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SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

STEPHEN COLUCCI, individually, and on behalf of all others similarly situated,

Plaintiff,

vs.

PRIVATE LABEL NUTRACEUTICALS LLC dba MARITZMAYER LABORATORIES, a Georgia Limited Liability Company; and DOES 1-25, Inclusive,

Defendants.

Case No.: RIC 1411347

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

(Declaration of Ryan M. Ferrell, Hon. Leo S. Papas, and [Proposed] Order filed concurrently herewith)

Date: February 29, 2016
Time: 8:30 a.m.
Dept: 5

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TO THE COURT AND TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 29, 2016, at 8:30 a.m. or as soon thereafter as the matter may be heard in department 5, the Courtroom of the Honorable Craig G. Riemer, Superior Court for the County of Riverside, Plaintiff Stephen Colucci ("Plaintiff") will and hereby does move the Court for an Order finally approving the class action settlement in this case.

This motion is made on the grounds that the proposed settlement is fair, adequate, and reasonable; that the Notice Plan complied with applicable legal standards; and that the Class continues to satisfy the requirements of class certification.

This motion is based upon this Notice of Motion and Motion for Final Approval of Class Action Settlement, the accompanying Memorandum of Points and Authorities, the declarations filed in support thereof, the pleadings and papers on file in this action, and such additional evidence or argument as may be accepted by the Court at or prior to the hearing on this motion.

Respectfully submitted,

Dated: February 3, 2016

NEWPORT TRIAL GROUP
A Professional Corporation

By: _____
Ryan M. Ferrell
Attorney for Plaintiff and the Class

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Private Label Nutraceuticals LLC dba MaritzMayer Laboratories ("Private Label") is the manufacturer and distributor of over-the-counter drug called diet pills called Garcinia Cambogia 1300 and Garcinia Cambogia 75 ("Diet Pills"). Second Amended Complaint ("SAC") ¶ 1. The Diet Pills are labeled and advertised as weight loss pills for (1) weight management, (2) appetite control, and (3) the inhibition of fat production. *Id.* On November 26, 2014, Plaintiff Stephen Colucci ("Plaintiff") filed this class action lawsuit against Private Label, alleging that it falsely advertised the Diet Pills as miracle pills that have the ability to cause the user to lose weight without diet modification or exercise. SAC ¶¶ 11, 12. Plaintiff brought causes of action on behalf of himself and a putative class of purchasers of the Diet Pills for: (1) violation of the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1770 *et seq.* ("CLRA"); (2) violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.* ("UCL") and False Advertising Law, Cal. Bus. & Prof. Code §§ 17500 *et seq.* ("FAL"); (3) negligent misrepresentation; and (4) fraud. SAC ¶¶ 26-72.

In the months following the filing of his Complaint, Plaintiff, through his counsel, conducted both formal and informal discovery. Declaration of Ryan M. Ferrell Decl. ("Ferrell Decl."), ¶ 12. Plaintiff intended to file his Motion for Class Certification sometime in the late spring or summer of 2015. Ferrell Decl., ¶ 12. As such and Pursuant to the Court's Case Management Order A(8), prior to the filing of Plaintiff's Motion for Class Certification, Plaintiff and Defendant conducted mediation in front of the Hon. Leo Papas (Ret.) of Judicate West. Ferrell Decl., ¶ 7. After extensive negotiation and mediation, the Parties reached the Settlement Agreement. Exhibit 1 to Declaration of Ryan M. Ferrell ("R. Ferrell Decl.").

The Court granted preliminary approval of the Settlement Agreement on November 5, 2015. Ferrell Decl. ¶ 11. Through this motion, Plaintiff now moves the Court to take the final step in approving the settlement in this case, by holding a fairness hearing and granting final approval of the Settlement Agreement.

The Settlement Agreement is fair, adequate, and reasonable, and should be finally approved.

As an initial matter, "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small." *Kullar v. Foot Locker Retail, Inc.,* 168 Cal.App.4th 116, 128 (2008) citing *Dunk v. ford Motor Co.,* 48 Cal.App.4th 1794, 1802 (1996).

