARD, DONNA PATTERSON and MARY TOMPKINS, on behalf of themselves and all others similarly situated, Plaintiffs, v. **BASIC RESEARCH, LLC, et al.,** Defendants.	Case No. 2:07-cv-00871 Judge Ted Stewart Magistrate Judge Dustin B. Pead

PARTIES' JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM IN SUPPORT THEREOF

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In this certified nationwide class action, Plaintiffs[1] and Defendants[2] (collectively "the Parties") hereby submit their Memorandum in Support of their Joint Motion for Preliminary Approval of Class Action Settlement.

I. MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs and Defendants hereby move for an Order preliminarily approving the terms of settlement of this nationwide class action, as set forth in the Parties' "Settlement Agreement and General Release" dated February 18, 2015 (the "Settlement Agreement").[3] The Parties request that this Court enter an Order: (1) preliminarily approving the terms of the proposed settlement (the "Settlement"), as set forth in the Settlement Agreement; (2) approving the form and method for providing notice of the Settlement to the Class; and (3) scheduling a final approval hearing at which time the Court will consider the request for final approval of the Settlement, payment of attorneys' fees and expenses, and entry of the Order and Final Judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

In or around February 2006, Basic Research, through Dynakor, began marketing, distributing and selling a weight-loss dietary supplement called Akävar 20/50 ("Akävar"). In November 2007, Plaintiffs Miller, Howard, and Patterson filed their Class Action Complaint styled *Miller, et al. v. Basic Research, Inc., et al*., Case No. 2:07-cv-0087, in this Court asserting,

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[1] The Plaintiffs are Pamela Miller, a citizen of Arizona ("Miller"), Randy Howard, a citizen of Illinois ("Howard"), Donna Patterson, a citizen of Washington, D.C. ("Patterson"), and Mary Tompkins, a citizen of California ("Tompkins").

[2] Defendants are Basic Research, LLC ("Basic Research"), Dynakor Pharmacal, LLC ("Dynakor"), Western Holdings, LLC, Bydex Management, LLC, Dennis Gay ("Gay"), Daniel B. Mowrey, Ph.D. ("Mowrey") and Mitchell K. Friedlander ("Friedlander").

[3] *See* Declaration of Scott R. Shepherd ("Shepherd Decl."), Exhibit A, filed herewith.

among other things, claims against Defendants under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Utah Pattern of Unlawful Activity Act, and the Utah Consumer Sales Practices Act (the "Litigation").

Defendants' initial motion to dismiss Plaintiffs' Complaint was granted in April 2008, with leave granted to Plaintiffs to replead. In May 2008, Plaintiffs filed their Amended Complaint. Defendants' motion to dismiss that pleading was granted in part and denied in part in October 2008. *Miller v. Basic Research,* 2008 U.S. Dist. LEXIS 87655, 2008 WL 4755787 (D. Utah Oct. 27, 2008). On November 17, 2008, Defendants filed their Answer to Plaintiffs' Amended Complaint.

In December 2007, Plaintiff Tompkins filed an action in the Superior Court of the State of California, Sacramento County, entitled *Tompkins v. Basic Research, et al.,* Case No. 34-2007-00882581 CU-MC-CDS (the "*Tompkins* Action"), naming as defendants Basic Research, Dynakor, Western Holdings, Gay, Mowrey, and Friedlander, and asserting claims under California's Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act. In February 2008, these Defendants removed the *Tompkins* Action to the United States District Court for the Eastern District of California, pursuant to the provisions of the federal Class Action Fairness Act. On April 22, 2008, that district court denied Tompkins' motion to remand the Tompkins Action to state court, and granted Defendants' motion seeking the transfer of the *Tompkins* Action to this Court. *Tompkins v. Basic Research LLC,* 2008 U.S. Dist. LEXIS 81411, 2008 WL 1808316 (E.D. Cal. Apr. 22, 2008). The *Tompkins* Action was docketed in this Court as Case No. 2:08-cv-00313-DB. Pursuant to a motion filed by Plaintiffs Miller, Howard, and Patterson, the *Tompkins* Action was consolidated into the Litigation by Order dated July 10, 2008.

After completing class certification discovery,[4] in November 2009 Plaintiffs filed their motion for nationwide class certification. Dkt. No. 62. In September 2010, this Court issued a Memorandum Decision certifying a nationwide class. *Miller v. Basic Research,* 285 F.R.D. 647 (D. Utah 2010). Defendants sought Rule 23(f) appellate review, which the Court of Appeals for the Tenth Circuit denied. *Miller v. Basic Research,* 2010 U.S. App. LEXIS 27778 (10th Cir. Nov. 2, 2010). On October 25, 2010, Defendants filed a petition for rehearing on their Petition for Permission to Appeal. On November 2, 2010, the Tenth Circuit denied that petition by a decision of 2-1 with a written dissent.

In March 2011 and in response to the written dissent, this Court issued a Memorandum Decision clarifying the Class definition, approving Plaintiffs' proposed nationwide Class notice program, and denying Defendants' motion to stay the proceedings. *Miller v. Basic Research,* 2011 U.S. Dist. LEXIS 21521, 2011 WL 818150 (D. Utah Mar. 2, 2011). Pursuant to this Court's Order, the Class notice program was carried out in Spring 2011, resulting in 19 requests by Class members to be excluded from the Litigation.[5]

Thereafter, the Parties and their counsel continued with merits discovery. From the inception of the Litigation, each Party has conducted extensive discovery into the facts and documents related to the Litigation, including reviewing approximately 16 million pages of documents produced to Plaintiffs by Defendants and by third parties, documents produced to Defendants by Plaintiffs, responses to written discovery requests, sworn depositions of all the Plaintiffs, depositions of various of Defendants' employees, and depositions of expert witnesses

[4] At Defendants' request, this Court ordered discovery bifurcated into class certification and merits discovery.

[5] Six Canadian citizens, who are not Class members, also submitted opt-out requests.

for all Parties.

On September 10, 2012, the Parties engaged in a mediation conducted in San Francisco, California, with the assistance of Antonio Piazza, a widely respected mediator. At the end of the day, the Parties executed a Memorandum of Understanding (the "MOU"). Over the next three months, the Parties attempted to formally document the terms and conditions of the Settlement. Plaintiffs' Counsel prepared an initial draft of the Settlement Agreement. Defendants and their counsel reviewed the draft and sent Plaintiffs' counsel their proposed edits. In December 2012, however, efforts to finalize a settlement agreement broke down.

In December 2012, Plaintiffs filed a motion to enforce the parties' nationwide class action settlement. Dkt. No. 263. Following a hearing held on March 14, 2013, this Court issued its ruling granting Plaintiffs' motion to enforce. *Miller v. Basic Research,* 2013 U.S. Dist. LEXIS 40553, 2013 WL 1194721 (D. Utah Mar. 22, 2013). On April 1, 2013, Defendants filed a notice of appeal to the Tenth Circuit Court of Appeals. Dkt. No. 281. This Court then denied Defendants' motion seeking a stay of proceedings, but suspended the due date for submission of the Parties' joint motion for preliminary approval of the settlement until the Tenth Circuit ruled on Defendants' appeal. *Miller v. Basic Research,* 2013 U.S. Dist. LEXIS 56748, 2013 WL 1654760 (D. Utah Apr. 16, 2013). The Tenth Circuit Court of Appeals ordered the Parties to brief jurisdictional issues, and then ordered merits briefing. Oral argument before the Tenth Circuit panel was held in Denver on November 18, 2013. In May 2014, the Tenth Circuit issued a published opinion denying Defendants' appeal for lack of jurisdiction. *Miller v. Basic Research,* 750 F.3d 1173 (10th Cir. 2014). Defendants filed a petition for rehearing and/or rehearing *en banc*, which was denied by the Tenth Circuit on June 19, 2014.

On July 21, 2014, Plaintiffs filed their own motion requesting preliminary approval of the

Settlement. Dkt. No. 298. On August 1, 2014, Defendants filed a motion seeking preliminary approval of the MOU the parties had executed after their September, 2012 mediation. Dkt. No 299. On December 23, 2014, this Court issued a Memorandum Decision and Order again directing the parties to file a joint motion for preliminary approval of the Settlement on or before January 5, 2015. Dkt. No. 306. At Defendants' request, this deadline was extended to January 20, 2015. Dkt. No. 308. Thereafter, the deadline again was extended, first to February 3, 2015 (Dkt. No. 312), and then to February 18, 2015. Dkt. No. 314. During the period of these extensions, the Parties were able to work out all remaining differences, and now present the Court with their Settlement.

III. REASONS FOR THE SETTLEMENT

Plaintiffs' Counsel have conducted a thorough investigation into, and analysis of, the facts and the applicable federal and state law relating to the matters at issue in the Litigation. They have taken depositions of Defendants' employees and experts and have interviewed numerous witnesses, and they have reviewed many millions of pages of material produced by Defendants concerning their sales and marketing practices and other factors that bear upon Plaintiffs' claims. All of the Plaintiffs and several of Plaintiffs' expert witnesses, as well as expert witnesses for Defendants, have been deposed. Plaintiffs' counsel have considered carefully the likelihood of success in the Litigation and the likely total damages that could be recovered against the Defendants. They have conducted extensive arm's-length settlement negotiations over the course of several years and have determined, after taking into account the substantial benefits conferred on the Class by the Settlement, that the Settlement would be fair, reasonable, and adequate and in the best interests of the Class.

Every settlement is necessarily the result of a risk-benefit analysis that requires an

evaluation of the merits of the claims and defenses asserted, the likelihood of successfully and maintaining class certification and thereafter being able to provide benefits to the Class members, and the burdens and risks of litigation. Here, Plaintiffs have alleged that the Defendants deliberately misrepresented the Akävar product to consumers. Nevertheless, throughout the Litigation, mediation and negotiation processes, Defendants have proffered a host of factual and legal defenses, explanations and arguments concerning their conduct and the Akävar product that must be weighed in the settlement analysis, and that create risk regarding not only the ultimate outcome of the class action but also the extent of the success that the Class could achieve even if the ultimate outcome were favorable to Plaintiffs. In addition to the general risks attendant in every litigation, these arguments include issues of proof at trial, the inherent risk when a case devolves to a "battle of the experts," and establishing proximate cause and damages, as well as various substantive case-specific risks. Moreover, this benefit must be compared to the risk that no recovery might be achieved after a contested trial and likely appeals, possibly years into the future.

