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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

Case No. 13cv0618 DMS JMA

CLASS ACTION

NOTICE OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS, ISSUANCE OF NOTICE TO THE CLASS, AND SETTING OF FINAL APPROVAL HEARING

Judge: Hon. Karen S. Crawford
Location: Courtroom 1C
Date: October 2, 2014
Time: 11:00 a.m.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 2, 2014, at 11:00 a.m., at the United States District Court for the Southern District of California, located at 221 West Broadway, San Diego, California, Courtroom 1C, Plaintiffs Ed Hazlin and Karen Albence will and hereby do move before the Honorable Karen S. Crawford for an order granting preliminary approval of class action settlement, conditionally certifying the settlement class, directing issuance of notice to the settlement class, and scheduling a final approval hearing.

This motion is based on this notice and motion, the supporting memorandum of points and authority, the Joint Stipulation of Settlement and corresponding exhibits, and the Declaration of Todd D. Carpenter and corresponding exhibits, concurrently filed herewith, as well as the pleadings on file in this action, and upon such other matters, evidence, and arguments as may be presented to the Court before or at the hearing on this motion.

Dated: September 15, 2014

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By: */s/ Todd D. Carpenter*
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CERTIFICATE OF SERVICE

The undersigned hereby certify that on September 15, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system per Civil Local Rule 5.4 which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail notice list, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice list. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Todd D. Carpenter

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MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS, ISSUANCE OF NOTICE TO THE CLASS, AND SETTING OF FINAL APPROVAL HEARING

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Plaintiffs Ed Hazlin and Karen Albence and Defendants Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC (together, "Parties") submit this memorandum in support of the Parties' Joint Motion for Preliminarily Approval of Class Action Settlement. The Parties' Stipulation of Settlement ("Stipulation" or "Settlement") was filed on September 12, 2014.[1]

I. INTRODUCTION

The Parties seek preliminary approval of the proposed Settlement of this class action against Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC (together, "Defendants"). The Settlement meets Plaintiffs' goals of this litigation—the availability of [approximately] a full refund of the proposed class members' retail purchase price for up to six bottles purchased; capped at $100.00 for each Settlement Class Member and the removal of the alleged misrepresentations from Defendants' Wellesse Joint Movement Glucosamine products ("Wellesse JMG" or "Products") labeling and related advertising.

Plaintiffs allege that in violation of the Consumers Legal Remedies Act ("CLRA"), California Civil Code §§ 1750, *et seq.*, and in violation of California's Unfair Competition Law ("UCL"), California Business and Professions Code §§ 17200, *et seq.*, and in breach of express warranty, Wellesse JMG, a line of glucosamine-based, joint-health dietary supplements, does not provide the joint-health benefits touted by Defendants. In particular, Plaintiffs allege that through an extensive, uniform, nationwide advertising campaign and through the representations on the Products' labeling and packaging, Defendants represented that one ounce a day of Wellesse JMG will improve joint health, ease joint discomfort, protect and rebuild cartilage tissue, lubricate joints for improved mobility and flexibility, and consumers will feel the benefits of Wellesse JMG in seven days. Plaintiffs further allege that these statements, along with the statement that "[c]linical studies show that Glucosamine and Chondroitin in combination are beneficial

[1] All capitalized terms shall have the same meanings set forth in the Stipulation of Settlement Agreement attached hereto as Exhibit 1.

in maintaining healthy joint function, cartilage and flexibility," are false, misleading, and likely to deceive the public.

Plaintiffs alleged and confirmed through discovery that thousands of consumers purchased Defendants' products based on their purported joint-health benefits. But all of the clinical studies of glucosamine hydrochloride and chondroitin sulfate—the core ingredients in the Products—conclude that these agents, either alone or in combination, perform no better than placebo in providing joint-health benefits and relieving stiffness and joint and knee pain. *See* Second Amended Complaint ("SAC") ¶¶ 27-48. Plaintiffs allege that despite this knowledge, Defendants did not change their Wellesse JMG products or the representations on the Products' labels and packaging. As a result of the Settlement, Plaintiffs believe that they have been able to achieve a significant change in the labeling and advertising of Wellesse JMG. This benefits Class Members that may still be using the products, as well as new customers that may purchase the products in the future. Plaintiffs have also achieved another goal of this consumer protection litigation: monetary compensation for alleged damages (which may be measured by the purchase price). That is, Plaintiffs believe that they have obtained what they set out to achieve in this lawsuit.

Defendants have expressly denied and continue to deny all charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts, or omissions that were or could have been alleged in this Action. Defendants have also denied and continue to deny that their Wellesse JMG labeling and packaging representations were false or misleading. Defendants have represented that while they are aware of the studies cited by Plaintiffs, they believe those studies do not support Plaintiffs' assertions, and other studies contradict the studies Plaintiffs cite. Defs.' Mot. to Dismiss, Doc. No. 17-1 at 3, 19-21. Defendants, however, appreciate the costs and uncertainty attendant to any litigation, and they have agreed to the proposed Settlement.

Specifically, after extensive and hard-fought negotiations, Plaintiffs and Defendants have agreed to the following settlement relief:

First, Defendants will cease making representations that Wellesse JMG provides certain joint-health benefits for a period of three years from the Settlement's Effective Date. Stipulation § IV.B.

Second, Defendants will establish a non-reversionary Settlement Fund in the amount of $3,100,000.00. Anyone who purchased Wellesse JMG from the time it was sold until May 21, 2014, may submit a claim for each bottle of the product purchased. For each 16 ounce bottle of Wellesse Joint Movement Glucosamine purchased, Authorized Claimants shall be entitled to receive a payment of up to $15.00 from the Settlement Fund. This amount represents the approximate average retail purchase price for the product. For each 33 ounce bottle of Wellesse Joint Movement Glucosamine purchased, Authorized Claimants shall be entitled to receive a payment of up to $18.00 from the Settlement Fund. This amount represents the approximate average retail purchase price for the product. Authorized Claimants may receive a full reimbursement for each of their purchases up to one hundred dollars ($100) in total recovery. *Id.* § IV.A.

Further, costs of notice and claims administration will be paid by Defendants from the Settlement Fund. *Id.* §§ IV.C, IV.E.1, and VI.A.

The proposed Settlement will accomplish the goals of the Wellesse JMG lawsuit by removing the subject language from the Wellesse JMG packages and advertising, as well as obtaining up to $100.00 of actual damages for Class Members who allegedly suffered damage (which may be measured in part by the purchase price).

The Parties jointly request that the Court conditionally certify for settlement the proposed Class stated as follows:

> All persons who purchased Wellesse Joint Movement Glucosamine products in the United States up to the date of the entry of the Preliminary Approval Order. Excluded from the Settlement Class are: (i) those who purchased the Wellesse Joint Movement Glucosamine products for purpose of resale; (ii) those with claims for personal injuries arising from the ingestion of one or more Wellesse Joint

> Movement Glucosamine products; (iii) Defendants and their officers, directors, and employees; (iv) any person who files a valid and timely Request for Exclusion; and (v) the Judge(s) to whom this Action is assigned and any members of their immediate families.

Id. § II.A.36.

In addition, the Parties move the Court to designate Plaintiffs as the Class Representatives of the Settlement Class and conditionally appoint Carpenter Law Group and Patterson Law Group, as counsel for the Class. *Id.* §§ II.A.10, II.A.13, III.A.2.

At the preliminary approval stage, the Court makes only a preliminary determination of the fairness, reasonableness, and adequacy of the Settlement so that notice of the Settlement may be given to the Class and a fairness hearing may be scheduled to make a final determination regarding the fairness of the Settlement. *See* 4 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 11.25 (4th ed. 2002) ("*Newberg*"); *Manual for Complex Litigation* § 21.632 (4th ed. 2005) ("*Manual (Fourth)*"). In so doing, the Court reviews the Settlement to determine that it is not collusive and, "taken as a whole, is fair, reasonable and adequate to all concerned." *Rodriguez v. West Publ'g Co.*, 563 F.3d 948, 965 (9th Cir. 2009) (*quoting Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982)), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 617 (2010). As set forth in further detail below, the proposed Settlement plainly meets this standard, so the Parties jointly request that the Court enter the Proposed Order regarding Preliminarily Approval of Class Action Settlement that: (1) preliminarily approves the terms of the Settlement; (2) approves the form, method, and plan of notice of the Settlement; (3) conditionally certifies the Class for settlement purposes; and (4) schedules a Final Settlement Hearing at which the request for final approval of the proposed Settlement and entry of the Final Judgment will be considered.