Furthermore, the settlement provides complete relief to all Class Members who made a valid claim, in the form of a refund in one of two amounts based upon the Class Member's level of proof for purchasing the Diet Pills. Class Members with a receipt will receive a full refund of their purchase price, and those with no proof of purchase but who swear or affirm that they purchased the Diet Pills during the Class Period will receive $3.00 per purchase, with a cap of 9.00 per household.[1] Second, with respect to injunctive relief, the Settlement Agreement requires Private Label to make changes to the label of Diet Pills; it must add a disclaimer which states: "Caloric intake restriction and exercise required to obtain desired results. Results may vary." This labeling will also be included on any advertising that depicts the labeling of 1300 and/or 75. This injunctive is of utmost importance when viewed against the Complaint in this matter. Plaintiff complained that the Diet Pills were advertised as miracle pills that have the ability to cause the user to lose weight without diet modification or exercise. SAC ¶¶ 11, 12. This disclaimer removes any confusion as to the Diet Pills being miracle pills. Further, it falls in line with the guidelines of the U.S. Food and Drug Administration ("FDA") which has state, "[t]he only proven way to lose weight is either to reduce the number of calories you eat or to increacse the number of calories you burn off through exercise. Most experts recommend a combination of both.[2]"

In light of the factors courts must weigh when evaluating the fairness of a settlement, *see Kullar v. Foot Locker Retail, Inc.,* 168 Cal.App.4th 116, 128 (2008) ("The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement

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[1] The $3.00 per bottle amount was negotiated with an eye towards information received in discovery. In discovery, Plaintiff was able to ascertain that the average sales price of a bottle of 1300 or 75 was $2.16, with an average range of $2.00 to $4.00. In looking at the average price of $2.12, even those Class Member without a receipt are receiving a full refund on average.

[2] *The Facts about Weight Loss Products and Programs,* FDA/FTC/NAAG Brochure available at http://www.attorneygeneral.gov/uploadedfiles/consumers/weight_loss.pdf

agreement include "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."), it is evident that final approval of the Settlement Agreement is warranted.

The Class Notice Plan in this case constituted the best notice that is practicable under the circumstances. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Martorana v. Marlin & Saltzman*, 175 Cal. App. 4th 685, 694-95 (2009). Defendant had the contact information for approximately 200 Class Members and those Class Members received direct notice of the Settlement. Ferrell Decl. ¶ 15. However, the Class is larger than 200, so further notice was required. As such, the notice plan involved notice by publication via print and Internet, including publication in several widely circulated California newspapers and information on a Case Website and toll-free telephone number. The Notice Plan complied and continues to comply with the plan that was originally approved by the Court and disseminated to the Class following class certification and satisfied all applicable legal standards.[3]

Finally, the Court has already preliminarily certified the Class in this case, which is defined as: All persons who are domiciled or reside in the United States of America, who purchased 1300 or 75 in the United States for personal use between November 26, 2010 and the Opt-Out Date, and were domiciled or resided in United States at the time of purchase. *See* SAC ¶ 18. Plaintiff requests that the Court grant final approval on behalf of the above Class, which continues to meet all of the requirements of class certification.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff originally filed this class action lawsuit in the Superior Court for the County of

[3] As the claims process is still in progress (all claims had to be postmarked by January 29, 2016), the Parties will submit statements affirming that the Notice Plan was fully and completely implemented and updating the Court as to the statistics of the claims, exclusions., and objections. To date, there have been 919 Class Member claims, 2 objections, and 1 exclusion. Plaintiff intends to give the Court a reasoned response to both objections in a separate filing on or before February 19, 2016, pursuant to the Preliminary Approval Order. Preliminarily the Court should be aware that one objection was based on the premise that the Settlement should have been a common-fund settlement as opposed to a claims-made settlement and the other objector simply wanted more money for his purchase.