In particular, Plaintiffs faced the risks of the stringent standards imposed by recent court decisions impacting the federal RICO claim, the inherent difficulties of conducting complex litigation, the difficulty of establishing that Defendants' sales practices were unlawful and misleading, and that Defendants' knew this, and the problems associated with explaining scientific evidence to a jury. Moreover, during the time that this matter was proceeding through Plaintiffs' Motion to Enforce, Defendants' Tenth Circuit Appeal, and the following proceedings over the past months in this Court, these same Defendants (or a subset of them, including Defendants Basic Research, Dynakor, Friedlander, Gay and other Basic Research-affiliated entities) were granted summary judgment in a similar enforcement action relating to the Akävar

product brought against them by the Federal Trade Commission, and in that opinion Judge Waddoups found that Basic Research's advertising claims for Akävar, including the advertising slogan "eat all you want and still lose weight," are supported by competent and reliable scientific evidence. *Basic Research, LLC v. FTC,* No. 2:09-cv-0779-CW, 2014 U.S. Dist. LEXIS 169043 (D. Utah Nov. 25, 2014).

In all events, and especially in light of these risks, Plaintiffs' Counsel believe that the Settlement, which provides the opportunity for a full refund to Class members who purchased Akävar, represents an excellent result for Plaintiffs and the Class and merits preliminary approval.

IV. THE TERMS OF THE SETTLEMENT AND NOTICE PROGRAM

The Settlement resolves all claims of the Class against all Released Parties. The Settlement Agreement provides that Defendants will provide a refund to any Class member who submits a claim form, under penalty of perjury, in the amount of $25.00 per box purchased, or more, if the Class member can demonstrate through a receipt or a detailed credit card statement that the Class member actually paid more than $25.00 per box claimed.[6]

In addition, the Settlement Agreement provides for the form and manner of Class notice, the proof of claim procedures, the procedure for objecting to any terms of the Settlement, and the procedure by which Plaintiffs' Counsel will apply for attorneys' fees and reimbursement of expenses incurred in prosecuting this Litigation.

V. SETTLEMENT ADMINISTRATION AND NOTICE

Defendants will retain a third party administrator, Digital Settlement Group LLC (the

[6] During the Parties' discussions leading to the revised Settlement Agreement, Defendants provided evidence to Plaintiffs' counsel showing that the average retail sale price of the Akävar product was in the range of $25.00. Shepherd Decl., ¶ 7.

"Administrator") to administer the Settlement.

Notice to the Class will be accomplished by a combination of direct and publication notice. The Administrator will send the short-form Notice, in substantially the same form as Exhibit C to the Settlement Agreement, via electronic mail to all purchasers of the Products whose names and addresses Defendants possess.

The Administrator will place an advertisement of the settlement with a corresponding link to the dedicated Settlement website on various websites for a period of 30 days, commencing within thirty (30) days of the entry of the Preliminary Approval Order.

The long-form Notice, in substantially in the same form as the Notice attached as Exhibit B to the Settlement Agreement, will be posted on the Internet at a dedicated Settlement website established by the Settlement Administrator commencing on the first date on which Notice is published under this Settlement Agreement. The Parties respectfully submit that the proposed Class notice requirement meets the requirements of Rule 23(e)(1). *See generally* 3 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 8:30, at 318-324 (5th ed. 2013) (discussing Internet-based class notice campaigns as effective supplement to direct notice to class members via electronic mail).

VI. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT PRELIMINARY APPROVAL

A. The Role Of This Court In Preliminary Approval Of A Class Action Settlement

The approval of a proposed settlement of a class action suit is a matter within the broad discretion of the trial court. *United States v. Hardage*, 982 F.2d 1491, 1495 (10th Cir.1993). Preliminary approval does not require the trial court to answer the ultimate question of whether a proposed settlement is fair, reasonable and adequate. Rather, that determination is made only

after notice of the settlement has been given to the members of the Class and after they have been given an opportunity to voice their views of the settlement. *See In re Crocs, Inc. Secs. Litig.,* 2013 U.S. Dist. LEXIS 122593, *10-11, 2013 WL 4547404 (D. Colo. Aug. 28, 2013); 5 James Wm. Moore *et al.*, MOORE'S FEDERAL PRACTICE § 23.83[1], at 23-336.2 to 23-339 (3d ed. 2002).

Courts have also noted that the standard for preliminary approval is less rigorous than the analysis at final approval. *See, e.g., Crocs,* 2013 U.S. Dist. LEXIS 122593, at *10-11; *Karvaly v. eBay, Inc*., 245 F.R.D. 71, 80 (E.D.N.Y. 2007); *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994) (holding that the issue at preliminary approval is whether there is probable cause to justify notifying class members of proposed settlement); *In re Bromine Antitrust Litig*., 203 F.R.D. 403, 416 (S.D. Ind. 2001) (bar for obtaining preliminary approval of class action settlement is low).[7]

In considering a potential settlement, the trial court need not reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute, *see City of Detroit v. Grinnell Corp*., 495 F.2d 448, 456 (2d Cir. 1974), and need not engage in a trial on the merits. *Officers for Justice v. Civil Service Comm'n.*, 688 F.2d 615 (9th Cir. 1982).[8] The

[7] Frequently, courts are asked as part of the preliminary approval process to conditionally certify a settlement class at the same time as they approve the settlement. In that situation, "district courts must be 'even more scrupulous than usual' when examining the fairness of the proposed settlement." *In re Motor Fuel Temp. Sales Pracs. Litig.,* 271 F.R.D. 263, 270 (D. Kan. 2010) (*quoting In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 534 (3d Cir. 2004)); *accord Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, of course, such heightened scrutiny is not mandated because this Court certified the nationwide Class in 2010.

[8] Courts in this circuit (and other circuits) have followed this analysis in deciding whether preliminary approval is appropriate. *See Arata v. Nu Skin Int'l.,* 5 F.3d 534 (table), 1993 U.S. App. LEXIS 21747, *7, 1993 WL 321710 (9th Cir. July 14, 1993) (noting, in approving settlement, that "district court evaluated the proposed settlement and granted preliminary approval . . . in accordance with the procedures outlined in the Manual for Complex Litigation");

relevant inquiry is "to [weigh] the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983) (*quoting Carson v. American Brands, Inc.*, 450 U.S. 79, 88 (1981)).

B. Likelihood Of Success On The Merits

Assessing the likelihood of Plaintiffs' success on the merits necessarily requires a judgment and evaluation by counsel based upon a comparison of the terms of the compromise with the likely rewards of litigation. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (quoting *Protective Committee for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424-425 (1968)). Therefore, many courts recognize that the opinion of experienced counsel supporting the settlement is entitled to considerable weight. *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 852 (E.D. La. 2007) (because counsel is the court's main source of information about settlement, the court will give weight to class counsel's opinion regarding fairness of settlement); *Smith v. Dominion Bridge Corp*., 2007 U.S. Dist. LEXIS 26903, *21, 2007 WL 1101272 (E.D. Pa. Apr. 11, 2007) (same); *Hughes v. Microsoft Corp*., 2001 U.S. Dist. LEXIS 5976, *20-21, 2001 WL 34089697 (W.D. Wash. Mar. 26, 2001) (in determining whether to approve settlement, court keeps in mind unique ability of class counsel to assess potential risks and rewards of litigation); *Weinberger*, 698 F.2d at 74 (same). Class counsels' opinion should be presumed reasonable because they are in the best position to

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Livingston v. Toyota Motor Sales USA, Inc., 1995 U.S. Dist. LEXIS 21757, *23-24, 2011 WL 2313604 (N.D. Cal. May 30, 1995) (preliminary approval recommended where special master concludes that proposed settlement "[fell] within the range of possible approval" because "(a) the negotiations occurred at arm's-length; (b) there was sufficient discovery; [and] (c) the proponents of the settlement are experienced in similar litigation"); *In re Telectronics Pacing Sys., Inc.,* 137 F. Supp. 2d 985, 1015-1016 (S.D. Ohio 2001) (same, *citing* Federal Judicial Center. MANUAL FOR COMPLEX LITIGATION, § 30.44 (2d ed. 1985)); *In re NASDAQ Market-Makers Antitrust Litig.,* 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (same); *In re Mid-Atlantic Toyota Antitrust Litig*., 564 F. Supp. 1379, 1983-1384 (D. Md. 1983) (same).

evaluate fairness due to an intimate familiarity with the lawsuit. *Boyd v. Bechtel Corp*., 485 F. Supp. 610, 622 (N.D. Cal. 1979). For example, in *Lyons v. Marrud, Inc.*, Case No. 66 Civ. 415, 1972 WL 327, *2 (S.D.N.Y. June 6, 1972), the court noted that "[e]xperienced and competent counsel have assessed these problems and the probability of success on the merits. They have concluded that compromise is well-advised and necessary. The Parties' decision regarding the respective merits of their positions has an important bearing on this case." *See also Tuten v. United Airlines, Inc.,* 2013 U.S. Dist. LEXIS 156415, *7-8, 2013 WL 8480458 (D. Colo. Oct. 31, 2013).

Here, counsel for Plaintiffs have extensive experience in complex consumer protection litigation and believe this Settlement is fair, reasonable, and adequate in light of the facts and circumstances of this case. This conclusion should be afforded considerable weight by this Court, particularly because the Settlement was reached only after extensive arm's-length negotiations. *See* Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION, § 21.632, at 320-321 (4th ed. 2004).

C. Further Factors To Be Considered In Granting Preliminary Approval

The primary question raised by a request for preliminary approval is whether the proposed settlement is within the range of possible approval. "At the preliminary approval stage, the Court makes a preliminary evaluation of the proposed settlement and determines whether it has any reason not to notify the Class members or not to hold a fairness hearing." *In re Motor Fuel Temp. Sales Pracs. Litig.,*, 286 F.R.D. 488, 492 (D. Kan. 2012) (*citing Am. Med. Ass'n. v. United Healthcare Corp*., 2009 U.S. Dist LEXIS 45610, *3, 2009 WL 1437819 (S.D.N.Y. May 19, 2009), and *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982)). This preliminary determination establishes an initial presumption of fairness when, in addition to a settlement being in a range of reasonableness, the court finds that (1) the negotiations occurred at arm's-

length; (2) there was sufficient discovery; and (3) the proponents of the settlement are experienced in similar litigation. *See* 4 William B. Rubenstein, NEWBERG ON CLASS ACTIONS, § 13.13 (5th ed. 2014). Here, the Settlement meets all of these criteria.