II. HISTORY OF THE LITIGATION

On March 15, 2013, Plaintiff Ed Hazlin filed his Complaint against Botanical Laboratories, LLC, alleging violations of the UCL, CLRA, and breach of express warranty. Stipulation § I.B; Doc. No. 1. Plaintiff Hazlin alleged that Defendants' representations regarding Wellesse JMG were false and misleading. *Id.* In particular, Plaintiff took issue with the representations that Defendants' Wellesse JMG products: "provide[] EXTRA STRENGTH Glucosamine [which allegedly "protects and rebuilds cartilage tissue to keep your joints flexible and your body active"] and scientifically supported levels of Chondroitin plus MSM to maintain healthy movement of your joints;" "[k]eep your joints lubricated for improved mobility and flexibility with just 1 oz a day;" "[i]mprove[] Joint Health so you can enjoy the benefits of less joint discomfort and get back to the activities you love;" and that Class Members will "Start to feel it in 7 Days." *See* Class Action Complaint ("Compl.") ¶ 5; SAC ¶ 5. Plaintiff alleged that these representations are deceptive because numerous studies show that the core ingredients in Wellesse JMG—glucosamine and chondroitin—are ineffective in providing the advertised joint-health benefits. *See* Compl. ¶¶ 5-9, 13, 16-31; SAC ¶¶ 5-9, 13-14, 19-48. Plaintiff's lawsuit seeks injunctive, declaratory, and monetary relief.

Before the action was filed, Plaintiff's counsel undertook an extensive investigation of the factual allegations ultimately made in the Complaint. Stipulation § I.F. This investigation included review of Defendants' publicly available advertisements for Wellesse JMG and review and analysis of scientific studies and articles relating to the ingredients in Wellesse JMG and in competitors' joint-health supplements. *Id.*

On May 20, 2013, Plaintiff filed a first amended complaint ("FAC"), and on May 30, 2013, Plaintiff Hazlin Filed a Second Amended Complaint ("SAC"), amending the FAC to add Plaintiff Karen Albence and Defendants Botanical Laboratories, Inc. and Schwabe North America, Inc.[2] *Id.* § I.C-D; Doc. Nos. 11-12. Defendants filed a motion to

[2] The SAC contains the same causes of action as the Complaint and the FAC, and the allegations by Plaintiffs Ed Hazlin and Karen Albence in the SAC are virtually identical to those raised by Plaintiff Hazlin in the Complaint and the FAC.

dismiss on June 25, 2013, and after full briefing by the Parties, the Court denied the motion to dismiss on August 8, 2013. Doc. Nos. 17, 19, 22, 24. Defendants then filed their answer on August 22, 2013. Stipulation § I.E; Doc. No. 25. On September 3, 2013, the Court ordered that an Early Neutral Evaluation Conference be held on October 25, 2013. Doc. No. 28.

The Parties participated in an Early Neutral Evaluation Conference on October 25, 2013, with the Honorable Jan Adler. Stipulation § I.G; Doc. No. 30. On December 17, 2013, Plaintiffs, corporate representatives from Defendants, and Defendants' counsel participated in mediation with the Honorable Dickran Tevrizian. Stipulation § I.H. In advance of the settlement conferences with the Court and mediation, the Parties requested and exchanged pre-mediation discovery, including information relating to the sales of Wellesse JMG. *Id.* § I.F. In preparation for the mediation, the Parties exchanged briefs in support of their respective positions, and Defendants provided additional national sales information and pricing information regarding Wellesse JMG, as well as proposed changes to the Wellesse JMG product labels and associated label statements. *Id.* § I.H. The mediation lasted approximately twelve hours, after which the Parties successfully reached an agreement. *Id.* On January 21, 2014, Defendants notified the Court that the Parties reached a settlement. Doc. No. 35.

III. SETTLEMENT TERMS

A. The Proposed Settlement Relief

1. Prospective Relief

For a period of three years from the Settlement's Effective Date, Defendants will cease making representations that Wellesse JMG provides certain joint-health benefits, unless at the time of making such representations, they possess and rely upon competent and reliable scientific evidence that substantiates that the representations are true. *Id.* § IV.B. Such representations regarding Wellesse JMG include the following: "start to feel it in 7 days," "improves joint health," "less joint discomfort," "protects and rebuilds cartilage," "for healthy joint support & mobility," "for healthy joint support and

flexibility," "glucosamine is necessary to protect and rebuild cartilage tissue and keep joints strong & healthy," "mobility, flexibility, & lubrication," or substantially similar language that reasonably conveys the same meaning. *Id.*

2. Retrospective Relief

In return for a release of all claims, Defendants will establish a non-reversionary Settlement Fund in the amount of $3,100,000.00. *Id.* § IV.A. Anyone who purchased Wellesse JMG from the time it was sold until January 3, 2014, may submit a claim to receive a cash payment from the Settlement Fund. *Id.* For each 16-ounce bottle of Wellesse JMG purchased, Settlement Class Members are entitled to a payment of $15.00, and for each 33-ounce bottle of Wellesse JMG purchased, Settlement Class Members are entitled to a payment of $18.00[3]. *Id.* Settlement Class Members may seek reimbursement for claims up to $100.00 in total recovery. *Id.*

If the aggregate amount of Eligible Claims exceeds the Net Settlement Fund, each Authorized Claimant's award shall be reduced on a *pro rata* basis. *Id.* § IV.C.2. But if after the initial three-month notice period concludes without totaling $1,000.000.00 in Claims, the Notice period will be extended an for additional three months. *Id.* § IV.D.1. In the event that the dollar amount of approved claims submitted by Settlement Class Members does not meet or exceed the amount remaining in the Settlement Fund after payment of costs and expenses of settlement administration, the Court's award of attorneys' fees, and a service award to the Class Representatives as well as the tallied amount of all Authorized Claims, the Settlement Administrator shall divide the remaining cash amount equally by the number of Authorized Claimants and shall pay each such Authorized Claimant his or her share of the remaining cash amount. *Id.* § IV.C.2.

[3] The reimbursement amounts represent the average retail purchase price for Joint Movement Glucosamine products during the class period; $15.00 for the 16 ounce and $18.00 for the 33 ounce bottle.

3. Notice And Administration Costs, Attorneys' Fees And Expenses, And Service Awards for Plaintiffs

All costs of Notice and Claims Administration will be paid by Defendants from the Settlement Fund. *Id.* §§ II.A.36, IV.C.1, V.D, and VI.A. In addition, Defendants agree not to oppose Class Counsel's application for an award of attorneys' fees and expenses in an amount not to exceed 30% of the Settlement Fund, or $930,000 plus actual costs, and the fees and expenses awarded by the Court will be paid from the Settlement Fund. *Id.* § X.A-B. Defendants also agree not to oppose an application for service awards in the amount of $3,500.00 to each Plaintiff, and any service award approved by the Court will be paid from the Settlement Fund. *Id.* § X.C-D.

B. The Proposed Notice Program

The Parties have developed a Notice Program with the help of KCC, LLC a firm that specializes in developing class action notice plans. Because the Products are sold over the counter at retail stores, Defendants do not have mailing addresses or other contact information for Class Members. Therefore, the Notice Program focuses primarily on notice by a combination of print and Internet-based publication via Full Notice (Long-Form Notice) and Publication Notice (Short-Form Notice). *Id.* §§ II.A.21, II.A.31, VII.B-D. The Notice Plan is a creative and comprehensive solution to provide the most effective notice to the largest reach of potential class members within an efficient budget.

1. Print Advertisement Placements

The Long Form Notice will be posted no later than ten (10) days from entry of the Preliminary Approval Order on the Settlement Website, and it will be available until the Effective Date. *Id.* § VII.C.2. and VII.D.1. *See* Exhibit 4 to the Stipulation of Settlement, "Long Form or Full Notice". The Summary or Short Form Notice is the notice which will appear in the publications notated herein and as more fully set forth below. *See* Exhibit 5 to the Stipulation of Settlement, "Short Form Notice". The Publication Notice is designed to provide potential Class Members with information regarding the Settlement and to inform them about their rights through the use of internet "impressions" and banner ads;

the types of advertising seen when a user visits any number of popular websites. The Summary Notice (which will be used in the magazine publications) contains a general description of the lawsuit, the Settlement relief, how a claim can be filed, and a general description of Class Members' legal rights. Both the Summary Notice and the Publication Notice direct Class Members to the Settlement Website and a toll-free number Class Members may use to obtain a copy of the Full Notice, the Claim Form, and other information. The Summary and Publication Notices will be published in various print and online media sources chosen based on marketing research on the demographics of consumers who purchase Wellesse JMG. The demographic information for Glucosamine purchasers is set forth in the Stipulation, Ex. 3, p.1-2, "Target Audience". As set forth in the Stipulation, Ex. 3, the Summary or Short Form Notice will be published as follows:

PUBLICATION:	ISSUANCE	NOTICE SIZE	# INSERTIONS
Arthritis Today	**Bi-Monthly**	**Third Page**	**1**
Better Homes & Gardens	**Monthly**	**Third Page**	**1**
National Geographic	**Monthly**	**Half Page**	**1**
People Magazine	**Weekly**	**Third Page**	**2**
Reader's Digest	**Monthly**	**Full Page (Digest)**	**1**
Total:			**6**

See Id., Ex. 3, p. 2-4. It will also be sent via electronic or regular mail to callers at their request. *Id.* § VII.D.3.