Riverside on November 24, 2014. The crux of Plaintiff's complaint was that Private Label falsely advertised its Diet Pills as miracle pills with the ability to cause the user to lose weight without a change in diet and/or exercise. SAC ¶¶ 1, 11-17. Plaintiff alleged that Private Label's claims of efficacy for the Diet Pills were false and misleading because weight loss without a reduction of daily caloric intake and/or an increase in exercise is not possible. *Id.* ¶ 12.

The Settlement Agreement reached was the result of arm's length negotiations by the Parties to compromise their disputed claims. *See* Ferrell Decl., ¶ 7. The Parties participated in an all-day mediation in front of the Honorable Leo Papas (Ret.) on May 14, 2015. *See id.*, ¶ 7. As part of the mediation, Plaintiff submitted a robust mediation brief analyzing the facts and issues in this case. *See id, ¶ 6.* As a result of this mediation and other negotiations, the Parties reached the Settlement. *See id*, ¶¶ 7-8.

As part of the settlement in principle and pursuant to California Consumers Legal Remedies Act, Civil Code § 1782(d), Plaintiff agreed to and did amend his Complaint. The SAC expanded the class definition to include Class Members that purchased a nearly identical diet pill called Garcinia Cambogia 75, that has the same advertising claims and the same ingredients. SAC ¶ 1. With a settlement in principle, the Parties then worked extensively on and produced the finalized Settlement Agreement and Notice Plan. Exhibit 1 to Ferrell Decl. In addition to the refunds to Class Members described above and in further detail herein, the Settlement Agreement provides that Plaintiff may make an application to the Court for an incentive award of up to $5,000 for his service as the class representative and attorneys' fees and costs not to exceed $200,000.[4] Settlement Agreement, § 9.1. These amounts were agreed to and negotiated only after the parties reached a final agreement on the substantive relief to the Class. Ferrell Decl. ¶ 9. Prior to this mediation, both Parties had served extensive written discovery. Ferrell Decl. ¶ 12.

III. TERMS OF THE SETTLEMENT AGREEMENT

The Settlement Agreement provides comprehensive relief to the Class. It establishes a claims-made settlement, in which all Class Members who submit a valid claim will receive a refund. It also

[4] The Settlement Agreement's provisions regarding attorneys' fees, costs, and the class representative incentive award are detailed in Plaintiff's Motion for Attorneys' Fees, Costs, and Incentive Award and Plaintiff's Reply in support of Plaintiff's Motion for Attorneys' Feess, Costs, and Incentive Award.

provides injunctive relief in the form of modifications to the Diet Pills' labeling. The material terms of the Settlement Agreement are set forth below.

A. Class Member Relief

1. Monetary Relief

The Settlement Agreement calls for Private Label to provide a refund to all Class Members who submit a valid Claim Form within the Claim-In Period. The refund will be in one of two amounts, determined as follows: (1) any Claimant who provides a receipt for his or her purchase of Diet Pills will receive a full refund of the amount shown on the receipt for up to 5 bottles of the Diet Pills[5] and (2) any Claimant who did not provide a proof of purchase but who swore or affirmed that he or she purchased the Diet Pills during the Class Period will receive a refund of $3.00 per purchase, with a cap of $9.00 per household.[6] Settlement Agreement § 4.2.3.

2. Injunctive Relief

The Settlement Agreement also provides injunctive relief to the Class by requiring Private Label to make changes to the Diet Pills' labeling. Private Label will place a new Disclaimer on the Diet Pills label, which will read: "Caloric intake restriction and exercise required to obtain desired results. Results may vary." This labeling will also be included on any advertising that depicts the labeling of 1300 and/or 75. *Id.* § 4.1.2. This disclaimer is important because the entirety of Plaintiff's allegations is premised on the idea that Private Label misled consumers by advertising Diet Pills as miracle pills that worked without a change to diet and/or exercise. SAC. ¶¶ 1; 11-17. The disclaimer will appear on the outer package panel of Diet Pills in a font size no smaller than the smallest font used elsewhere on the package, in a readable color. Settlement Agreement, § 4.1.2.1.