1. The Settlement Is The Product Of Serious, Informed, And Non-Collusive Negotiations

This Settlement is the result of countless hours of negotiations over the years. Over the course of the Litigation, Plaintiffs' counsel, on several occasions, raised the possibility of settlement and suggested to Defendants' counsel various settlement frameworks. Based upon the Parties' years of experience litigating this action, and their familiarity with the factual and legal issues involved the Parties were ultimately able to negotiate the contours of a fair, adequate and reasonable settlement, taking into account the costs and risks of continued litigation.

Only after these negotiations were the Parties able to achieve a mutually acceptable resolution of a portion of Plaintiffs' and Class members' claims. These negotiations were hard-fought and were conducted at arm's-length.

2. Class Certification Discovery and Merits Discovery

To understate, discovery in the Litigation was extensive and thorough. The Parties took numerous party, witness, and expert depositions, and the volume of documents produced and reviewed was, in Plaintiffs' Counsels' experience, unprecedented for an action of this type and size. This factor strongly supports preliminary approval.

3. Settlement Proponents' Experience

Defendants' negotiations were conducted initially by defense counsel Richard Burbidge and then-counsel (now District Judge) Robert Shelby and thereafter by defense counsel Christopher Sullivan, all of whom are experienced class action defense lawyers. Plaintiffs' negotiations were handled principally by Plaintiffs' counsel Kevin Roddy and Scott Shepherd,

whose experience and competence this Court analyzed at the time it certified the Class and appointed them Co-Lead Counsel.

VII. PROPOSED SCHEDULE OF EVENTS

The Parties propose the following schedule of events leading to the Fairness Hearing:

Notice to the Class	No later than 30 days after the Order Preliminarily Approving Settlement and Providing for Notice is signed (the Notice Date)
Last day for Class members to object	14 days prior to Final Approval Hearing
Date by which to file papers in support of settlement, and request for attorneys' fees and reimbursement of expenses	21 days prior to Final Approval Hearing
Replies, if any, in support of settlement	7 days prior to Final Approval Hearing
Final Approval Hearing	_____, 2015

This schedule is similar to those used in numerous class action settlements and provides due process to the Class with respect to their rights concerning the Settlement.

VIII. CONCLUSION

Counsel for the Parties reached this Settlement following extensive litigation and arm's-length negotiations. At this juncture, this Court need not answer the ultimate question: whether the Settlement is fair, reasonable, and adequate. This Court is being asked to permit notice of the terms of the Settlement to be provided to the Class and to schedule a hearing to consider any views expressed by Class members, the fairness of the Settlement, and Lead Plaintiffs' Counsels' request for an award of fees and reimbursement of expenses. It is clear that the Settlement

should be preliminarily approved and the proposed Order entered.

For all the above-stated reasons, the Parties respectfully request that this Court (1) preliminarily approve the proposed Settlement; (2) approve the form and manner of notice; and (3) set a hearing date for final approval of the proposed Settlement. A proposed Order is attached as Exhibit A to the Settlement Agreement.

Dated: February 18, 2015

Respectfully submitted,

SHEPHERD, FINKELMAN, MILLER & SHAH, LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, AND MEMORANDUM IN SUPPORT THEREOF** was served on this 18th day of February, 2015, by electronic transmission via the Court's CM/EMF notification system on the following:

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Exhibit A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PAMELA MILLER, RANDY HOWARD, DONNA PATTERSON and MARY TOMPKINS, on behalf of themselves and all others similarly situated, Plaintiffs, v. **BASIC RESEARCH, LLC, et al.,** Defendants.	**DECLARATION OF SCOTT R. SHEPHERD IN SUPPORT OF PARTIES' JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MEMORANDUM IN SUPPORT THEREOF** Case No. 2:07-cv-00871 Judge Ted Stewart Magistrate Judge Dustin B. Pead

I, SCOTT R. SHEPHERD, hereby declare that:

1. I am counsel for Plaintiffs, Pamela Miller, Randy Howard, Donna Patterson, and Mary Tompkins, and I am Co-Lead Counsel for the Nationwide Class in the captioned action. I have personal knowledge of the facts contained in this Declaration, and if called upon to testify would so testify.

2. I submit this Declaration in Support of the Parties' Joint Motion for Preliminary Approval of Class Action Settlement and Memorandum in Support Thereof in this action.

3. Attached hereto as Exhibit "1" is a true and correct copy of the executed Settlement Agreement and General Release and accompanying exhibits in this matter.

4. Attached to the Settlement Agreement as Exhibit "A" is a copy of the form of the proposed Preliminary Approval Order agreed to by the Parties.

4. Attached to the Settlement Agreement as Exhibit "B" is the proposed Long-Form Notice to the Class.

5. Attached to the Settlement Agreement as Exhibit "C" is the proposed Short-Form Notice to the Class.

6. Attached to the Settlement Agreement as Exhibit "D" is the proposed Claim Form.

7. During the negotiations leading up to the Settlement Agreement, Defendants provided Plaintiffs' Counsel with written documentation showing that the average retail price paid for the Akävar product at relevant times was in the range of $25.00 per package.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Media, Pennsylvania on February 18, 2015.

s/ Scott R. Shepherd
Scott R. Shepherd

Exhibit 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PAMELA MILLER, RANDY HOWARD, DONNA PATTERSON, and MARY TOMPKINS, On Behalf of Themselves And All Others Similarly Situated,	:	Case No. 2:07-cv-00871
Plaintiffs,	:	District Judge Ted Stewart
v.	:	Magistrate Judge Dustin B. Pead
BASIC RESEARCH, LLC, DYNAKOR PHARMACAL, LLC, WESTERN HOLDINGS, LLC, DENNIS GAY, BYDEX MANAGEMENT, LLC, DANIEL B. MOWREY, Ph.D., MITCHELL K. FRIEDLANDER and DOES 1-50,	:	
Defendants.	:	

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Settlement Agreement" or "Agreement" or "Settlement") is entered into between Plaintiffs, Pamela Miller ("Miller"), Randy Howard ("Howard"), Donna Patterson ("Patterson") and Mary Tompkins ("Tompkins") (collectively "Plaintiffs"), and their counsel, on the one hand, and Defendants Basic Research, LLC ("Basic Research"), Dynakor Pharmacal, LLC ("Dynakor"), Western Holdings, LLC ("Western"), Dennis Gay ("Gay"), Daniel B. Mowrey, Ph.D. ("Mowrey"), and Mitchell K. Friedlander ("Friedlander") (collectively "Defendants"), and their counsel, on the other (collectively, the "Parties").

RECITALS

A. In or around February 2006, Dynakor began marketing, and Basic began distributing, a dietary supplement marketed for weight loss under the trade name Akävar 20/50 ("Akävar"), whose functional weight loss formula consists of a proprietary blend of yerba mate, guarana and damiana ("YGD").

B. In November 2007, Miller, Howard and Patterson filed their Class Action Complaint styled *Miller, et al. v. Basic Research, Inc., et al.*, Case No. 2:07-cv-0087, in the United States District Court for the District of Utah asserting, among other things, claims against Defendants for allegedly false and misleading advertising, sales and marketing practices with respect to Akävar. Specifically, Plaintiffs alleged that Defendants' conduct violated the federal Racketeer Influenced and Corrupt Organizations Act, the Utah Pattern of Unlawful Activity Act, the Utah Consumer Sales Practices Act, and constituted fraud, negligent misrepresentation and unjust enrichment (the "Litigation").

C. Defendants' initial motion to dismiss Plaintiffs' Complaint was granted in April 2008 with leave granted to Plaintiffs to replead. In May 2008, Plaintiffs filed their Amended Complaint, and Defendants' motion to dismiss that pleading was granted in part and denied in part in October 2008.

D. In December 2007, Plaintiff Mary Tompkins filed an action in the Superior Court of the State of California, Sacramento County, entitled *Tompkins v. Basic Research, et al.,* Case No. 34-2007-00882581 CU-MC-CDS (the "*Tompkins* Action") against Basic Research, Dynakor, Western Holdings, Gay, Mowrey, and Friedlander, alleging claims under the California Unfair Competition Law, California False Advertising Law and the California Consumers Legal Remedies Act. In February 2008, the Defendants in the *Tompkins* Action removed the *Tompkins* Action to the United States District Court for the Eastern District of California, pursuant to the

provisions of the federal Class Action Fairness Act. On April 22, 2008, that Court denied Plaintiff Tompkins' motion to remand the *Tompkins* Action to state court, and granted Defendants' motion to transfer the *Tompkins* Action to the United States District Court for the District of Utah, where it was docketed as Case No. 2:08-cv-00313-DB. Pursuant to motion filed by Plaintiffs Miller, Howard and Patterson, the *Tompkins* Action was consolidated into the Litigation by Order dated July 10, 2008.

E. After completing class certification discovery, in November 2009 Plaintiffs filed their motion for certification of a nationwide class. In September 2010, the Court issued a Memorandum Decision certifying a nationwide class, defined as "those persons who purchased Akävar in reliance of the slogan 'Eat all you want and still lose weight.'" Defendants sought Rule 23(f) appellate review, which was denied by the Court of Appeals for the Tenth Circuit. On October 25, 2010, Defendants filed a petition for rehearing on their Petition for Permission to Appeal. On November 2, 2010, the Tenth Circuit denied that petition by a decision of 2-1 with a written dissent.

F. On March 2, 2011, the Court issued a Memorandum Decision: (1) modifying the Class definition to: "People who purchased Akävar after seeing or hearing the marketing slogan, 'Eat all you want and still lose weight,' during the relevant damages period"; (2) approving Plaintiffs' proposed nationwide class notice program; and (3) denying Defendants' motion to stay the proceedings. Pursuant to the Court's Order, the Class Notice program was implemented. Nineteen (19) Class members requested to be excluded from the Litigation.[1]

G. On November 25, 2014, the United States District Court for the Central District of Utah issued a Memorandum of Decision and Order granting summary judgment in favor of Basic Research, and finding that Basic Research's advertising claims for Akävar, including the

[1] Six Canadian citizens, who are not Class members, also submitted opt-out requests.

advertising slogan "eat all you want and still lose weight," are supported by competent and reliable scientific evidence. *See, e.g.* Memorandum Decision and Order, dated November 25, 2014, in *Basic Research, LLC, et al. v. Federal Trade Commission and The United States of America*, Case No. 2:09-cv-0779 CW.,

H. Defendants deny the material allegations raised in the Litigation, and deny any wrongdoing and any liability in connection with the claims asserted in the Litigation. Defendants have raised a number of defenses to the claims asserted and to certification of any class, and will vigorously defend this Litigation in the event the Settlement is not approved by the Court.