2. Internet Media Placements

Additionally, the Notice Plan calls for the placement of seventy million (70,000,000) unique web-based impressions over a one to two month period targeted to adults ages thirty five and up (35+) (consistent with the demographic information about Glucosamine purchasers). The internet banner notices and Facebook text ads will include an embedded link to the case settlement website. The internet website banner placements

will run on a number of high quality, trusted websites with significant internet browsing audiences, including, but not limited to: USA Today, the Food Network, Everday Health, CNN, Sporting News, NBC, FOX NEWS Channel, Ancestry.com, Orbitz, Realtor, Kiplinger's, All Recipes.com, CBS, AccuWeather.com, drugstore.com, eHow.com, HGTV.com, Dr Phil and Investorlink. Approximately twenty-five million impressions containing the proposed "banner ad" with the embedded link to the Settlement Administrator's website will be posted on these websites in the forty-five (45) days following Preliminary Approval.

Additionally, approximately 45,000,000 similar impressions will be placed on Facebook targeting adults age thirty-five and up (35+). The Facebook impressions will also contain an embedded link to the case website. In summary, the internet based notice campaign will provide the following:

Placement:	**Target:**	**Impressions:**	**Time Period**
XPN – Run of Network (websites listed above)	**Adults Age 35+**	**25,000,000**	**45 days after Preliminary Approval**
Facebook	**Adults Age 35+**	**45,000,000**	**45 days after Preliminary Approval**
Total:		**70,000,000**	

Complementing the Short Form and Publication Notice is the Full Notice, which will include, *inter alia*, a short, plain statement regarding the Action and the proposed Agreement, a description of the proposed Settlement relief and the procedures for participating in the Settlement and submitting a Claim Form, an explanation of the procedures and deadline for opting out of and objecting to the Settlement, and an explanation that any judgment entered in the Action will be binding on all Settlement Class Members who have not been excluded. *Id.* § VII.C.1. The Full Notice will be posted

no later than ten days from entry of the Preliminary Approval Order on the Settlement Website, and it will be available until the Effective Date. *Id.* § VII.D.2. It will also be sent via electronic or regular mail to callers at their request. *Id.* § VII.D.3. The Full Notice is attached to the Stipulation as Exhibit 4.

Finally, in accordance with the California Legal Remedies Act, the Notice Plan provides for publication notice to be made on four occasions; once per week for four consecutive weeks in the Legal/Classified section of the San Diego Union Tribune Metro Distribution.

Plaintiffs estimate the resultant Notice Program will conform to the Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist (*See* Exhibit 11 to the Stipulation) and Plain Language Guide's suggested reach and frequency parameters. *See* Exhibit 3 to the Stipulation. The proposed Notice Plan will reach approximately 70.6% of likely class members on average 1.8 times each. *See* Exhibit 3 to the Stipulation; "Plan Delivery".

IV. ARGUMENT

A. The Proposed Settlement And Notice To The Class Meet The Criteria For Preliminary Approval

Federal Rule of Civil Procedure 23(e), requires judicial approval for any settlement agreement that will bind absent class members. *See* Fed. R. Civ. P. 23(e); *see also Briggs v. United States*, No. C 07-05760, 2010 U.S. Dist. LEXIS 50990, at *7 (N.D. Cal. Apr. 30, 2010). The approval of a proposed class action settlement is a matter within the broad discretion of the trial court. *Officers for Justice*, 688 F.2d at 625 (*citing Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). The sole inquiry at the preliminary approval stage is "'whether a proposed settlement is fundamentally fair, adequate, and reasonable,' recognizing that '[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.'" *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (*quoting Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

Settlements of complex class actions prior to trial are strongly favored. *See Churchill Vill., LLC v. Gen. Elec. Co.*, 361 F.3d 566, 576 (9th Cir. 2004); *In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). The preliminary approval step requires the Court to "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Manual* § 21.632, at 321. At this stage, the Settlement "need only be *potentially* fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval, after such time as any party has had a chance to object and/or opt out." *Misra v. Decision One Mortg. Co.*, No. SA CV 07-0994, 2009 U.S. Dist. LEXIS 119468, at *9 (C.D. Cal. Apr. 13, 2009) (emphasis in original; citation omitted). Courts have consistently noted that the standard for preliminary approval is ***less rigorous*** than the analysis at final approval: preliminary approval is appropriate as long as the proposed settlement falls "within the range of possible judicial approval." *Newberg* § 11:25 (*citing Manual For Complex Litigation* § 30.41 (3rd ed. 1995); *Manual (Fourth)* § 21.632, at 321.

> If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no, obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing . . . .

Young v. Polo Retail, LLC, No. C-02-4546, 2006 U.S. Dist. LEXIS 81077, at *12-13 (N.D. Cal. Oct. 25, 2006) (internal citations omitted); *see also Satchell v. Fed. Express Corp.*, Nos. C 03-2659 and C 03-2878, 2007 U.S. Dist. LEXIS 99066, at *17-18 (N.D. Cal. Apr. 13, 2007) (where the settlement was "the result of extensive, arms'-length negotiations between the Parties," and "[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive," the court concluded that the settlement "has no obvious defects and is within the range of possible settlement approval, such that notice to the Class is appropriate").

The proposed Settlement satisfies the standard for preliminary approval, as there is no question as to its fairness, reasonableness, and adequacy, placing it squarely within the range of possible approval.

1. The proposed Settlement is sufficiently fair, reasonable, and adequate for preliminary approval.

To determine whether a proposed settlement is fair, adequate, and reasonable, a district court must ultimately consider several factors, including: (i) the strength of the plaintiffs' case; (ii) the risk, expense, complexity, and likely duration of further litigation; (iii) the risk of maintaining class action status throughout the trial; (iv) the amount offered in settlement; (v) the extent of discovery completed and the stage of the proceedings; (vi) the experience and views of counsel; (vii) the presence of a governmental participant;[4] and (viii) the reaction of the class members to the proposed settlement. *Staton*, 327 F.3d at 959 (internal citation and quotation marks omitted). The proposed Settlement is fair, adequate, and reasonable after analysis of each of these factors.

a. The strength of Plaintiffs' case and the risk, expense, complexity, and likely duration of further litigation.

The crux of Plaintiffs' claims is that Defendants represent that Wellesse JMG provides joint-health benefits, but studies on the Products' core ingredients demonstrate that they cannot provide such benefits. Defendants benefited from their representations because Plaintiffs and Class Members purchased the Products based on those representations, but none of the advertised benefits were received. Plaintiffs and their counsel believe their claims are meritorious, but Defendants have raised and would continue to raise challenges to the legal and factual bases of their claims. Although the Parties differ as to the likelihood of Plaintiffs ultimately prevailing at trial, it is apparent that both sides bear risk in proceeding to litigate the case.

[4] This factor is inapplicable to the present case.

The proposed Settlement strikes a balance between the Parties' positions regarding the Products by providing a fund from which Class Members can obtain refunds for the purchase price of the Products. The proposed Settlement thus provides immediate certainty and valuable benefits to the Class Members, rather than forcing them to wait years for all litigation and appeals to be fully resolved at the risk of recovering nothing.

If this case does not settle, it would be necessary to continue, as Defendants have done since the inception of this lawsuit, to raise objections to the legal and factual bases of Plaintiffs' claims. Such inquiries would necessarily involve detailed discovery, including expert testimony regarding the precise ingredients in Wellesse JMG, as well as the scope of Defendants' knowledge of the efficacy of those ingredients. The proposed Settlement, on the other hand, balances these costs, risks, and potential for delay against the benefits of settlement, achieving a settlement that is fair and desirable to the Class. *See Dirienzo v. Dunbar Armored, Inc.*, Nos. 09CV2745 and 10CV1931, 2011 U.S. Dist. LEXIS 36650, at *5-6 (S.D. Cal. Apr. 4, 2011) ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." (*quoting Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004))).

The Settlement's avenues of relief provide meaningful benefits to Class Members. And given the alternative of long and complex litigation before this Court, the expense involved in such litigation, the possibility of further appellate litigation, and the risk that Plaintiffs may not ultimately prevail, the availability of prompt relief under the Settlement is highly beneficial to the Class. By reaching this Settlement, the Parties will avoid protracted litigation and will establish a means for swift resolution of Class Members' claims against Defendants.

b. The risk of maintaining class-action status throughout trial.

As stated by the Court in its Order Denying Defendants' Motion to Dismiss (Doc. No. 24, hereinafter "Order"), the courts have wrestled with whether claims similar to those raised by Plaintiffs rely on an incognizable lack-of-substantiation theory and

whether a class representative may maintain an action for representations he did not see. *See* Order at 4-5, 6-7 (citing cases). Plaintiffs both read the Wellesse JMG product labels, but this could cause issues with maintaining class action status as to Defendants' other representations. Additionally, several recent decisions denying class certification in cases involving similar class certification issues demonstrate that there is a high degree of risk that class-action status could not be maintained throughout litigation. *See, e.g.*, *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387, 2014 U.S. Dist. LEXIS 1640 (N.D. Cal. Jan. 7, 2014); *Nilon v. Natural-Immunogenics Corp.*, No. 3:12cv00930, 2013 U.S. Dist. LEXIS 141728 (S.D. Cal. Sept. 30, 2013); *Moheb v. Nutramax Labs., Inc.*, No. CV 12-3633, 2012 U.S. Dist. LEXIS 167330 (C.D. Cal. Sept. 4, 2012).

c. The amount or type of relief offered in the Settlement.