B. Narrowly Tailored Release

The Settlement Agreement contains a narrowly tailored Class Member release that is specifically limited to the claims arising out of or relating to the SAC, between November 24, 2010 and the Opt-Out Date. *Id.* § 6.1. Significantly, the release specifically excludes claims for personal

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[5] An upper limit of 5 bottles was decided upon based on the idea that more than 5 bottles purchased signified a purchase for use other than personal.

[6] This represents a significant amount considering that the sale price of Diet Pills averages approximately $2.16. Ferrell Decl. ¶ *.

injury. *Id.*

The release comports with the applicable law, which holds that a class action lawsuit may release all claims "that may arise out of the transactions or events pleaded in the complaint." Conte & Newberg, 4 Newberg on Class Actions ("Newberg"), § 12:15 (4th ed. 2010); *Nat'l Super Spuds v. New York Mercantile Exchange,* 660 F.2d 9, 16-18 (2d Cir. 1981).

C. Claims Administration and Class Notice

The Settlement Agreement required Private Label to pay all costs and expenses of administering the settlement and providing Notice to the Class. Settlement Agreement § 5.1. As provided in the Settlement Agreement, and as approved by the Court, the claims administration and notice were handled by Class Action Administrators ("CAA"), an independent settlement administrator that has expertise in administering class claims. *See* Preliminary Approval Order. The Class Notice Plan involved notice by publication, primarily in newspapers and via the Internet. The specifics regarding the Notice Plan are set forth in detail in Section V below.

IV. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE

A. Standard for Class Action Settlement Approval

The law favors the compromise and settlement of class action lawsuits. *See, e.g.,* Dunk v. Ford Motor Co., 48 Cal.App.4th 1794, 1801 (1996) citing *Officers for Justice v. Civil Service Comm.,* 688 F.2d 615, 625 (9th Cir. 1982) ("Due regard should be given to what is otherwise a private consensual agreement between the parties. The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. Ultimately, the [trial] court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.")

Indeed, "there is an overriding public interest in settling and quieting litigation" and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). The decision to approve or reject a settlement is committed to the sound discretion of the trial court because it "is exposed to the litigants and their strategies, positions and proof." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). However, in exercising such discretion, the trial

court should give "proper deference to the private consensual decision of the parties. . . [T]he court's intrusion upon what is otherwise a private consensual agreement . . . must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon*, 150 F.3d at 1027.

B. <u>The Settlement Was Not Procured by Fraud, Overreaching, or Collusion and Is Therefore Entitled to a Presumption of Fairness</u>

Before approving a class action settlement, the trial court must be satisfied that the agreement is not the product of fraud, overreaching, or collusion. Where a settlement is reached following arm's-length negotiations, it is presumed to be fair. Newberg, § 11.41 (4th ed. 2011); *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1801 (1996).

As stated above, the settlement here was reached after significant and extensive negotiation, including a full day of mediation in front of an experienced retired federal judge. *See* Declaration of Hon. Leo S. Papas (Ret.). Plaintiff already had an eye towards his Motion for Class Certification, including experts, and had prepared extensive written discovery. Ferrell Decl. ¶ 12. The parties did not negotiate attorneys' fees and costs until after an agreement on the relief to the Class was reached. *Id.* ¶ 9. Therefore, the proposed Settlement Agreement is informed by Plaintiff thorough investigation, discovery efforts, and prepared motion practice. It was not the product of fraud, overreaching, or collusion by the negotiating parties, and as a result, is presumptively fair.

C. <u>The Settlement Is Fair, Adequate, and Reasonable</u>

The Court is required to determine that a proposed class action settlement is fair, adequate, and reasonable. In making this determination, the court must weigh a number of factors, including:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Kullar v. Foot Locker Retail, Inc., 168 Cal.App.4th 116, 128 (2008) citing *Dunk v. Ford Motor Co.*,

48 Cal.App.4th 1794, 1802 (1996). Consideration of these factors supports final approval of the settlement in this case.

1. Strength of Plaintiff's Case

While Plaintiff's counsel has been able to defeat motions for judgment on the pleadings and obtain class certification in similar class actions[7], there was no guarantee that Plaintiff would prevail on the merits of his claims. In fact, Plaintiff expected that Private Label would raise issues regarding Plaintiff's standing to continue this litigation based on the court's holding in *Delarosa v. Boiron*, Case No. 10-cv-1569-CBO (CWx), 2012 WL 8716658 at *5 (C.D. Cal., Dec. 28, 2012), that plaintiff lacked standing to seek injunctive relief.