I. The Parties and their counsel have conducted extensive discovery and an extensive examination of the facts and documents related to the Litigation, including reviewing millions of documents produced to Plaintiffs by Defendants and by third parties, documents produced to Defendants by Plaintiffs, responses to written discovery requests, depositions of all the named Plaintiffs, depositions of certain of Defendants' employees, and depositions of experts for all parties.

J. The Litigation, if it were to continue, would likely result in expensive and protracted litigation, appeals and continued uncertainty as to outcome.

K. Plaintiffs and their counsel have concluded that this Settlement Agreement provides substantial benefits to Plaintiffs and to members of the Class (as defined below), and resolves all issues that were or could have been raised in the Litigation without further prolonged litigation and the risks and uncertainties inherent in litigation.

L. Plaintiffs and their counsel have concluded that this Settlement Agreement is fair, reasonable, and adequate, and is in the best interests of the Class.

M. Defendants consent to the Settlement Agreement solely to avoid the expense, inconvenience, and inherent risk of litigation, as well as the concomitant disruption of their business operations.

N. Nothing in this Settlement Agreement shall be construed as an admission or concession by Defendants of the truth of any allegations raised in the Litigation, or of any fault, wrongdoing, or liability of any kind.

O. This Settlement Agreement, its terms, documents related to it, and the negotiations or proceedings connected with it shall not be offered or received into evidence in the Litigation, or any other action or proceeding to establish or as evidence of any liability or admission by Defendants.

NOW, THEREFORE, in consideration of the foregoing, and the mutual covenants, promises and general releases set forth below, the Parties hereby agree as follows:

PROPOSED CLASS FOR SETTLEMENT PURPOSES

1. **The Settlement Class.** For purposes of this Settlement Agreement, the Settlement Class is defined as:

> All persons in the United States who, from November 1, 2003, through the date of the Final Approval Order, purchased Akävar for personal consumption and not for resale after seeing or hearing the marketing slogan "Eat all you want and still lose weight."

2. **Settlement Class Counsel.** Pursuant to the Court's Class Certification Order, class counsel ("Class Counsel") are identified as follows:

Scott R. Shepherd
Shepherd, Finkelman, Miller & Shah, LLP
35 E. State Street
Media, PA 19063

Kevin P. Roddy
Wilentz, Goldman & Spitzer, P.A.

90 Woodbridge Center Drive, Suite 900
Woodbridge, NJ 07095

3. **Settlement Purposes Only**. Nothing in this Settlement Agreement shall be construed as acquiescence by any of the Defendants in the certification of the Class. In the event that the Settlement Agreement is terminated pursuant to its terms or is not approved in all respects by the Court, or such approval is reversed, vacated, or modified in any respect by this or any other court, Defendants reserve all rights to oppose class certification or to seek to decertify the Class, and the Litigation shall proceed and no reference to the Settlement, this Settlement Agreement, the definition of the Settlement Class, or any documents, communications, or negotiations related in any way thereto shall be made for any purpose in this Litigation or any other action or proceeding.

BENEFITS TO THE CLASS

4. **Payment of Claims**. Defendants will pay for (a) All Valid Claims (as defined below) submitted by Class members pursuant to Paragraph 11 of this Agreement; (b) administrative costs of the settlement; (c) costs of notice; and (d) the awarded expenses and attorneys' fees to Class Counsel (as specified in Paragraph 5, below).

5. **Application for Attorneys' Fees, Expenses and Service Awards**. Class Counsel will apply to the Court for an aggregate award of attorneys' fees in the amount of $2,455,000 and actual expenses in the amount of $950,000. Plaintiffs will apply to the Court for awards in the amount of $5,000 each for their service in this action. Defendants will not oppose Class Counsel's application for fees and expenses, and Plaintiffs' application for service awards, in these amounts. Class Counsel and Plaintiffs agree that Defendants will not, under any circumstances, be liable to Class Counsel and/or Plaintiffs for more than $2,475,000 in combined attorneys' fees and service awards, or for more than $950,000 in actual expenses.

RELEASES

6. **Release by Plaintiffs and the Settlement Class.**

(a) As used in this Agreement, the "Releasing Parties" shall mean Plaintiffs, Pamela Miller, Randy Howard, Donna Patterson and Mary Tompkins, and each Class member (except persons who obtained proper and timely exclusion from the Class following the dissemination of Class Notice in 2011, as described in Paragraph F of the Recitals), on her/his own behalf and on behalf of her/his spouse, as well as the present, former and future respective administrators, agents, assigns, attorneys, executors, heirs, partners, predecessors-in-interest, and successors of any of the foregoing.

(b) As used in this Agreement, the "Released Parties" shall mean: (i) Basic Research, LLC, Dynakor Pharmacal, LLC, Western Holdings, LLC, Dennis Gay, Bydex Management, LLC, Daniel B. Mowrey, Ph.D., Mitchell K. Friedlander and their present, former, and future direct and indirect parent companies, affiliates, agents, employees, divisions, predecessors-in-interest, subsidiaries and successors; (ii) any person or entity in the chain of distribution of the Akävar Product (other than Class members) including, but not limited to, raw materials suppliers, manufacturers, distributors and retailers, and their present, former and future direct and indirect parent companies, affiliates, agents, employees, divisions, predecessors-in-interest, subsidiaries, and successors; and (iii) all of the afore-mentioneds' respective present, former, and future officers, directors, employees, shareholders, members, owners, agents, assigns, and attorneys.

(c) As used in this Agreement, the "Released Claims" shall mean any and all rights, duties, obligations, allegations, contentions, claims, actions, causes of action, or liabilities, whether arising under local, state, or federal law, whether by statute, contract, common law, or

equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated that arise out of or relate in any way to (i) the claims that were or could have been asserted in the Litigation regarding the Akävar Product; and (ii) the Akävar Product including, but not limited to, its efficacy or performance, as well as any advertising, labeling, marketing, claims, or representations of any type whatsoever regarding such product.

(d) The Releasing Parties hereby release and forever discharge the Released Parties from the Released Claims as of the date the Final Judgment Order (as defined below) is entered.

7. **Release of Unknown Claims.** The Releasing Parties acknowledge that they may have claims that are currently unknown and that the release in this Agreement is intended to and, will fully, finally and forever discharge all Released Claims, whether now asserted or unasserted, known or unknown, suspected or unsuspected, which now exist, or heretofore existed or may hereafter exist, which if known, might have affected their decision to enter into this release. Each Releasing Party shall be deemed to waive any and all provisions, rights and benefits conferred by any law of the United States, any state or territory of the United States, or any state or territory of any other country, or principle of common law or equity, which governs or limits a person's release of unknown claims. In making this waiver, the Releasing Parties understand and acknowledge that they may hereafter discover facts in addition to or different from those that are currently known or believed to be true with respect to the subject matter of this release, but agree that they have taken that possibility into account in reaching this Settlement Agreement and that, notwithstanding the discovery or existence of any such additional or different facts, as to which the Releasing Parties expressly assume the risk, they fully, finally and forever settle and release

any and all Released Claims, known or unknown, suspected or unsuspected, which now exist, or heretofore existed, or may hereafter exist, and without regard to the subsequent discovery or existence of such additional or different facts. The foregoing waiver includes, without limitation, an express waiver, to the fullest extent not prohibited by law, by Plaintiffs, the Class members and all Releasing Parties, of any and all rights under California Civil Code Section 1542, which provides:

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

In addition, Plaintiffs, Settlement Class members and all Releasing Parties also expressly waive any and all provisions, rights, and benefits conferred by any similar federal, state or foreign law or principle of common law or equity, that are similar, comparable, or equivalent, in whole or in part, to California Civil Code Section 1542.

8. **Litigation Bar.** In light of certain facts revealed in discovery, as well as the decision of the United States District Court for the Central District of Utah in the *Basic Research, LLC, et al. v. Federal Trade Commission, et al.* matter that "Basic Research has provided reliable evidence that Basic Research's advertising claims for Akävar are supported by competent and reliable scientific evidence," the Parties agree that Defendants can continue to market, advertise, and sell Akävar and can continue to use the advertising phrase "Eat All You Want And Still Lose Weight" in advertisements for Akävar. The Parties further agree that, as of the Effective Date, no Releasing Party may sue any Released Party based on any claim arising out of or related in any way to Akävar, including, but not limited to, its efficacy or performance,

as well as any advertising, labeling, marketing, claims, or representations of any type whatsoever regarding Akävar.

SETTLEMENT ADMINISTRATION

9. **Settlement Administration.** The Parties agree that Defendants shall retain a third-party administrator, Digital Settlement Group LLC ("Administrator") to administer the Settlement. Defendants shall bear all expenses associated with administering the Settlement.

10. **Class Notice.**

A. Direct Notice. Defendants shall send the short-form Notice via electronic mail to all purchasers of the Products whose names and addresses are presently in the possession of Defendants.

B. Publication Notice. Publication Notice to the Settlement Classes shall be provided in the forms approved by the Court in the Preliminary Approval Order, in the following formats:

i) Written notice by Internet ads. An advertisement of the Settlement with a corresponding link to the Settlement website shall run on various websites, as set forth in the notice plan agreed to by the Parties, for a period of thirty (30) days, commencing within twenty-one (21) days of the entry of the Preliminary Approval Order. Defendants shall retain an internet notice expert to conduct this notice. Defendants shall pay for such notice.

ii) Written notice by Internet posting. The long-form of the Publication Notice shall be posted on the Internet at a website established by the Settlement Administrator commencing on the first date on which Notice is published under this Settlement Agreement.

The Long and Short Form Notices shall be substantially in the same forms as the exemplars attached as Exhibits B and C, hereto.

11. **Claims Process**. Each Class member who purchased Akävar, and who has not already sought and obtained a refund of the purchase price, shall be entitled to submit a claim as described below:

(a) The Notice shall provide information regarding the filing of claims. Claim forms (Exhibit D) shall be available from the Settlement website. A claim shall be considered valid (a "Valid Claim") if it (i) is postmarked no later than sixty (60) days after the Fairness Hearing defined in Paragraph 14 below; (ii) contains all of the information and documentation required by the Settlement Agreement and Notice; and (iii) satisfies the terms of Paragraph 11(b). Only Class members who submit Valid Claims shall be entitled to a cash refund as set forth in this Paragraph 11.