The proposed Settlement has high value and provides substantial economic and non-monetary benefits to the Class in comparison to what Plaintiffs and the Class could achieve through a successful trial. Plaintiffs have steadfastly sought reimbursement of the purchase price of the Products, and as a result, the Class will receive significant cash refunds—up to $100.00 for each Settlement Class Member. Stipulation § IV.A. There are also non-monetary benefits provided to the Class by the proposed Settlement. Defendants have agreed to certain labeling changes: they will not represent that Wellesse JMG provides certain joint-health benefits unless they possess and rely upon competent and reliable scientific evidence that substantiates that the representations are true, providing Settlement Class Members and consumers as whole with accurate information about the Products. *Id.* § IV.B. This change in Defendants' advertising protocol is attributable to the filing of this Action, and it is considered a non-monetary benefit. *See Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164-65 (Del. 1989) (stating that a "benefit need not be measurable in economic terms," and there is a benefit to "[c]hanges in corporate policy . . . if attributable to the filing of a meritorious suit")).

In addition, Plaintiffs Hazlin and Albence do not receive any unduly preferential treatment under the Settlement. With the exception of a service award of $3,500.00 each

to Plaintiff Hazlin and Plaintiff Albence to account for their willingness to step forward and represent other consumers and to compensate them for their time and effort devoted to prosecuting the common claims, Plaintiffs are treated the same as every other Class Member. Such service awards "are fairly typical in class action cases." *Dennis v. Kellogg Co.*, No. 09-CV-1786, 2013 U.S. Dist. LEXIS 163118, at *25 (S.D. Cal. Nov. 14, 2013) (*citing Rodriguez*, 563 F.3d at 958). *See also Williams v. Costco Wholesale Corp.*, No. 02cv2003, 2010 U.S. Dist. LEXIS 19674, at *10 (S.D. Cal. Mar. 4, 2010) ("Although Plaintiff Williams seeks a $5,000 service fee for himself which is not available to other class members, the fee appears to be reasonable in light of Plaintiff Williams' efforts on behalf of the class members.").

It is likely that a successful result at trial would not garner a better result than that achieved by the proposed Settlement. But even if it did, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair." *Officers for Justice*, 688 F.2d at 628 (*citing Flinn v. FMC Corp.*, 528 F.2d 1169, 1173-74 (4th Cir. 1975)). In light of the uncertainties of trial, the value of the Settlement plainly meets (and exceeds) the adequacy standard and renders this factor supportive of the proposed Settlement.

d. The extent of discovery completed and the stage of the proceedings.

"[W]here there has been sufficient information sharing and cooperation in providing access to necessary data, the settlement may be fair and adequate." *Misra*, 2009 U.S. Dist. LEXIS 119468, at *23 (*citing In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000)). Informal discovery is adequate in a class action settlement because "'formal discovery is not a necessary ticket to the bargaining table' where the Parties have sufficient information to make an informed decision about settlement." *See Clesceri v. Beach City Investigations & Protective Servs.*, No. CV-10-3873, 2011 U.S. Dist. LEXIS 11676, at *27-28 (C.D. Cal. Jan. 27, 2011) (*quoting Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998)).

Here, before filing the Complaint in March 2013, Class Counsel undertook an extensive investigation of the facts, including review of Defendants' publicly available advertisements for Wellesse JMG, and review and analysis of scientific studies and articles relating to the ingredients in Wellesse JMG and in other similar joint-health products. Stipulation § I.F. In September 2013, the Court ordered the Parties to participate in an Early Neutral Evaluation Conference. Doc. No. 28. The Parties then requested and exchanged pre-mediation discovery, including information relating to the sales of Wellesse JMG, and participated in settlement negotiations with the Honorable Jan Adler during the Early Neutral Evaluation Conference on October 25, 2013. Stipulation § I.F. On November 27, 2013, Defendants served their initial disclosures, and once permitted by the Court, Plaintiffs served their first sets of interrogatories, requests for admissions, and document requests. *Id.* In preparation for a mediation with the Honorable Dickran Tevrizian on December 17, 2013, the Parties exchanged briefs in support of their respective positions, and Defendants provided additional national sales information and pricing information regarding Wellesse JMG, as well as proposed changes to the Wellesse JMG product labels and associated label statements. *Id.* §§ I.F and I.H. Discovery was not needed to calculate Settlement Class Members' damages because they will provide the requisite information regarding whether they purchased 16- or 33-ounce (or both) bottles of Wellesse JMG, and they will be refunded the approximate average retail purchase price of either $15.00 or $18.00 for each purchase, respectively, up to $100.00 in total recovery. *Id.* § IV.A.2.

Although this case settled relatively early in the proceedings, the Parties have conducted formal and informal discovery as well as an extensive pre-filing investigation into the science and disclosures. Discovery to date has been clearly sufficient to provide the background and specific data necessary to evaluate the fairness, adequacy, and reasonableness of the proposed Settlement. *See Misra*, 2009 U.S. Dist. LEXIS 119468, at *11; *see also Clesceri*, 2011 U.S. Dist. LEXIS 11676, at *27-28, 34 (preliminarily approving the settlement where the Parties conducted significant informal discovery).

Therefore, Plaintiffs believe they have reviewed the necessary data to make an informed decision about the benefits of the proposed Settlement, and the Court should find that sufficient discovery took place.

e. The experience and views of counsel.

Counsel for Plaintiffs and Defendants, all well versed in complex class action litigation, support the approval of the Settlement—a fact that is accorded "great weight" because counsel have the greatest familiarity with the facts of the litigation and thus "are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *In re Pac. Enter. Sec. Litig.*, 47 F.3d at 378; *accord Wietzke v. Costar Realty Info., Inc.*, No. 09cv2743, 2011 U.S. Dist. LEXIS 20605, at *14 (S.D. Cal. Mar. 2, 2011) (*citing DIRECTV*, 221 F.R.D. at 528). *See also Clesceri*, 2011 U.S. Dist. LEXIS 11676, at *28-29 ("Counsels' opinions warrant great weight both because of their considerable familiarity with this litigation and because of their extensive experience in similar actions." (*quoting In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989))).

In this case, counsel for Plaintiffs and Defendants support approval of the proposed Settlement. Plaintiffs' counsel has set forth the basis for its recommendation in the Declaration of Todd D. Carpenter ("Carpenter Decl.") See Carpenter Decl., ¶¶15-28. Therefore, this factor weighs heavily in favor of preliminarily approving the terms of the proposed Settlement.

f. The reaction of the Class Members to the proposed Settlement.

At the preliminary approval stage, the reaction of class members to a proposed settlement is usually not known because notice has not yet been sent to the class. As such, this factor is not as meaningful a consideration now as it may be at the final fairness hearing where Settlement Class Members will have an opportunity to object to the proposed Settlement. The Parties will provide further evidence of the reaction of the Class Members before the Settlement fairness hearing.

Additionally, where a class has not yet been certified, granting preliminary approval and directing notice to class members may actually enhance their opt-out rights. *See In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995). This is because when "the right to exclusion [from the class] is provided simultaneously with the opportunity to accept or reject the terms of a proposed settlement," class members have a more concrete basis upon which to decide what they will sacrifice by opting out. *Id.* at 205-06; *see also In re Baldwin-United Corp.*, 105 F.R.D. 475, 481 (S.D.N.Y. 1984). Likewise, the Class Members here will benefit from simultaneous class certification and notice of the Settlement, militating in favor of preliminary approval.

2. The proposed Settlement is the result of extensive, arm's-length negotiations conducted by highly experienced counsel.

The requirement that a settlement be fair is designed to protect against collusion among the Parties. Typically, "[t]here is a presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for Court approval." *Newberg* § 11.41; *see also Monterrubio v. Best Buy Stores, L.P.*, No. 2:11-CV-03270, 2013 U.S. Dist. LEXIS 166021, at *12 (E.D. Cal. Nov. 20, 2013) ("[E]ven in class action contexts, 'the trial court is entitled to rely upon the judgment of experienced counsel for the Parties. Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel.'" (*quoting Elkins v. Equitable Life Ins. Co.*, No. 96-296, 1998 U.S. Dist. LEXIS 1557, at *82-83 (M.D. Fla. Jan. 27, 1998))).

The Parties did not begin to discuss settlement until after the Court scheduled an Early Neutral Evaluation Conference with the Honorable Jan Adler on October 25, 2013—over seven months after the initiation of the lawsuit and a full round of motion-to-dismiss briefing. Stipulation § I.F. The Parties also participated in a mediation on December 17, 2013. In the time leading up to and following the Conference and the mediation, the Parties engaged in significant discovery efforts. The Parties exchanged discovery including local and national Wellesse JMG sales information, initial

disclosures, interrogatories, requests for admissions, document requests, and proposed changes to the Wellesse JMG product labels and associated label statements. *Id.* §§ I.F and I.H.