In order to prevail on his CLRA, UCL, and FAL claims, Plaintiff would have to demonstrate that Private Label's advertising of Diet Pills was likely to mislead a reasonable consumer. *See Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008). Claims under these consumer protection statutes are all governed by the "reasonable consumer" test, which requires plaintiffs to prove that members of the public are likely to be deceived. *Id.*; *see also Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 679-80 (2006). Plaintiff's argument in this case was that Private Label's advertising of Diet Pills was likely to mislead members of the public because it promised weight loss without restricting caloric intake and/or increasing exercise activity. The basis for Plaintiff's argument is grounded in the same argument made by the FDA.[8] Defendant would likely counter at trial that Plaintiff's claim was a "lack of substantiation" argument, which has been found insufficient under California consumer protection law. *See, e.g., Chavez v. Nestle USA, Inc.*, No. CV 09-9192, 2011 WL 2150128, at *5-6 (C.D. Cal. May 19, 2011); *Fraker v. Bayer Corp.*, No. CV F 08-

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[7] *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, United States District Court, Central District of California, 2008 WL 4906433 (Nov. 2008), *Williams et al. v. Biotab Nutraceuticals, Inc.* et al, Case Nos. BC 414808 and 415948 (Los Angeles Superior Court 2010), *Delarosa v. Boiron, Inc.*, United States District Court, Central District of California, Case No. 8:10-CV-1569-JST (CWx), *Gibson v. Homedics, Inc.*, Case No. 37-2010-00086916-CU-MT-CTL (San Diego Superior Court 2010), *Hoover v. Hi-Tech Pharmacal Co. Inc., et al.*, United States District Court, Central District of Calfornia, Case No. EDCV 13-0097-JGB (OPx).

[8] *The Facts about Weight Loss Products and Programs,* FDA/FTC/NAAG Brochure available at http://www.attorneygeneral.gov/uploadedfiles/consumers/weight_loss.pdf "[t]he only proven way to lose weight is either to reduce the number of calories you eat or to increacse the number of calories you burn off through exercise. Most experts recommend a combination of both."

1564, 2009 WL 5865678, at *8-9 (E.D. Cal. Oct. 6, 2009). It would also be expected that Private Label would maintain that its representations of the efficacy of the Diet Pills were true. In fact, Defendant recently cited to "The Use of Garcinia Extract Hydroxycitric Acid as a Weight Loss Supplement: A Systematic Review and Meta-Analysis of Randomized Clinical Trials" as support for the efficacy of the Diet Pills. *See* Exhibit A to the Declaration of Sean Gaffney in support of Defendant's Opposition to Plaintiff's Motion for Attorneys' Fees, Costs, and Representative Award ¶ 2. These would be highly contentious issues involving intensive expert discovery and testing, and there is no way to predict which way a jury would find.

Because the UCL claim sounds in fraud[9], in order to prevail on his UCL claim, Plaintiff would have to establish all five elements of fraud: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, *i.e.,* to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12 Cal.4th 631, 638 (1996). This is also true of Plaintiff's CLRA claim. *Nelson v. Pearson Ford Co.,* 112 Cal. Rptr. 3d 607, 638 (Ct. App. 20120). Particularly noteworthy here are the second and third elements of knowledge of falsity and intent to deceive, which are additional requirements that go beyond what is necessary to prove a false advertising claim. Private Label would certainly argue at trial that even if its advertising of the Diet Pills was found "likely to mislead a reasonable consumer," it had no knowledge of falsity or intent to deceive. There is no guarantee that Plaintiff would prevail.