(b) Class members who submit a claim containing a declaration, signed under penalty of perjury, that:

(i) affirms that he or she purchased Akävar, and saw the claim "Eat All That You Want and Still Lose Weight";

(ii) affirms that he or she has not already obtained a refund of the purchase price; and

(iii) identifies the (a) number of boxes of Akävar purchased; and (b) the location(s) and approximate date(s) of the purchase(s)

shall be entitled to receive a refund of $25.00 per box purchased, unless the Class Member provides proof of purchase (in the form of a receipt or detailed credit card statement) demonstrating that the class member paid more than $25.00 for each box claimed.

(c) Defendants and the Administrator will be responsible for reviewing all claims to determine their Validity. Any Settlement Class member seeking reimbursement for more than three (3) purchases may have his/her claim reviewed for potential fraud, and Defendants reserve the right to challenge any Settlement Class member's claim (irrespective of

number of purchases claimed) so long as Defendants have a good faith basis to challenge that claim. Any claim that does not comply with the terms of the Notice, claim form, or any applicable Court order shall be rejected as invalid. If a Settlement Class member elects to challenge a rejected claim, he or she must present the dispute to the Administrator, who shall, in turn, present it to Defendants and Class Counsel for consideration. If the Parties cannot resolve it to the satisfaction of the claimant, the disputed claim may be submitted to the Court for final resolution. As a convenience to the Parties and the Court, Defendants and Class Counsel may combine Settlement Class Members' notices and statements of contest into a single submission, or series of submissions, for the Court's review and decision.

SETTLEMENT APPROVAL PROCESS

12. **Preliminary Approval Order**. The Parties agree to petition the Court promptly after execution of this Settlement Agreement for an Order preliminarily approving the Settlement Agreement (the "Preliminary Approval Order"). A copy of the form of the proposed Preliminary Approval Order agreed to by the Parties is attached hereto as Exhibit A. The Preliminary Approval Order shall provide, *inter alia:*

(a) There is probable cause to believe that the Settlement proposed in this Agreement has been negotiated at arm's-length and is preliminarily determined to be fair, reasonable, adequate, and in the best interests of the Settlement Class for settlement purposes;

(b) Subject to the Court's consideration of additional evidence regarding the Notice at the Fairness Hearing (as defined below), and based on the documents submitted to the Court in connection with preliminary approval, the Notice and the proposed plan for giving notice fully complies with the requirements of Fed. R. Civ. P. 23 and due process, constitutes the

best notice practicable under the circumstances, and is due and sufficient notice to all persons entitled to notice of this Settlement;

(c) A final hearing on the Settlement proposed in this Agreement shall be held before the Court to determine whether the proposed Settlement is fair, reasonable and adequate, and whether it should be approved by the Court ("Fairness Hearing");

(d) In further aid of the Court's jurisdiction to review, consider, implement, and enforce the proposed Settlement, all Plaintiffs and Class members shall be preliminarily enjoined and barred from commencing, prosecuting, or otherwise litigating any action asserting any of the Released Claims, either directly, representatively, derivatively, or in any other capacity, whether by a complaint, counterclaim, defense, or otherwise, in any local, state, or federal court, or in any agency or other authority or forum wherever located. Any person or entity who knowingly violates such injunction shall pay the attorneys' fees and costs incurred by Defendants or any other Released Party as a result of the violation.

13. **Right to Object or Comment.** Any member of the Class may comment in support of or in opposition to the Settlement and may do so in writing, in person, or through counsel, at his or her own expense, at the Fairness Hearing. Except as the Court may order otherwise, no Class member objecting to the Settlement shall be heard and no papers, briefs, pleadings, or other documents submitted by any such Class member shall be received and considered by the Court unless such Class member shall both file with the Court and mail to Class Counsel and counsel for Defendants written objection with the caption, *Miller, et al. v. Basic Research, Inc., et al.*, Case No. 2:07-cv-00871, that includes: (a) the Class member's full name and current address; (b) a signed declaration that he or she is a member of the Settlement Class and that identifies the products purchased as well as the approximate date and location of

the purchases; (c) the specific grounds for the objection; (d) all documents or writings that such Class member desires the Court to consider; and (e) a notice of intention to appear (if any). Any Class member who fails to object in the manner prescribed herein shall be deemed to have waived his or her objections and forever barred from making any such objections in this action or in any other action or proceeding. While the statement described in subparagraph (b) is *prima facie* evidence that the objector is a member of the Class, Plaintiffs or Defendants or both may take discovery regarding the matter, subject to Court approval.

14. **Final Judgment and Order.** If this Settlement Agreement is preliminarily approved by the Court, the Parties shall jointly request at the Fairness Hearing that the Court enter final judgment (the "Final Judgment and Order"). The Fairness Hearing shall be held no earlier than twenty-one (21) days after the deadline for all Class members to object under Paragraph 13 of this Agreement. A copy of the form of the proposed Final Judgment and Order agreed to by the Parties is attached hereto as Exhibit B. The Final Judgment and Order shall provide, *inter alia*, that:

(a) The Settlement Agreement is fair, reasonable, and adequate and in the best interests of the Class;

(b) The Notice fully complied with the requirements of Fed. R. Civ. P. 23 and due process, constituted the best notice practicable under the circumstances, and was due and sufficient notice to all persons entitled to notice of this Settlement;

(c) The Released Claims are dismissed with prejudice as to all Released Parties, without fees or costs except as provided in this Settlement Agreement;

(d) Plaintiffs and members of the Class are permanently enjoined and barred

from commencing, prosecuting, or otherwise litigating, in whole or in part, either directly, representatively, derivatively, or in any other capacity, whether by a complaint, counterclaim, defense, or otherwise, in any local, state, or federal court, or in any agency or other authority or forum wherever located, the Released Claims. Any person or entity who knowingly violates such injunction shall pay the reasonable costs and attorney's fees incurred by Defendants or any other Released Party as a result of such violation; and

(e) The Court shall retain exclusive jurisdiction over this action, the Parties, and all Class members to determine all matters relating in any way to the Final Judgment and Order, the Preliminary Approval Order, or the Settlement Agreement, including, but not limited to, the administration, implementation, interpretation, or enforcement of such orders or Agreement.

15. **Finality of Judgment.** The Final Judgment and Order shall be deemed final on the later of: (a) the expiration of the time to appeal the Final Judgment and Order with no appeal having been filed; or (b) if any such appeal is filed, the termination of such appeal on terms which affirm the Final Judgment and Order or dismiss the appeal with no material modification of the Final Judgment and Order; and (c) the expiration of the time to obtain any further appellate review of the Final Judgment and Order ("Effective Final Judgment Date").

16. **Dates of Payment Obligations.** Defendants shall have no obligation to make any payments under this Settlement Agreement until the Court enters the Preliminary Approval Order. Except as otherwise provided in Paragraph 11, all payments of cash refunds will be made as expeditiously as possible but, in no event, any later than 120 days after the Effective Final Judgment Date. Defendants shall pay any attorneys' fees and costs awarded by the Court within thirty (30) days of the Court's entry of the Final Approval Order and Judgment.

17. **Option to Withdraw.** Either Defendants or Class Counsel, on behalf of the Class, shall have the option to withdraw from the Settlement Agreement, and thereby render this Settlement null and void, if (a) the other Party breaches any material provision of the Settlement Agreement or the Preliminary Approval Order, or fails to fulfill any material obligation hereunder or thereunder; (b) the Court fails to give final approval to any portion of the Settlement Agreement or any aspect of the Settlement by September 1, 2015; (c) the attorney general or other authorized officer of the United States or any state, or any representative of any local, state, or federal agency or branch of government, shall have intervened in the Litigation or advised the Court in writing of opposition to the terms of the Settlement Agreement, and the withdrawing Party reasonably believes such intervention or opposition will render impracticable or unlikely the final approval of the Settlement; or (d) upon such other grounds as may be agreed to by the Parties or permitted by the Court. Any election made by a Party to terminate this Agreement pursuant to this Paragraph shall be made no later than seven (7) days prior to the Fairness Hearing.

18. **Effect of Withdrawal/Rejection.** In the event that (a) either Party withdraws from the Settlement Agreement pursuant to Paragraph 17; (b) the Settlement Agreement, Preliminary Approval Order, and Final Judgment and Order are not approved in all material respects by the Court; or (c) the Settlement Agreement, Preliminary Approval Order, or Final Judgment and Order are reversed, vacated, or modified in any material respect by this or any other Court; then (i) the Settlement Agreement shall become null and void; (ii) Defendants shall cease to have any payment or other obligations, except for all notice and administrative costs incurred between the date that the Parties hereto submit this Settlement Agreement to the Court for approval and the date Class Counsel are notified that the Settlement Agreement has become

null and void; (iii) the Litigation may continue; and any and all orders entered pursuant to the Settlement Agreement shall be deemed vacated; provided, however, that if the Parties hereto agree to appeal jointly such ruling and the Settlement Agreement and Final Judgment and Order are upheld on appeal, then the Settlement Agreement and Final Judgment and Order shall be given full force and effect according to their terms.

MISCELLANEOUS PROVISIONS

19. **Interpretation**. This Settlement Agreement contains the entire agreement among the Parties hereto and supersedes any prior discussions, agreements or understandings among them. All terms are contractual. In the event of an alleged ambiguity, there will be no presumption or construction against either side as the drafter.

20. **Binding Effect**. The terms are and shall be binding upon each of the Parties hereto, their administrators, agents, assigns, attorneys, executors, heirs, partners, representatives, predecessors-in-interest, and successors, and upon all other persons claiming any interest in the subject matter hereto through any of the Parties hereto including any Class.

21. **Headings**. The headings contained in this Settlement Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Settlement Agreement.

22. **No Rescission on Grounds of Mistake**. The Parties acknowledge that they have made their own investigations of the matters covered by this Settlement Agreement to the extent they have deemed it necessary to do so. Therefore, the Parties agree that they will not seek to set aside any part of the Settlement Agreement on the grounds of mistake. Moreover, the Parties understand, agree, and expressly assume the risk that any fact not recited, contained, or embodied in the Settlement Agreement may turn out hereinafter to be other than, different from,

or contrary to the facts now known to them or believed by them to be true, and further agree that the Settlement Agreement shall be effective in all respects notwithstanding and shall not be subject to termination, modification, or rescission by reason of any such difference in facts.