The Parties' mediation was held in front of the Honorable Dickran Tevrizian, an experienced and skilled mediator, who assisted the Parties to the point of reaching an agreement in principle on December 17, 2013. *Id.* § I.H. By this time, Plaintiffs and Plaintiffs' counsel, who are experienced in prosecuting complex class action claims, had "a clear view of the strengths and weaknesses" of their case and were in a strong position to make an informed decision regarding the reasonableness of a potential settlement. *Bellows v. NCO Fin. Sys.*, No. 3:07-cv-01413, 2008 U.S. Dist. LEXIS 103525, at *21 (S.D. Cal. Dec. 2, 2008) (*quoting In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985)).

The Conference and mediation were followed by detailed negotiations between the Parties before agreement on the Settlement was reached. The fact that the Settlement was prompted by an experienced mediator is one factor that demonstrates the Settlement was anything but collusive. *See, e.g., Grant v. Capital Mgmt. Servs., L.P.*, No. 10-cv-2471, 2014 U.S. Dist. LEXIS 29836, at *13 (S.D. Cal. Mar. 5, 2014) ("Participation of a mediator is not dispositive, but 'is a factor weighing in favor of a finding of non-collusiveness.'" (*quoting In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011)); *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283, 2013 U.S. Dist. LEXIS 63856, at *14 (N.D. Cal. May 3, 2013) ("Here, the settlement resulted from non-collusive negotiations, i.e., two private mediation sessions with a mediator experienced in wage and hour class actions, which tends to support the conclusion that the settlement process was not collusive.") (internal quotations and citations omitted); *Sandoval v. Tharaldson Emp. Mgmt.*, No. EDCV 08-482, 2010 U.S. Dist. LEXIS 69799, at *15 (C.D. Cal. June 15, 2010) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive." (*quoting Satchell*, 2007 U.S. Dist. LEXIS 99066, at *17)); *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689, 2003 U.S. Dist.

LEXIS 17090, at *13 (S.D.N.Y. Sept. 26, 2003) ("[T]he fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable.") (citation omitted).

Furthermore, the nature of the subsequent negotiations between the Parties, the experience of counsel as longstanding class-action attorneys, and the fair result reached are illustrative of the non-collusive, arm's-length negotiations that lead to the Settlement.

3. The proposed Notice is adequate and should be approved.

Reasonable notice must be provided to Class Members to allow them an opportunity to object to the proposed Settlement. *See* Fed. R. Civ. P. 23(c)(2)(b), 23(e)(1). In a settlement class maintained under Rule 23(b)(3), as here, notice must meet the requirements of both Rule 23(c)(2) and Rule 23(e), but since "[t]he requirements of Rule 23(c)(2) are stricter than the requirements of Rule 23(e) and arguably stricter than the due process clause," the plan for dissemination of notice need only satisfy Rule 23(c)(2). *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 324-25 (E.D. Pa. 1993). Under Rule 23(c)(2)(B), notice to the Class must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," although actual notice is not required.

To satisfy Rule 23(c)(2), Rule 23(e), due process, and bind all members of the Class, the Notice must: (1) describe the essential terms of the proposed settlement; (2) disclose any special benefits provided to the class representatives; (3) provide information regarding attorneys' fees; (4) indicate the time and place of the hearing to consider approval of the settlement, and the method for objecting to (or, if permitted, for opting out of) the settlement; (5) explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set out those variations; and (6) prominently display the address and phone number of class counsel and the procedure for making inquiries. *Manual (Third)* § 30.212. The mechanics of the notice process are left to the discretion of

the court, subject only to the broad "reasonableness" standards imposed by due process. In this Circuit, it has long been the case that a notice of settlement will be adjudged satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Vill.*, 361 F.3d at 575 (*quoting Mendoza v. United States*, 623 F.2d 1338, 1352 (9th Cir.1980))).

Here, the form of Notice proposed by the Parties is clear, precise, informative, and provides Class Members with sufficient information to make an informed and intelligent decision whether to object to the Settlement. *See* Stipulation § VII and Exs.4-6. As such, it complies with the foregoing standards. Additionally, the proposed dissemination of the Class Notice satisfies all due process requirements. The Settlement states that Defendants will provide notice to the Class after preliminary approval of the Settlement by the Court. Because Defendants sell Wellesse JMG over the counter at retail stores, they do not have a way to identify or locate mailing addresses for the vast majority of individual Class Members. Therefore, the Notice Program focuses on publishing the Long- and Short-Form Notices in print and online media, and the Long-Form Notice and Claim Form will be available through the Settlement Website. Additionally, thousands of internet banner ads and impressions will be generated utilizing banner ads directing potential class members to the Claims Administrator's website for a full accounting of the settlement. *See* Exhibit 3 (Notice Plan) and 6 (Banner Ads) to the Stipulation.

The contents and dissemination of the proposed Notice will fairly and accurately inform the Class members of the terms of the proposed Settlement and provide sufficient opportunity for them to make informed decisions regarding their rights—this constitutes the best notice practicable under the circumstances and fully complies with the requirements of Rule 23 and due process. *See, e.g.*, *Beck-Ellman v. Kaz USA, Inc.*, No. 3:10-CV-02134, 2013 U.S. Dist. LEXIS 60182, at *9-13, 21-24 (S.D. Cal. Jan. 7, 2013) (granting preliminary approval where the notice plan was developed with the assistance of a settlement administrator and consisted of a publication notice, a website notice, and a

potential mailed notice); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 636 (S.D. Cal. 2011) (granting final approval where notice was published online, in newspapers and magazines, and on the settlement website). Accordingly, the Court should approve the proposed Notice and direct its dissemination.

For all of the above-stated reasons, the Court should preliminarily approve the proposed Settlement.

B. The Proposed Class Should Be Conditionally Certified

The Ninth Circuit recognizes the propriety of certifying a settlement class to resolve consumer lawsuits. *Hanlon*, 150 F.3d at 1019. Plaintiffs seeking class certification bear the burden of demonstrating that each element of Rule 23(a) and at least one of the requirements of Rule 23(b) are satisfied.[5] *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (*citing Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). While the Court's analysis must be rigorous, Rule 23 grants the district court "broad authority at various stages in the litigation to revisit class certification determinations and redefine or decertify classes as appropriate." *Dalton v. Lee Publ'ns, Inc.*, No. 08cv1072, 2013 U.S. Dist. LEXIS 71291, at *9 (S.D. Cal. May 20, 2013) (*citing Armstrong v. Davis*, 275 F.3d 849, 871 n.28 (9th Cir. 2001)). The Court "need only form a reasonable judgment on each certification requirement," taking the complaint's allegations as true and only considering the merits of the case "to the extent they are related to the Rule 23 analysis." *Walker v. Life Ins. Co. of the Sw.*, No. 10-9198, 2012 U.S. Dist. LEXIS 186296, at *22-23 (C.D. Cal. Nov. 9, 2012) (internal quotations and citations omitted).

[5] In assessing these certification requirements, a court may properly consider that there will be no trial. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial.").

1. The proposed Class is ascertainable.

Although Rule 23 does not expressly require that a proposed class be ascertainable, courts imply such a condition. *Brittni Cottle-Banks v. Cox Commc'ns, Inc.*, No. 10cv2133, 2013 U.S. Dist. LEXIS 72070, at *25-26 (S.D. Cal. May 21, 2013) (*quoting Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009)). "'A class definition should be precise, objective, and presently ascertainable,' though 'the class need not be so ascertainable that every potential member can be identified at the commencement of the action.'" *Mazur*, 257 F.R.D. at 567 (*quoting O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998)). Ascertainability is satisfied when it is "administratively feasible to determine whether a particular person is a class member." *Soto v. Diakon Logistics (Del.), Inc.*, No. 08-cv-33, 2013 U.S. Dist. LEXIS 119028, at *6 (S.D. Cal. Aug. 21, 2013) (citation omitted).

The Class definition here utilizes objective criteria that make class membership objectively verifiable. The Settlement Class Members will inform the Settlement Administrator about their purchases of the Wellesse JMG products and either send in their receipts verifying the purchases or certify under oath that such purchases were made if receipts are unavailable. California federal courts have routinely found similar classes to be ascertainable. *See supra* Part IV.A.3 (*Beck-Ellman*, 2013 U.S. Dist. LEXIS 60182, at *9-13, 21-24 (preliminarily approved even where the defendants did not have contact information for the majority of the class members because the case mainly involved retail purchases from third-party stores to consumers); *Hartless*, 273 F.R.D. at 636 (final approval granted even where class members' addresses were largely unknown to the defendant because class members mailed in claim forms certifying their purchases)). Accordingly, the ascertainability requirement is met here.