2. <u>Risk and Expense of Further Litigation</u>

In light of the relative strength of Plaintiff's claims and Private Label's defenses, Plaintiff faced the risk of obtaining nothing if he continued to pursue this litigation. Moreover, continuing to litigate this case would prove to be costly for both parties. The parties, their counsel, and their experts would have to spend considerable time and resources preparing and arguing various motions, conducting discovery, and preparing for trial. Plaintiff, especially, would have to conduct scientific testing and analysis and present significant expert testimony regarding the efficacy of the Diet Pills. In recognition of these potential risks and costs, the parties engaged in active settlement talks before they entered into the Settlement Agreement. Through informed, arm's-length negotiations, the parties

[9] *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 888 (Cal. 2011).

decided to reach a compromise rather than continue the litigation.

3. Amount Offered in Settlement

"The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Kullar v. Foot Locker Retail, Inc.,* 168 Cal.App.4th 116, 128 (2008) citing *City of Detroit v. Grinnell Corp.* 495 F.2d 448, 455 (2d Cir.1974), overruled on other grounds, as recognized by *Chambless v. Masters, Mates & Pilots Pension Plan,* 885 F.2d 1053, 1058 (2d Cir.1989). As detailed below, Plaintiff was able to get 100% refunds for those Class Members that provided a receipt, and Plaintiff was able to get effectively 100% refunds for those Class Members that did not provide a receipt.[10]

The Settlement Agreement provides substantial relief for the Class that gives Class Members multiple avenues to financial recovery and relief moving forward in perpetuity. Jessica Vega, an employee of Defendant submitted a declaration that stated that approximately 475,000 units of the Diet Pills were sold during the Class Period. Declaration of Jessica Vega in support of Motion for Preliminary Approval ¶ 8. Private Label agreed to pay a refund for these purchases to every Class Member who made a valid claim within the Claim-In Period. *Id.* § 4.2.1. Class Members could receive a refund in a variety of ways, if they provided a receipt of their purchase of the Diet Pills, or if they swore or affirmed that they purchased the Diet Pills during the Class Period. *Id.* § 4.2.3. The amounts to be paid out to Class Members would not be diminished by any attorneys' fees, costs, or incentive award, since these would all be paid separately from the relief to the Class. *Id.* § 9.2. In addition, Private Label agreed to provide injunctive relief in the form of changes to the Diet Pills' labeling. Settlement Agreement § 4.1. This is significant accomplishment since the Court in *Delarosa* found that the plaintiff lacked standing to seek injunctive relief on behalf of herself and the Class. *Delarosa v. Boiron*, Case No. 10-cv-1569-CBO (CWx), 2012 WL 8716658 at *5 (C.D. Cal., Dec. 28, 2012). Private Label also agreed to pay all costs and expenses associated with administering the settlement

[10] Class Members who did not submit a receipt were able to get refunds of $3.00 per bottle with a limit of three bottles. The $3.00 per bottle amount was negotiated with an eye towards information received in discovery. In discovery, Plaintiff was able to ascertain that the average sales price of a bottle of 1300 or 75 was $2.16, with an average range of $2.00 to $4.00. In looking at the average price of $2.12, even those Class Member without a receipt are receiving a full refund on average. Ferrell Decl. ¶ 14.

and providing Notice to the Class. Settlement Agreement § 5.1. As of the date of this filing, these amounts were estimated to total approximately $65,000 and will be further detailed in the forthcoming declaration from Class Action Administration once all of the claims are received and processed. When viewed in light of the risks and costs of further litigation, these benefits constitute an exceptional result for the Class.

4. Stage of Proceedings

Before entering into the Settlement Agreement, the parties were prepared to proceed with a contested class certification motion; Plaintiff had already retained experts and had propounded extensive written discovery necessary for the class certification motion. Ferrell Decl ¶¶ 12-13. The litigation to that point had already included two Motions to Strike and one Amended Complaint. While the settlement came relatively early in the litigation, it was an informed settlement as evidenced by Plaintiff's propounded written discovery[11] and a 10 hour mediation session. Ferrell Decl. ¶¶ 7, 12.