23. **Amendment.** This Settlement Agreement may be amended or modified only by a written instrument signed by the Parties or their counsel. Amendments and modifications may be made without notice to the Class unless notice is required by law or by the Court.

24. **Construction.** For the purpose of construing or interpreting this Settlement Agreement, the Parties agree that it is to be deemed to have been drafted equally by all Parties hereto and shall not be construed strictly for or against any Party.

25. **Integration of Exhibits.** The exhibits to this Settlement Agreement are an integral and material part of the Settlement and are hereby incorporated and made a part of the Settlement Agreement.

26. **Jurisdiction.** The United States District Court for the District of Utah has jurisdiction over the Parties to this Settlement Agreement and the Class. Any action of any kind arising from or relating in any respect to this Settlement Agreement or the enforcement of any rights or obligations contained herein shall be filed exclusively in the United States District Court for the District of Utah.

27. **No Admission.** Neither this Settlement Agreement, nor any of its provisions, nor any of the documents (including, but not limited to, drafts of the Settlement Agreement, the Preliminary Approval Order, or the Final Judgment and Order), negotiations, or proceedings relating in any way to the Settlement, shall be construed as or deemed to be evidence of an

admission or concession by any person, including Defendants, and shall not be offered or received in evidence, or subject to discovery, in this or any other action or proceeding except in an action brought to enforce its terms or except as may be required by law or Court order. The provisions of this Paragraph shall become effective when this Settlement Agreement has been signed by the Parties and shall be binding on the Parties and their counsel regardless of whether the Settlement Agreement is otherwise rendered null and void pursuant to Paragraphs 17 and 18.

28. **Governing Law.** This Settlement Agreement shall be governed by and construed in accordance with the internal laws (as opposed to the conflicts of law provisions) of the State of Utah.

29. **Counterparts.** This Settlement Agreement may be executed in counterparts, and may be executed by facsimile, and as so executed shall constitute one agreement.

30. **No Media Statements.** Neither the Parties nor their counsel shall issue any press release, or make any statement to any media or press, regarding this Settlement, including any references on web sites maintained by Plaintiffs or their counsel, other than to state that the Litigation has been resolved on terms satisfactory to the Parties and contained in this Agreement.

Pamela Miller

PAMELA MILLER

_____

RANDY HOWARD

_____

DONNA PATTERSON

admission or concession by any person, including Defendants, and shall not be offered or received in evidence, or subject to discovery, in this or any other action or proceeding except in an action brought to enforce its terms or except as may be required by law or Court order. The provisions of this Paragraph shall become effective when this Settlement Agreement has been signed by the Parties and shall be binding on the Parties and their counsel regardless of whether the Settlement Agreement is otherwise rendered null and void pursuant to Paragraphs 17 and 18.

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PAMELA MILLER

RANDY HOWARD

DONNA PATTERSON

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PAMELA MILLER

RANDY HOWARD

DONNA PATTERSON

MARY TOMPKINS

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Woodbridge, NJ 07095
Telephone: 732-636-8000
Facsimile: 732-726-6686

BASIC RESEARCH, LLC

By: _____

DYNACOR PHARMACAL, LLC

By: _____

WESTERN HOLDINGS, LLC

By: _____

BYDEX MANAGEMENT, LLC

MARY TOMPKINS

Scott R. Shepherd
James C. Shah
Nathan C. Zipperian
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BASIC RESEARCH, LLC

By: _____

DYNACOR PHARMACAL, LLC

By: _____

WESTERN HOLDINGS, LLC

By: _____

BYDEX MANAGEMENT, LLC

By: _____

DENNIS GAY

DANIEL B. MOWREY, PhD.

MITCHELL K. FRIEDLANDER

Approved as to form:

Ronald F. Price
Christopher Sullivan
Jason Kerr
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5742 West Harold Gatty Drive
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Telephone: (801) 530-2900
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Attorneys for Defendants

By: _____

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MITCHELL K. FRIEDLANDER

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Facsimile: (801) 517-7192
Attorneys for Defendants

Exhibit A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PAMELA MILLER, RANDY HOWARD, DONNA PATTERSON and MARY TOMPKINS, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. BASIC RESEARCH LLC, DYNAKOR PHARMACAL, LLC, WESTERN HOLDINGS,LLC, BYDEX MANAGEMENT, L.L.C., DENNIS GAY, DANIEL B. MOWREY, Ph.D., MITCHELL K. FRIEDLANDER and DOES 1-50, Defendants.	Civil No. 2:07-cv-00871-TS

[PROPOSED] ORDER GRANTING THE PARTIES' JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

WHEREAS, Plaintiffs Pamela Miller, Randy Howard, Donna Patterson, and Mary Tompkins, and Defendants, Basic Research, LLC, Dynakor Pharmacal, LLC, Western Holdings, LLC, Bydex Management, LLC, Dennis Gay, Daniel B. Mowrey, Ph.D., and Mitchell K. Friedlander (collectively "the Parties") have entered into a Joint Stipulation of Settlement ("Settlement Agreement"), and filed the Parties' Joint Motion for Preliminary Approval of Class Action Settlement on February 18, 2015, after substantial motion practice, discovery and lengthy arms-length settlement discussions;

AND, WHEREAS, the Court has received and considered the Settlement Agreement,

including the accompanying exhibits, and the record in this Action;

AND, WHEREAS, the Parties have made an application, pursuant to Federal Rule of Civil Procedure 23(e), for an order preliminarily approving the settlement of this Litigation, and for its dismissal with prejudice upon the terms and conditions set forth in the Settlement Agreement;

AND, WHEREAS, the Court has reviewed the Parties' application and the supporting memorandum for such order, and has found good cause for same.

NOW, THEREFORE, IT IS HEREBY ORDERED:

The Settlement Agreement Is Preliminarily Approved and Final Approval Schedule Set

1. If not otherwise defined herein, all capitalized terms have the same meanings as set forth in the Settlement Agreement.

2. The Court hereby preliminarily approves the Settlement Agreement and the terms and conditions of settlement set forth therein, subject to further consideration at the Final Approval Hearing.

3. The Court has conducted a preliminary assessment of the fairness, reasonableness, and adequacy of the Settlement Agreement, and hereby finds that the settlement falls within the range of reasonableness meriting possible final approval. The Court therefore preliminarily approves the proposed settlement as set forth in the Settlement Agreement.

4. Pursuant to of the Federal Rule of Civil Procedure 23(e) the Court will hold a final approval hearing on _____, 2015, at_____a.m./p.m., in the Courtroom of the Honorable Ted Stewart, United States District Court for the District of Utah, 351 West Temple, Salt Lake City, Utah 84101, for the following purposes:

a. determining whether the proposed settlement of the Litigation on the terms

and conditions provided for in the Settlement Agreement is fair, reasonable and adequate and should be approved by the Court;

b. considering the application of Class Counsel for an award of attorneys' fees and expenses as provided for under the Settlement Agreement;

c. considering the application for service awards to the Plaintiffs as provided for under the Settlement Agreement;

d. considering whether the Court should enter the [Proposed] Final Judgment and the [Proposed] Final Order Approving Settlement;

e. considering whether the release by the Class Members of the Released Claims as set forth in the Settlement Agreement and the Final Order should be provided; and

f. ruling upon such other matters as the Court may deem just and appropriate.

5. The Court may adjourn the Final Approval Hearing and later reconvene such hearing.

6. Any Class Member may enter an appearance in the Litigation, at his or her own expense, individually or through counsel. All Class Members who do not enter an appearance will be represented by Class Counsel.

7. The Parties may further modify the Settlement Agreement prior to the Final Approval Hearing so long as such modifications do not materially change the terms of the settlement provided therein. The Court may approve the Settlement Agreement with such modifications as may be agreed to by the Parties, if appropriate, without further notice to Class Members.

8. Opening papers in support of final approval of the Settlement Agreement and any application for attorneys' fees and expenses and/or Plaintiffs' service awards must be filed with

the Court and served at least 21 days prior to the Final Approval Hearing. Reply papers, if any, must be filed and served at least 7 days prior to the Final Approval Hearing.

The Court Approves the Form and Method of Class Notice and Notice Plan

9. The Court approves, as to form and content, the proposed Long-form Notice and Short-form Notice (collectively the "Class Notice"), which are Exhibits B and C, respectively, to the Settlement Agreement on file with this Court as well as the Notice Plan as set forth in paragraph 10 of the Settlement Agreement.

10. The Court finds that the distribution of Class Notice substantially in the manner and form set forth in this Order and the Settlement Agreement meets the requirements of Federal Rule of Civil Procedure 23 and due process, is the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all Persons entitled thereto.

11. The Court approves the designation of Digital Settlement Group LLC to serve as the Court-appointed Settlement Administrator for the settlement. The Settlement Administrator shall disseminate Class Notice and supervise and carry out the notice procedure, the processing of claims, and other administrative functions, and shall respond to Class Member inquiries, as set forth in the Settlement Agreement and this Order under the direction and supervision of the Court.

12. The Court directs the Settlement Administrator to establish a Settlement Website, making available copies of this Order, the Class Notice, Claim Forms that may be downloaded and submitted by U.S. Mail, the Settlement Agreement and all exhibits thereto, and such other information as may be of assistance to Class Members or required under the Settlement Agreement.

13. The Settlement Administrator is ordered to substantially complete dissemination of the Class Notice no later than 30 days after the Court enters this Preliminary Approval Order.

14. The costs of the Class Notice, processing of claims, creating and maintaining the Settlement Website, and all other Claims Administrator and Class Notice expenses shall be paid by Defendants in accordance with the applicable provisions of the Settlement Agreement.

Procedure for Class Members to Participate In the Settlement

15. Class Members who wish to claim a settlement award must submit their Claim Form and supporting documentation no later than 90 days after the date first set by the Court for the Final Approval Hearing. Such deadline may be further extended without notice to the Class by Court order, by agreement between the Parties, or as set forth in the Settlement Agreement.

Exclusions from the Class

16. A list reflecting all previous requests for exclusions shall be filed with the Court by Plaintiffs at or before the Final Approval Hearing.