2. The Settlement Class satisfies Rule 23(a).

Rule 23(a) of the Federal Rules of Civil Procedure enumerates four prerequisites for class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. In light of the Settlement, the Parties agree that each of these requirements is met.

a. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Even though there is no "magic number," forty class members are sufficient to satisfy the numerosity requirement. *Menagerie Prod. v. Citysearch*, No. CV 08-4263, 2009 U.S. Dist. LEXIS 108768, at *16 (C.D. Cal. Nov. 9, 2009) (*citing Stuart v. Radioshack Corp.*, No. C-07-4499, 2009 U.S. Dist. LEXIS 12337, at *13 (N.D. Cal. Feb. 5, 2009)). Here, the numerosity requirement is readily met. Up until January 3, 2014, Defendants sold approximately eight million bottles of Wellesse JMG, providing Plaintiffs with an estimate of tens of thousands of Class Members, and class actions may proceed based on estimates as to the size of the proposed class. *Tchoboian v. Parking Concepts, Inc.*, No. SACV 09-422, 2009 U.S. Dist. LEXIS 62122, at *12-13 (C.D. Cal. July 16, 2009) (*citing In re Alcoholic Bev. Litig.*, 95 F.R.D. 321, 324 (E.D.N.Y. 1982)). Where, as here, the Class is large in numbers, it is typically inconvenient and impracticable to join all members of the proposed Class. *Tchoboian*, 2009 U.S. Dist. LEXIS 62122, at *12 (*citing Jordan v. L.A. Cnty.*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982)). Thus, the numerosity requirement is satisfied.

b. Commonality

Commonality requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). All questions of fact and law need not be common to satisfy the rule—"commonality only requires a single significant question of law or fact." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) (*citing Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011)). But the class members' claims must "'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke.'" *Mazza*, 666 F.3d at 588 (*quoting Dukes*, 131 S. Ct. at 2551). This requirement is readily satisfied here. There are multiple questions of law and fact, all arising from Defendants' uniform, deceptive representations that Wellesse JMG will provide numerous joint-health benefits. These

representations allegedly injured Settlement Class Members in the exact same way: they all purchased a product which does not perform as represented and they have been harmed in the amount they paid for the product. See *Weiner v. Dannon Co., Inc.*, 255 F.R.D. 658, 664-65 (C.D. Cal. 2009) ("The proposed class members clearly share common legal issues regarding Dannon's alleged deception and misrepresentations in its advertising and promotion of the Products," which "are sufficient to satisfy the Ninth Circuit's 'permissive' view of Rule 23(a)(2)."") (citation omitted).

c. Typicality

Under Rule 23(a)(3), the claims of the representative parties must be typical of the class members' claims. "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon*, 976 F.2d at 508 (*citing Weinberger v. Thornton*, 114 F.R.D. 599, 603 (S.D. Cal. 1986)). And the test "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (*quoting Hanon*, 976 F.2d at 508). Typicality is satisfied where, as here, Plaintiffs' claims are "reasonably co-extensive" with absent Class Members' claims; they need not be "substantially identical." *Hanlon*, 150 F.3d at 1020.

Here, Plaintiffs' claims are typical of those of the Settlement Class because they arise from a common course of conduct and legal theory. They have asserted during this litigation that Defendants engaged in false advertising in violation of consumer-protection laws and breached express warranties to Class members by misstating the joint-health benefits of the Products. The Class representatives allege that they purchased Wellesse JMG products that are within the Class definition, and had they known the truth about Defendants' misrepresentations and omissions, they would not have purchased the Wellesse JMG products. *See, e.g., McCrary v. Elations Co., LLC*, No. EDCV 13-00242, 2014 U.S. Dist. LEXIS 8443, at *32, 36 (C.D. Cal. Jan. 13, 2014) (finding typicality where the plaintiff "purchased Elations believing it was proven to reduce his joint pain,"

had he "known that Elations was not clinically proven to help with his joint pain, he would not have purchased it," and he "suffered the same type of economic injury and seeks the same type of damages as the putative class members, namely a refund of the purchase price."); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 502 (S.D. Cal. 2013) (finding typicality where the plaintiff and class members "were all exposed to the same alleged misrepresentations on the packages and advertisements," the plaintiff "would not have purchased the Kashi product or would have paid less for [it] had she known it contained artificial ingredients," and the plaintiff "alleges to have suffered the same type of economic injury and seeks the same type of damages as the putative class members; namely, a refund of all or part of the purchase price.") (internal citations omitted).

d. Adequacy

Rule 23(a)(4) requires the representative parties to "fairly and adequately protect the interests of the class." In the Ninth Circuit, adequacy is satisfied where (i) the interests of the proposed class representatives are not antagonistic to the interests of the Class, and (ii) counsel for the class is qualified and competent to vigorously prosecute the action. *See Staton*, 327 F.3d at 957 (*citing Hanlon*, 150 F.3d at 1020).

Here, the Class representatives' interests are aligned with those of the Settlement Class, and there are no conflicts or antagonism—they have suffered economic loss from the same misrepresentations disseminated by Defendants. Plaintiffs understand and are prepared to fulfill their duties to the Settlement Class. Throughout the course of this litigation, Plaintiffs have kept abreast of the litigation and been available for multiple communications with Plaintiffs' counsel and provided information for the various pleadings that have been filed. *See* Carpenter Decl. ¶29.

Likewise, Plaintiffs' counsel satisfy the adequacy requirement. In retaining Todd Carpenter of Carpenter Law Group[6] and James Patterson of Patterson Law Group,[7] Plaintiffs have employed counsel with the necessary qualifications, experience, and

[6] *See* Carpenter Decl. ¶¶30-31.

[7] *See* Carpenter Decl. Exhibit C; a true and correct copy of Patterson Law Group's resume.

resources to vigorously prosecute this action. Further, Plaintiffs' Counsel have performed extensive work to date in identifying and investigating potential claims in this action, surviving Defendants' motion to dismiss, and successfully mediating and negotiating the proposed Settlement. *See In re Emulex Corp.*, 210 F.R.D. 717, 720 (C.D. Cal. 2002) (in evaluating class counsel's adequacy, "a court may examine the attorneys' professional qualifications, skill, experience, and resources," and "may also look at the attorneys' demonstrated performance in the suit itself.") (internal citations omitted).

Based on the lack of antagonism between the interests of Plaintiffs and the Class and Plaintiffs' counsel's experience in class actions and other complex litigation, the adequacy-of-representation requirement is satisfied.

3. The Settlement Class satisfies Rule 23(b)(3).

Certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure is appropriate "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022 (*quoting* 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1777 (2d ed. 1986)). The two inquiries posed by Rule 23(b)(3) are whether (1) questions of law or fact common to the class members predominate over questions affecting only individual members, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. As such, Rule 23(b)(3) encompasses those cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615 (*quoting* Advisory Comm.'s Notes on Fed. R. Civ. P. 23, 28 U.S.C. App., p. 697).

a. Common questions predominate over individual issues.

The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623 (citation omitted). "Predominance is a test readily met in certain cases alleging consumer . . . fraud," *id.* at 625, "when there exists generalized evidence which proves or

disproves an [issue or] element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position," *Galvan v. KDI Distrib. Inc.*, No. SACV 08-0999, 2011 U.S. Dist. LEXIS 127602, at *24-25 (C.D. Cal. Oct. 25, 2011) (citation omitted).

The proposed Settlement satisfies the predominance requirement because the evidence necessary to establish Plaintiffs' claims is common to the Class representatives and all members of the Class—they would all seek to determine whether Wellesse JMG provides the advertised joint-health benefits and whether Defendants' representations were likely to deceive a reasonable consumer. These common questions "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication," and therefore, "there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022.

b. A class action is the superior method to settle this controversy.

The superiority requirement's purpose "is to assure that the class action is the most efficient and effective means of resolving the controversy." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (*quoting* 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1779 at 174 (3d ed. 2005)). Superiority is satisfied "if no realistic alternative exists." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996)). If, as here, absent class members are unaware of their rights, no alternatives exist because the likelihood of multiple, individual claims is remote, and therefore "[c]lass action certifications to enforce compliance with consumer protection laws are desirable and should be encouraged." *See Ballard v. Equifax Check Servs., Inc.*, 186 F.R.D. 589, 600 (E.D. Cal. 1999) (citation omitted).

The factors for determining superiority include: (i) class members' interest in individually controlling separate actions; (ii) any litigation on the issues already begun by class members; (iii) the desirability of concentrating the litigation in the particular forum; and (iv) the difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3). "A

consideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." *Zinser*, 253 F.3d at 1190 (citation omitted); *see also Valentino*, 97 F.3d at 1234 (finding superiority satisfied where granting class certification "will reduce litigation costs and promote greater efficiency").

An assessment of the "superiority" factors shows that concentrating the claims in a single forum through a class action is the best procedure for this Settlement. The damages at issue for each Class Member are too low, and the financial burdens of litigation are too high to incentivize Class Members to litigate their claims individually. *See Ballard*, 186 F.R.D. at 600 ("there is little incentive to sue individually" when the size of any individual damages claims are small). "Even if efficacious, these claims would not only unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs. In most cases, litigation costs would dwarf potential recovery." *Hanlon*, 150 F.3d at 1023; *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980) (class actions "vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost"); *Smith v. Microsoft Corp.*, No. 11-CV-1958, 2014 U.S. Dist. LEXIS 12799, at *10 (S.D. Cal. Jan. 28, 2014) ("The most compelling rationale for finding superiority in a class action is the existence of a negative value suit," i.e., certification is justified "where there are no other realistic possibilities for redress and plaintiffs would be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover.") (internal quotations and citations omitted).