As with any litigation, there are risks associated with continuing litigation and trial. Further, there is the element of the time value of money, that a dollar received today is worth more than a dollar received in the future. It is unknown how long it would have taken for this matter to get to trial and then potentially through subsequent appeals. Regardless, Plaintiff's counsel is confident in the merits of the case. Ferrell Decl. ¶ 16. However, disregarding the attendant risks and the time factor, as shown above, the settlement achieves nearly, if not everything, that Plaintiff and the Class could receive after a successful trial.

5. <u>Experience and Views of Counsel</u>

When counsel who recommend approval of a settlement are competent and experienced, their opinion should be given significant weight. *See Kirkorian v. Borelli*, 695 F.Supp. 446, 451 (N.D. Cal. 1988). In the instant case, the Class was represented by counsel with years of experience in class action litigation and who have entered into numerous substantial and similar settlements.[12]

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[11] Plaintiff had propounded written discovery pursuant to the Court's Case Management Order. That discovery was extensive and sufficient enough that Plaintiff would have been able to subsequently filed a Motion for Class Certification had the mediation not produced a settlement. Further, that discovery was sufficient enough to provide Plaintiff with all of the information necessary to enter into a reasonable and measured settlement. Ferrell Decl. ¶ *.

[12] Plaintiff's counsels' experience was extensively detailed in Plaintiff's Motion for Attorneys' Fees, Costs, and Representative Award. As such, those qualifications will not be repeated here.

Newport Trial Group ("NTG") has put forth time, resources, and experience in representing Plaintiff and the Class, and continues to be well-qualified and adequate to serve as Class Counsel.[13] Class Counsel entered into the Settlement Agreement only after conducting a thorough investigation into the factual and legal issues raised in this case and after discovery and mediation. Ferrell Decl. ¶ 7, 12, 17. Based upon their experience in similar class action cases, Class Counsel views the Settlement Agreement favorably. *Id.*

6. Reaction of Class Members to the Proposed Settlement

A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it. *See 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.App.4th 1135, 1153 (2000) citing *Dunk v. Ford Motor Co.,* 48 Cal.App.4th 1794, 1801 (1996). Despite the fact that the claims are still being recorded by CAA, over 900 Class Members have made claims thus far. Ferrell Decl. ¶ 18. The current claims can be compared to only one Class Member requesting exclusion and two objecting to the Settlement. Ferrell Decl. ¶ 19. Plaintiff will respond to both objections pursuant to the Preliminary Approval Order; however, it should be noted that the objections represent one class member who simply wants more money for his claim and one class member, a serial objector, who believes that the Settlement should not be approved because it is not a common-fund settlement.

The Court can see that there have been over 900 claims made and of those claims approximately .1% have requested exclusion and approximately .2% have objected. The response has been overwhelmingly positive and warrants the Court's inference that the Settlement is fair and should be finally approved.[13]

V. THE NOTICE PLAN COMPLIED WITH APPLICABLE LEGAL STANDARDS

To satisfy due process, notice to class members must be the "best practicable reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Martorana v. Marlin & Saltzman*, 175 Cal. App. 4th 685, 694-95 (2009). Where the

[13] Because the claims are still being processed, the Claims Administrator will submit a declaration regarding the specific details of compliance and the numbers of specific claims with Defendant's Response and/or Plaintiff's Reply to this Motion.

identity of specific class members is not reasonably available, notice by publication is an acceptable method of providing notice. *See In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1080 (N.D. Cal. 2007) (citing *Manual for Complex Litigation* § 21.311 (4th ed. 2004)); Cal. Civ. Code § 1781 (authorizing notice by publication under the CLRA "if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally"). Here, Private Label did not directly sell Diet Pills to Class Members, so it did not possess contact information for all but approximately 200 Class Members.[14] Ferrell Decl. ¶ 15. Because the majority of Class Members' identities were not known, the Class Notice Plan featured notice by publication, utilizing the dual platforms of print and Internet.