Procedure for Objecting to the Settlement

17. Any Class Member who desires to object to the proposed settlement, including the requested attorneys' fees and expenses or service awards to the Plaintiffs must timely file with the Clerk of this Court a notice of the objection(s), together with all papers that the Class Member desires to submit to the Court no later than fourteen (14) days before the date first set for the Final Approval Hearing (the "Objection Date"). The objection must also be served on Class Counsel and Defendant's counsel no later than the Objection Date. The Court will consider such objection(s) and papers only if such papers are received on or before the Objection Date provided in the Class Notice, by the Clerk of the Court and by Class Counsel and Defendants' counsel. In addition to the filing with this Court, such papers must be sent to each of the following persons:

Scott R. Shepherd
SHEPHED, FINKELMAN, MILLER & SHAH, LLP
35 E. State Street
Media, PA 19063

Kevin R. Roddy
WILENTZ, GOLDMAN &
SPITZER, P.A.
90 Woodbridge Center Drive, Suite 900
Woodbridge, NJ 07095

Christopher B. Sullivan
Ronald F. Price
Jason M. Kerr
PRICE PARKINSON & KERR, PLLC
5742 West Harold Gatty Drive
Salt Lake City, Utah 84116

18. The written objection must include: (a) a heading which refers to the Litigation; (b) the objector's name, address, telephone number and, if represented by counsel, of his/her counsel; (c) a statement that the objector purchased Akävar; (d) a statement whether the objector intends to appear at the Final Approval Hearing, either in person or through counsel; (e) a statement of the objection and the grounds supporting the objection; (f) copies of any papers, briefs, or other documents upon which the objection is based; and (g) the objector's signature.

19. Any Class Member who files and serves a written objection, as described in the preceding Section, may appear at the Final Approval Hearing, either in person or through counsel hired at the Class Member's expense, to object to any aspect of the fairness, reasonableness, or adequacy of this Agreement, including attorneys' fees. Class Members or their attorneys who intend to make an appearance at the Final Hearing must serve a notice of intention to appear on the Class Counsel identified in the Class Notice and to Defendants' counsel, and file the notice of appearance with the Court, no later than fourteen (14) days before the Final Approval Hearing.

20. Any Class Member who fails to comply with the provisions of the preceding paragraph shall waive and forfeit any and all rights he or she may have to appear separately and/or to object, and shall be bound by all the terms of the Settlement Agreement and by all proceedings, orders and judgments, including, but not limited to, the Release, in the Litigation.

21. Pending final determination of whether the settlement should be approved, neither the Class Representatives nor any Class Member, either directly, representatively, or in any other capacity, shall commence or prosecute against the Released Parties any action or proceeding in any court or tribunal asserting any of the Released Claims.

22. Counsel for the Parties are hereby authorized to utilize all reasonable procedures in connection with the administration of the settlement which are not materially inconsistent with either this Order or the terms of the Settlement Agreement.

DONE this ____ day of February, 2015.

BY THE COURT

_____
Honorable Ted Stewart
United States District Court Judge

Exhibit B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PAMELA MILLER, RANDY HOWARD, DONNA PATTERSON and MARY TOMPKINS, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. BASIC RESEARCH, LLC., DYNAKOR PHARMACAL, LLC, WESTERN HOLDINGS, LLC, DENNIS GAY, DANIEL B. MOWREY, Ph.D., MITCHELL K. FRIEDLANDER and DOES 1-50, Defendants.	Case No. 2:07-CV-00871 CLASS ACTION **NOTICE OF PROPOSED CLASS ACTION SETTLEMENT AND SETTLEMENT HEARING**

To: ALL PERSONS WHO PURCHASED THE AKÄVAR 20/50 DIETARY SUPPLEMENT PRODUCT, WITHIN THE UNITED STATES, NOT FOR RESALE AND HAVE NOT PREVIOUSLY RECEIVED A REFUND, BUT EXCLUDING THE DEFENDANTS, AND ANY ENTITY RELATED TO OR AFFILIATED WITH THE DEFENDANTS AND THEIR RESPECTIVE CURRENT OR FORMER OFFICERS, DIRECTORS OR EMPLOYEES, ANY JUDGE OR JUDICIAL OFFICER ASSIGNED TO THE CASE AND HIS OR HER IMMEDIATE FAMILY AND COUNSEL FOR THE DEFENDANTS.

WHY SHOULD I READ THIS NOTICE?

Your rights may be affected by this litigation. The purpose of this Notice is to inform you that the Court in this Action has preliminarily approved a proposed Settlement that would benefit persons who purchased the Akävar 20/50 dietary supplement product in the United States. You may be eligible to receive benefits under the Settlement proceeds if you purchased the Akävar 20/50 dietary supplement product and you have not previously received a refund for the product or previously exclude yourself from this lawsuit.

WHAT IS THIS LAWSUIT ABOUT?

This is an action brought pursuant to federal and state false advertising and unfair competition laws and related claims. Plaintiffs allege that Defendant Basic Research, LLC and the other Defendants advertised claims for "Akävar" in a false and misleading manner.

Defendants expressly deny that they did anything wrong and deny liability to the named Plaintiffs and to the Class Members for any claims relating to this lawsuit. By settling this lawsuit, Defendants are not admitting that they have done anything wrong. In fact, in a substantively similar case, the United States District Court for the Central District of Utah issued a Memorandum Decision and Order granting summary judgment in favor of Basic Research and against the Federal Trade Commission, finding that Basic Research's advertising claims for Akävar 20/50, including the advertising slogan "eat all you want and still lose weight," are supported by competent and reliable scientific evidence. *See, e.g.* Memorandum Decision and Order, dated November 25, 2014, in *Basic Research, LLC, et al. v. Federal Trade Commission and The United States of America*, Case No. 2:09-cv-0779 CW.

Nonetheless, Plaintiffs and Defendants have agreed to the Settlement described below.

IF YOU PURCHASED AKÄVAR 20/50 AND YOU WISH TO RECEIVE BENEFITS UNDER THE SETTLEMENT, YOU MUST COMPLETE AND SIGN A PROOF OF CLAIM FORM, AND RETURN IT TO THE ADDRESS SET FORTH BELOW IN THE "WHAT ARE MY OPTIONS?" SECTION OR FILL OUT A CLAIM FORM AT WWW.AKAVARSETTLEMENT.COM.

You can obtain more information about the status of the Settlement at the website www.akavarsettlement.com.

If you previously excluded yourself from the Class, you may not participate in the Settlement. If you wish to object to the Settlement, you must timely submit your objection as explained below. If you have not previously excluded yourself, you will be bound by any judgment entered with respect to the Settlement.

WHAT ARE THE SETTLEMENT TERMS?

Defendants have agreed to reimburse each Class Member who purchased Akävar 20/50 for $25.00 for each bottle purchased, for the full purchase price upon submitting a valid claim form. If the purchase price exceeded $25.00, Defendants will pay the full amount paid upon submission of a valid claim form and a receipt or detailed credit card statement showing the actual price paid.

ATTORNEYS' FEES

Plaintiffs' Counsel will petition the Court for an award of attorneys' fees in the amount of $2,455,000 and costs in the amount of $950,000. Any award of attorneys' fees and costs to Plaintiffs' Counsel will not reduce the benefits to you under the Settlement.

INCENTIVE AWARD TO NAMED PLAINTIFFS

Plaintiffs' Counsel will petition the Court for an award in the amount of $5,000.00, payable by Defendants to each representative Plaintiff as an incentive for acting as a "representative plaintiff." Any such award will not reduce the benefits to you under the Settlement, and will not increase the amount Defendants have agreed to pay under the Settlement.

RELEASES

The Settlement Agreement, which can be reviewed in its entirety at www.akavarsettlement.com, provides the following releases:

In consideration of the benefits obtained for the Class as described above, Plaintiffs and the Class hereby agree to release any and all Settled Claims (as defined below) against the Released Persons (as defined below) on the Final Effective Settlement Date.

A. "Settled Claims" means any and all claims, rights and causes of action, damages, punitive or statutory damages, penalties, losses and issues of any kind or nature whatsoever, asserted or unasserted, known or unknown, legal or equitable (including, but not limited to, any and all claims relating to or alleging breach of contract, consumer fraud, deceptive or unfair business practices, false or misleading advertising, intentional or negligent misrepresentation, negligence, concealment, omission, unfair competition, promise without intent to perform, unjust enrichment, and any and all claims or causes of action arising under or based upon any statute, act, ordinance, or regulation governing or applying to business practices generally, including, but not limited to, any and all claims relating to or alleging violation of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, Utah's Pattern of Unlawful Activity Act, Utah Code Ann. §§ 76-10-1001 to 1609, the Utah Consumer Sales Practices Act, Utah Code § 13-11-1or similar laws of the United States or any State or Territory of the United States), by or on behalf of Plaintiffs, all members of the Settlement Class, and all persons purporting to act on their behalf or purporting to assert a claim through them, including but not limited to, heirs and assigns, children, spouses, significant others, and companions (collectively the "Releasing Parties"), whether individual, class, representative, legal, equitable, direct or indirect, or any other type or in any other capacity against the Released Persons (as defined below), in connection with or that arise out of or relate in any manner whatsoever, in whole or in part, to the Lawsuit, or the claims asserted in the Lawsuit, or any communications, representations, statements, omissions to members of the Settlement Class with respect to the Akävar 20/50 dietary supplement products that were alleged or otherwise referred to in the Lawsuit or in the Settlement Agreement or that could have been asserted in the Lawsuit, including any claims that have been brought against any Released Persons and is currently pending in any other state or federal court, shall be finally and irrevocably compromised, released, and discharged with prejudice. Nothing herein shall be construed to release any claim for personal injury by any person arising from and/or as a result of the use of the Akävar 20/50 dietary supplement product.

B. "Released Persons" means Basic Research, LLC, Dynakor Pharmacal, LLC, Western Holdings, LLC, Dennis Gay, Bydex Management, LLC, Daniel B. Mowrey, Ph.D., Mitchell Friedlander and their predecessors, successors, assigns, parents, subsidiaries and affiliates and their respective present, former and future partners, members, principals, officers, directors, employees, agents, attorneys, and all others acting for such parties, with respect to the subject transactions past or present, and each of their assigns, representatives, heirs, executives, administrators and members of their immediate families and all persons to or through whom the advertising for Akävar 20/50 dietary supplement has been disseminated and/or Akävar 20/50 dietary supplement has been distributed and their officers, directors, employees, agents, attorneys, principals, members, predecessors, successors, assigns, parents, subsidiaries or affiliates.