Additionally, Class Members are not already involved in litigation concerning the controversy, and any possible difficulties of managing a class action are vitiated by the fact of this Settlement. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1273 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 128 S. Ct. 2131, 2134 (2008) ("we are not assessing whether this class action will create significant management problems, but instead determining whether it will create relatively more

management problems than any of the alternatives (including, most notably, [thousands of] separate lawsuits by the class members)," and where "common issues predominate over individualized issues, we would be hard pressed to conclude that a class action is less manageable than individual actions."). Thus, the requirements of Rule 23(b)(3) are met.

V. SCHEDULE OF ANTICIPATED EVENTS FOLLOWING PRELIMINARY APPROVAL

Dates, such as the time to complete publication of the Class Notice or to opt-out or object, are based on preliminary approval of the Settlement. The related dates calculated in accordance with the Stipulation of Settlement are as follows:

Event	Date
Preliminary Approval Granted	Day 1
Notice First Published	Day 10
Notice Last Published	Day 45
Last Day to Opt Out or Object	Day 75 – (30 days from last publication)
Motion for Attorneys' Fees & Costs	Day 75
Parties to File Final Approval Papers	Day 75
Final Approval Hearing	Day 105
Last Day to Submit a Claim Form	Day 135 – (30 days after Final Settlement Hearing)
Supplemental Claims Deadline (if required)	Day 225

Accordingly, the parties request that the Court schedule a Final Approval Hearing 105 days after granting preliminary approval, or as soon thereafter as the Court's schedule permits.

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VI. CONCLUSION

Based on the foregoing, the Parties respectfully request that the Court (1) certify the Class for settlement purposes; (2) designate Plaintiffs Hazlin and Albence as Class Representatives; (3) appoint Carpenter Law Group and Patterson Law Group as Class Counsel for the Settlement Class; (4) grant preliminary approval of the Settlement; (5) approve the proposed Notice Plan; and (6) schedule a final approval hearing.

Dated: September 15, 2014

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By: */s/ Todd D. Carpenter*

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CERTIFICATE OF SERVICE

The undersigned hereby certify that on September 15, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system per Civil Local Rule 5.4 which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail notice list, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice list. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Todd D. Carpenter

EXHIBIT 1

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

CV NO. 13-CV-00618-DMS (JMA)

JOINT STIPULATION OF SETTLEMENT

Judge: Hon. Karen S. Crawford

I. RECITALS

A. This Stipulation of Settlement, including all Exhibits hereto, ("Settlement") is entered into by and between plaintiffs Ed Hazlin and Karen Albence ("Plaintiffs"), on behalf of themselves and the Settlement Class Members, and defendants Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC ("Defendants"), (collectively, the "Parties"), and resolves in full this class action lawsuit (the "Action"). Capitalized terms used herein are defined in Section II of this Settlement or defined in parentheses elsewhere in this Settlement. Subject to Court approval pursuant to the applicable Federal Rules of Civil Procedure, and as provided herein, the Parties hereby stipulate and agree that, in consideration for the promises and covenants set forth in the Settlement and upon the entry by the Court of a Final Judgment and Order Approving Settlement and the occurrence of the Effective Date, the Action shall be settled and compromised upon the terms and conditions contained herein.

B. On March 15, 2013, Ed Hazlin, through Class Counsel, filed a class action complaint against Defendant Botanical Laboratories, LLC in the United States District Court for the Southern District of California captioned *Ed Hazlin v. Botanical Laboratories, LLC*, No. 13-CV-00618-DMS (JMA), on behalf of himself and all other consumers similarly situated who purchased Wellesse Joint Movement Glucosamine products. According to the allegations of the complaint, Defendants' advertising for Wellesse Joint Movement Glucosamine was likely to mislead consumers because, according to Plaintiffs, Wellesse Joint Movement Glucosamine does not improve joint health, mobility, flexibility, and lubrication. Plaintiff's complaint alleged causes of action for violations of California's Bus. & Prof. code § 17200, *et seq.*, California's Consumers Legal Remedies Act ("CLRA"), Civ. Code § 1750, *et seq.*, and breach of express warranty;

C. On May 20, 2013, Class Counsel filed a First Amended Class Action complaint, captioned *Ed Hazlin v. Botanical Laboratories, LLC*, No. 13-CV-00618-

DMS (JMA). On May 30, 2013, Plaintiff Hazlin filed a Notice of Withdrawal of Document, withdrawing the First Amended Complaint;

D. On May 30, 2013, Class Counsel filed a Second Amended Class Action complaint, captioned *Ed Hazlin and Karen Albence v. Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC*, No. 13-CV-00618-DMS (JMA), which added Plaintiff Karen Albence and Defendants Botanical Laboratories, Inc. and Schwabe North America, Inc. The Second Amended Class Action Complaint alleged a class of California consumers who purchased a Wellesse Joint Movement Glucosamine within the applicable statute of limitations and alleged the same causes of action as were alleged in the First Amended Complaint;

E. On August 22, 2013, Defendants filed their answer to the Second Amended Class Action Complaint, expressly denying the allegations therein and raising affirmative defenses;

F. Prior to commencement of the Action, Class Counsel undertook an extensive investigation of the facts, which included review of Defendants' publicly available advertisements for Wellesse Joint Movement Glucosamine, and review and analysis of scientific studies and articles relating to the ingredients in Wellesse Joint Movement Glucosamine and in competitor joint health supplement products. In advance of the settlement conferences conducted with the assistance of the Court and mediation with the assistance of the Hon. Dickran Tevrizian, Ret. (described below) and in connection with the Parties' negotiations, the Parties requested and exchanged pre-mediation discovery, including information relating to the sales of Wellesse Joint Movement Glucosamine. In connection with the Fed. R. Civ. P. 26(f) process, the Parties also had negotiations regarding a protocol relating to the discovery of electronically stored information ("ESI") and a Proposed Protective Order. On November 27, 2013, the Parties served their initial disclosures pursuant to Fed. R. Civ. P. 26(a). Once permitted by the Court, Plaintiffs served their first

sets of interrogatories, requests for admissions, and document requests;

G. Plaintiffs, corporate representatives of Defendants, and their counsel, participated in settlement conferences with the assistance of the Honorable Jan Adler during an Early Neutral Evaluation conference held on October 25, 2013. In preparation for and following the settlement conferences with the Court, Counsel for the Parties have also conducted extensive settlement negotiations between themselves;

H. On December 17, 2013, Plaintiffs, corporate representatives of Defendants, and their counsel, participated in mediation with the assistance of the Honorable Dickran Tevrizian, (Ret.). In preparation for the mediation and as part of settlement negotiations, the Parties exchanged briefs in support of their respective positions and Defendants provided additional national product sales information and pricing information regarding Wellesse Joint Movement Glucosamine, as well as proposed changes to the Wellesse Joint Movement Glucosamine product labels and associated label statements. This mediation involved all Parties and lasted approximately twelve (12) hours, during which the Parties successfully reached an agreement in principle, which is now finalized as reflected in this Settlement;

I. All Parties have reached the resolution set forth in this Settlement, providing for, among other things, the settlement of the Action between Plaintiffs, on behalf of themselves and the Settlement Class, and Defendants, on the terms and subject to the conditions set forth below; and

J. Class Counsel have determined that a settlement of the Action on the terms reflected in this Settlement is fair, reasonable, adequate, and in the best interests of Plaintiffs and the Settlement Class;

K. Defendants, to avoid the costs, disruption, and distraction of further litigation, and without admitting the truth of any allegations made in the Action, or any liability with respect thereto, have concluded that it is desirable that the claims

against them be settled and dismissed on the terms reflected in this Settlement; and

L. This Settlement is entered into by and between the Parties, by and through their respective counsel and representatives, and the Parties agree that: upon the Effective Date, the Action and all Released Claims shall be settled and compromised as between Plaintiffs and the Settlement Class on the one hand, and Defendants on the other hand on the following terms and conditions:

II. DEFINITIONS

A. As used in this Settlement and the attached exhibits (which are an integral part of the Settlement and are incorporated in their entirety by reference), the following terms shall have the meanings set forth below, unless this Settlement specifically provides otherwise:

1. "Action" means *Ed Hazlin and Karen Albence v. Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC*, No. 13-CV-00618-DMS (JMA).

2. "Attorneys' Fees and Expenses" means such funds as may be awarded by the Court to compensate Class Counsel as determined by the Court, as described more particularly in Section X of this Settlement.

3. "Authorized Claimant" means any Settlement Class Member who submits a valid and timely Claim Form.

4. "Authorized Claim(s)" means a Claim Form submitted by an Authorized Claimant.