Notice of the Settlement was published in the Riverside Press Enterprise on November 24, 2015; December 1, 2015; December 8, 2015; and December 15, 2015. *See* Exhibits B-E to Ferrell Decl. (true and correct copies of the published notices). Notice of the Settlement was published in the USA Today Los Angeles Regional Edition on November 23, 2015. *See* Exhibit F to Ferrell Decl. (a true and correct copy of the published notice). Notice of the Settlement was published in the USA Today San Francisco Regional Edition on November 23, 2015. *See* Exhibit G to Ferrell Decl. (a true and correct copy of the published notice). Notice of the Settlement was published in the USA Today National Edition on November 25, 2015. *See* Exhibit H to Ferrell Decl. (a true and correct copy of the published notice). Not only did these published notices comply with California Civil Code § 1781(d) and Government Code § 6064, which require publication four times in a newspaper of general circulation where the underlying transaction occurred, but Plaintiff was able to gain the concession into the settlement to also publish the notice in newspapers of much greater circulation in California and nationwide.

Notice of the Settlement was also available via a dedicated website and a dedicated toll-free number. In addition to these methods of notification, Plaintiff's counsel fielded approximately two-dozen phone calls from Class Members with questions concerning the Settlement. Ferrell Decl. ¶ 20.

Considering the above, Class Counsel submits that the Notice Plan in this case was more than adequate, complied with applicable legal standards, and went beyond the requirements of applicable

[14] Those Class Members were sent Notice Packets via first class mail. Settlement Agreement § 5.4.2.

legal standards.

VI. THE COURT HAS ALREADY CLEARLY WEIGHED IN ON THE SETTLEMENT CLASS IN THE PRELIMINARY APPROVAL ORDER

On November 5, 2015, the Court granted Preliminary Approval of Class Action Settlement. Ferrell Decl. ¶ 11. The Court did a detailed review of the then proposed settlement and there were numerous edits and additions made. (The Court held four Preliminary Approval hearings.) The Court preliminarily approved the Settlement because the Settlement more than satisfied the elements and requirements of a fair and reasonable class action settlement. All of the elements of class certification in this case remain satisfied, and Plaintiff requests that final approval be granted on behalf of the above Class.

VII. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiff's Motion for Final Approval.

Dated: February 3, 2016

NEWPORT TRIAL GROUP
A Professional Corporation

By: _____
Ryan M. Ferrell
Attorney for Plaintiff and the Class

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 4100 Newport Place, Suite 800, Newport Beach, CA 92660.

On February 3, 2016, I served the foregoing document described as **NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** on the following person(s) in the manner indicated:

SEE ATTACHED SERVICE LIST

[ ] (BY MAIL) I am familiar with the practice of Newport Trial Group for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope, with postage fully prepaid, addressed as set forth herein, and such envelope was placed for collection and mailing at Newport Trial Group, Newport Beach, California, following ordinary business practices.

[XX](BY HAND DELIVERY) I am familiar with the practice of Newport Trial Group for collection and processing of correspondence for hand delivery by courier. I caused such document t be delivered by hand to the addresse(s) designated.

[ ] (BY FEDERAL EXPRESS) I am familiar with the practice of Newport Trial Group for collection and processing of correspondence for delivery by overnight courier. Correspondence so collected and processed is deposited in a box or other facility regularly maintained by Federal Express that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope designated by Federal Express with delivery fees paid or provided for, addressed as set forth herein, and such envelope was placed for delivery by Federal Express at Newport Trial Group, Newport Beach, California, following ordinary business practices.

[ ] (BY FACSIMILE TRANSMISSION) On this date, at the time indicated on the transmittal sheet, attached hereto, I transmitted from a facsimile transmission machine, which telephone number is (949) 706-6469, the document described above and a copy of this declaration to the person, and at the facsimile transmission telephone numbers, set forth herein. The above-described transmission was reported as complete and without error by a properly issued transmission report issued by the facsimile transmission machine upon which the said transmission was made immediately following the transmission.

[ ] (BY ELECTRONIC TRANSMISSION) I served electronically from the electronic notification address of brice@trialnewport.com the document described above and a copy of this declaration to the person and at the electronic notification address set forth herein. The electronic transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on February 3, 2016, at Newport Beach, California.

Mandy K. Jung

SERVICE LIST

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