WHAT IS THE SETTLEMENT APPROVAL PROCEDURE?

The Court granted preliminary approval of the Settlement, subject to a final fairness hearing. At the final fairness hearing, the Court will be available to hear any objections and arguments concerning the fairness of the proposed Settlement. The final fairness hearing will take place on _____, 2015 at Courtroom 8.300 of the United States District Court, District of Utah, United States Courthouse (Courtroom of the Honorable Ted Stewart), 351 West Temple, Salt Lake City, Utah 84101. It is not necessary for you to attend this hearing.

If you previously excluded yourself from the Class pursuant to the Court's class certification orders of September 2, 2010 and March 2, 2011, you are not entitled to object to or comment on the Settlement or to speak at the fairness hearing. If you decided to remain in the class and you wish to object to or comment on the Settlement, you may submit your comments in writing as described below. If you wish to appear at the hearing and be heard, you must also indicate your intent to do so in writing. If you do not comply with these procedures, you will not be entitled to be heard at the final fairness hearing, to contest the approval of the Settlement, or to appeal from any orders or judgments.

If the Court approves the Settlement, the approval will bind all Class Members, except those who excluded themselves, and the judgment will release all Class Members' settled claims.

WHAT ARE MY OPTIONS?

If you purchased the Akävar 20/50 dietary supplement product and have not previously received a refund, and you wish to receive the financial benefit of the Settlement, you must return a signed Proof of Claim Form on or before _____ either on-line at www.akavarsettlement.com or to the following address: Akävar Settlement, _____. The Proof of Claim Form is available at www.akavarsettlement.com. Purchasers who timely return a signed Proof of Claim Form will be sent a full refund for each box of Akävar 20/50 product purchased.

Your interests as a Class Member will be represented by Plaintiffs' Counsel without charge to you. You may contact them at the following address: Scott R. Shepherd, Shepherd, Finkelman, Miller & Shah, LLP, 35 E. State Street, Media, PA 19063 or Kevin P. Roddy, Wilentz, Goldman & Spitzer, LP, 90 Woodbridge Center Drive, Suite 900, Woodbridge, NJ 07095. Or, if you prefer, you may enter your own appearance or ask the Court to allow you to participate through your own attorney, at your own expense. If you wish to participate through your own attorney, an appearance must be filed with the Court by _____.

If you decide that you wish to object to the Settlement you must submit your objection in writing to (1) Clerk of the Court, United States District Court for the District of Utah, United States Courthouse 351 West Temple, Salt Lake City, UT 84101; (2) Scott R. Shepherd, Shepherd, Finkelman, Miller & Shah, LLP, 35 E. State Street, Media, PA 19063; and (3) Christopher Sullivan, Price Parkinson & Kerr, PLLC, 5742 West Harold Gattey Drive, Salt Lake City, Utah 84116. **The objection must be postmarked no later than _____.** Any objection must include (i) your full name, current address, and current telephone number; (ii) the approximate date of the purchase(s) of the product, including location of purchase; (iii) any receipts or other proof of purchase if you have them; (iv) a statement of the position(s) you wish to assert, including the factual and legal grounds for the position(s); and (v) copies of any other documents that the you wish to submit in support of your position. In addition, any Class Member objecting to the Settlement shall provide a detailed list of any other objections to any class action settlements submitted in any court, whether state, federal or otherwise, in the United States in the previous five (5) years. If the Class Member has not objected to any other class action settlement in any court in the United States in the previous five (5) years, he, she or it shall affirmatively so state in the written materials provided in connection with the objection to this Settlement. If you wish to participate through your own attorney, an appearance must be filed with the Court by _____.

HOW MAY I OBTAIN ADDITIONAL INFORMATION?

The foregoing is only a summary of the lawsuit and the proposed Settlement. For more detailed information, you may review the pleadings, records, and other papers on file in the lawsuit, which may be inspected during business hours at the Clerk's Office, United States District Court for the District of Utah, United States Courthouse 350 South Main, Salt Lake City, UT 84101. The Clerk will make the files relating to this lawsuit available to you for inspection and copying at your own expense. You may also obtain further information at www.akavarsettlement.com.

February , 2015

Honorable Ted Stewart
United States District Court Judge

Exhibit C

Notice from the United States District Court
District of Utah, Central Division

IF YOU PURCHASED AKÄVAR 20/50 DIETARY SUPPLEMENT, A CLASS ACTION SETTLEMENT COULD AFFECT YOUR RIGHTS

A proposed settlement has been reached in a class action lawsuit alleging that Basic Research, LLC and related Defendants ("Defendants") misstated certain benefits of Basic Research's Akävar 20/50 dietary supplement in its labeling, advertising and marketing of the product. Defendants deny any wrongdoing and any liability in connection with the claims asserted in the Litigation and have raised a number of defenses to the claims asserted and to certification of any class. The settlement will provide a cash refund to eligible class members who purchased Akävar 20/50 for personal use, not for re-sale and who have not previously received a refund for the Akävar 20/50 product. If you qualify, you may send in a claim form to get benefits, or you can object to the Settlement. The United States District Court for the District of Utah authorized this notice. The Court will have a hearing on _____, 2015 to decide whether to approve the settlement. Any objections to the settlement must be received by _____, 2015.

WHO'S INCLUDED?

If you purchased Akävar 20/50 in the United States for personal use, not for re-sale and have not previously received a refund for that product, and you did not previously exclude yourself from the settlement, you may be a member of the class whose rights are affected by this settlement. If you're not sure you are included, you can get more information, including a detailed notice, at www.akavarsettlement.com.

WHAT'S THIS ABOUT?

The lawsuit claims that the labeling, advertising and marketing of Akävar 20/50 was misleading to consumers regarding the efficacy of the product. Defendants deny that they did anything wrong. Furthermore, in a substantively similar case, the United States District Court for the Central District of Utah issued a Memorandum Decision and Order granting summary judgment in favor of Basic Research and against the Federal Trade Commission, finding that Basic Research's advertising claims for Akävar 20/50, including the advertising slogan "eat all you want and still lose weight," are supported by competent and reliable scientific evidence. *See, e.g.* Memorandum Decision and Order, dated November 25, 2014, in *Basic Research, LLC, et al. v. Federal Trade Commission and The United States of America*, Case No. 2:09-cv-0779 CW. The Court has not decided which side was right, but both sides agreed to the settlement to resolve the case.

WHAT DOES THE SETTLEMENT PROVIDE?

Defendants have agreed to provide eligible class members with a cash refund of $25.00 per bottle of Akävar 20/50 purchased in these United States after November 1, 2003 (and not returned). If the purchase price exceeded $25.00, Defendants will refund the actual purchase price if you provide a receipt or detailed credit card statement showing the actual price paid. Attorneys' fees, costs of the litigation, settlement administration fees, and incentive awards to class representatives will be paid separately.

The settlement will release all claims that purchasers of Akävar 20/50 may have against Defendants relating in any way to the labeling, advertising, marketing, and/or purchase of Akävar 20/50, unless the individual previously excluded him/her self from the settlement.

WHAT ARE MY LEGAL RIGHTS AND OPTIONS?

Submit A Claim Form	A detailed notice and claim form package contains everything you need. Just visit www.akavarsettlement.com to get one. To qualify for a payment, you must send in a claim form.

Object	Write to the Court about why you don't like the settlement. The Court will hold a hearing in this case (*Miller, et al. v. Basic Research, et al.*) on _____, 2015 at ____p.m. in Courtroom 8.300 of the United States Courthouse (Courtroom of the Honorable Ted Stewart), 351 South West Temple, Salt Lake City, Utah 84101 to consider whether to approve the settlement and the request by the lawyers representing Settlement Class Members for attorneys' fees and costs. Unless you previously excluded yourself from the class, you may appear at the hearing to object to the settlement. To do so, you must file a written notice of objection, together with a statement of your reasons with the Court, at the above address with a copy to class counsel listed below, by no later than _____, 2015.
Do nothing	Get no payment. Give up rights.

You may obtain more information about the settlement, including the settlement agreement and the Court's orders, by visiting www.akavarsettlement.com. Please do not contact the Court or Defendants.

Exhibit D

PROOF OF CLAIM FORM

If you purchased the "Akävar 20/50" dietary supplement after you saw or heard the statement "Eat All You Want and Still Lose Weight", and to be eligible to participate in the benefits of the proposed class action settlement in *Miller, et al. v. Basic Research, LLC,* United States District Court for the District of Utah, Case No. 2:07-CV-871 (TS), you must fill this claim form out completely and mail it to the address given below. **This Claim Form must be postmarked no later than _____, 2015.** If you provide incomplete or inaccurate information, your claim may be denied.

1. Name: _____
   Street Address: _____
   City, State, Zip:_____

   IF YOU WISH TO RECEIVE $25.00 FOR EACH BOX OF AKAVAR 20/50 YOU ACTUALLY PURCHASED, PLEASE FILL OUT THE FOLLOWING SECTION

2. I state, **under penalty of perjury**, that I purchased _____ boxes of Akävar 20/50 at _____, located at _____, which were not returned for refund.

   IF YOU PAID MORE THAN $25.00 FOR AKAVAR 20/50 AND WISH TO BE REFUNDED THE ACTUAL AMOUNT YOU PAID, PLEASE FILL OUT THE FOLLOWING SECTION. IF YOU FILL OUT THIS SECTION, YOU MUST ENCLOSE A RECEIPT SHOWING THE PURCHASE PRICE, OR A DETAILED CREDIT CARD STATEMENT SHOWING THE PURCHASE PRICE

3. I state, under penalty of perjury, that I purchased _____ boxes of Akävar 20/50 at _____, located at _____, which were not returned for refund, and that I paid $_____ per box for the product. I have enclosed either a receipt(s) evidencing this/these purchase(s), or credit card statement(s) evidencing this/these purchase(s).

4. I wish to participate in this class action settlement.

By signing below, **I represent that the information contained in this Claim Form is true and correct and state as such under penalty of perjury. I understand that if I intentionally provide false information, I may be subject to punishment**. I understand my claim may be subject to verification, and that I may need to submit additional information to establish that my claim is valid. I also understand that by submitting this claim I am releasing all Released Claims, as detailed in the "Notice of Proposed Class Action Settlement and Settlement Hearing."

Signature _____ Date _____

MAIL YOUR COMPLETED CLAIM FORM TO THE FOLLOWING ADDRESS:
Akävar 20/50 Settlement

[INSERT ADDRESS]