5. "Award" means the relief obtained by Settlement Class Members pursuant to Section IV A of this Settlement.

6. "Claim(s)" means a request for relief submitted by a Settlement Class Member on a Claim Form submitted to the Settlement Administrator in accordance with the terms of the Settlement.

7. "Claim Form" or "Claim Forms" means the form to be used by a Settlement Class Member to submit a Claim to the Settlement Administrator. The

proposed Claim Form is subject to Court approval and attached hereto as Exhibit 2.

8. "Claims Deadline" means the date by which all Claim Forms must be postmarked or submitted online to the Settlement Administrator to be considered timely, and shall be no later than one hundred thirty five (135) days after the Court first sets a date for the Final Approval Hearing. In the event the Class Notice Period is extended, the Claims Deadline will be extended.

9. "Claims Protocol" means the protocol for reviewing and approving claims, attached as Exhibit 8.

10. "Class Counsel" means the attorneys of record for the Plaintiff and the putative Settlement Class, specifically the following individuals: Todd D. Carpenter of Carpenter Law Group and James R. Patterson of Patterson Law Group.

11. "Class Notice" means, collectively, the "Full Notice," the " Short-Form Notice," and Publications Notices substantially in the forms of Exhibits 4, 5 and 6, respectively, further referenced in Section VII of this Agreement.

12. "Class Period" means the period of time that Joint Movement Glucosamine began to be sold until and including the date the Preliminary Approval Order is entered.

13. "Class Representatives" means Plaintiffs Ed Hazlin and Karen Albence.

14. "Court" means the United States District Court for the Southern District of California.

15. "Defendants" means Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC.

16. "Effective Date" means either: (a) if the Final Judgment and Order Approving Settlement has been entered, the date when the time has run for all timely motions for reconsideration and/or appeals or other efforts to obtain

review, and no such motions or appeals or other efforts to obtain review have been filed; or (b) in the event that an appeal or other effort to obtain review of the Final Judgment and Order Approving Settlement has been initiated, the date upon which such appeal or other review has been finally concluded without reversal of the Final Judgment and Order Approving Settlement, and is no longer subject to review, whether by appeal, petitions for rehearing, petitions for rehearing en banc, petitions for writ of certiorari or otherwise, provided that any petition for review or an appeal of the award of Attorney's Fees and Expenses shall not delay the occurrence of the Effective Date.

17. "Escrow Agent" means the escrow agent agreed upon by the parties and approved by the Court to hold funds pursuant to the terms of this Settlement.

18. "Final Approval Hearing" means the hearing to be conducted by the Court on such date as the Court may order, to determine the fairness, adequacy, and reasonableness of the Settlement.

19. "Final Judgment and Order Approving Settlement" means the Final Judgment and Order Approving Settlement to be entered by the Court, substantially in the form of Exhibit 1, approving the Settlement as fair, adequate, and reasonable, confirming the certification of the Settlement Class, and issuing such other findings and determinations as the Court and/or the Parties deem necessary and appropriate to implement the Settlement.

20. "Full Notice" or "Long Form Notice" means the full legal notice of the Settlement , as approved by Class Counsel, Defendants' Counsel, and the Court, to be provided to Settlement Class Members under Section VII.C.1 of this Settlement, attached as Exhibit 4.

21. "Motion for Preliminary Approval of Settlement" means the motion to be filed for Preliminary Approval of this Settlement.

22. "Notice and Claim Administration Expenses" means all costs and expenses incurred by the Settlement Administrator, including all notice expenses, the cost of administering the Notice Program, and the costs of processing all Claims made by Settlement Class Members.

23. "Notice Date" means the date by which the Settlement Administrator completes dissemination of the Class Notice as provided in the Settlement and shall be no later than forty-five (45) days after the Court enters an Order granting Preliminary Approval of this Settlement. The Notice Date may be extended ("Supplemental Claims Deadline") if the Settlement Fund is not sufficiently exhausted, as described in Section IV.D below.

24. "Notice Program" means the Settlement Administrator's plan for disseminating Class Notice to the Settlement Class, as described in Exhibit 3.

25. "Objection Date" means the date by which Settlement Class Members must file and serve objections to the Settlement and shall be no later than thirty (30) days before the date first set for the Final Approval Hearing.

26. "Opt-Out Date" means the postmark date by which a Request for Exclusion must be submitted to the Settlement Administrator in order for a Settlement Class Member to be excluded from the Settlement Class, and shall be no later than thirty (30) days before the date first set for the Final Approval Hearing.

27. "Parties" means plaintiffs Ed Hazlin and Karen Albence and defendants Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC.

28. "Plaintiffs" means Ed Hazlin and Karen Albence.

29. "Preliminary Approval Order" means the order to be entered by the Court, substantially in the form of Exhibit 7, preliminarily approving the Settlement, certifying the Settlement Class, setting the date of the Final Approval Hearing, approving the Notice Program, Class Notice, and Claim Form, and setting the Opt Out Date, Objection Date, and Notice Date.

30. "Product" or "Wellesse Joint Movement Glucosamine" means Wellesse Joint Movement Glucosamine products, including all size variations.

31. "Publication Notice" means the notices for consumer magazines, newspapers and internet banner ads, substantially in the form of Exhibit 6.

32. "Released Claims" and "Released Parties" means those claims and parties released from liability under Section IX.

33. "Request for Exclusion" means the written communication that must be submitted to the Settlement Administrator and postmarked on or before the Opt-Out Date by a Settlement Class Member who wishes to be excluded from the Settlement Class.

34. "Settlement" means this Stipulation of Settlement and all Exhibits hereto.

35. "Settlement Administrator" means the entity(ies) retained by the Parties and approved by the Court to design and implement the program for disseminating Notice to the Class, administer the claims portion of this Settlement, and perform overall administrative functions.

36. "Settlement Class" and "Settlement Class Member(s)" each means all persons who purchased Wellesse Joint Movement Glucosamine products in the United States prior to the entry of the Preliminary Approval Order. Excluded from the Settlement Class are: (i) those who purchased the Wellesse Joint Movement Glucosamine products for purpose of resale; (ii) those with claims for personal injuries arising from the ingestion of one or more Wellesse Joint Movement Glucosamine products; (iii) Defendants and their officers, directors, and employees; (iv) any person who files a valid and timely Request for Exclusion; and (v) the Judge(s) to whom this Action is assigned and any members of their immediate families.

37. "Settlement Fund" means the amount of $3.1 million. The

Settlement Fund includes Notice and Claim Administration Expenses, Attorneys' Fees and Expenses and any Court-approved service award to the Plaintiffs.

38. "Settlement Website" means the Internet website to be established for this Settlement by the Settlement Administrator to provide information to the public and the Settlement Class about this Agreement and to permit Settlement Class Members to submit Claims online.

39. "Short-Form Notice" means the Notice as approved by Class Counsel, Defendants' Counsel, and the Court, to be provided to Settlement Class Members substantially in accordance with Exhibit 5.

40. "Supplemental Claims Deadline" means the date by which all Supplemental Claim Forms must be postmarked or submitted online to the Settlement Administrator to be considered timely, and shall be ninety (90) days after the calculation of claims following the initial Claims Deadline. The Supplemental Claims Deadline will be triggered in accordance with Section IV.D below.

41. "Supplemental Claim Forms" means the form to be used by a Settlement Class Member to submit a Claim to the Settlement Administrator after the Claims Deadline if the Supplemental Claims Deadline is triggered in accordance with Section IV.D below.

B. Other capitalized terms in this Stipulation but not defined in Section II.A shall have the meanings ascribed to them elsewhere in this Stipulation.

III. CERTIFICATION OF THE SETTLEMENT CLASS FOR SETTLEMENT PURPOSES ONLY AND FILING OF THE THIRD AMENDED COMPLAINT

A. Certification of the Settlement Class

1. This Settlement is for settlement purposes only, and neither the fact of, nor any provision contained in this Settlement, nor any action taken hereunder, shall constitute or be construed as an admission of: (a) the validity of any claim or allegation by Plaintiffs or of any defense asserted by Defendants, in

the Action; or (b) any wrongdoing, fault, violation of law, or liability on the part of any Party, Released Party, Settlement Class Member, or their respective counsel.

2. As part of the Motion for Preliminary Approval of Settlement, Plaintiffs will seek certification of the Settlement Class. Defendants hereby consent, solely for purposes of the Settlement, to the certification of the Settlement Class, to the appointment of Class Counsel, and to the approval of Plaintiffs as suitable representatives of the Settlement Class; provided, however, that if the Court does not approve this Settlement or the Settlement otherwise fails to be consummated, then Defendants shall retain all rights they had immediately preceding the execution of this Settlement to object to the certification or maintenance of the Action as a class action.

B. Filing of Third Amended Complaint

Plaintiffs shall file a Third Amended Class Action Complaint ("Third Amended Complaint") on behalf of the Settlement Class in the form of Exhibit 9.

C. REQUIRED EVENTS AND COOPERATION BY THE PARTIES

1. Preliminary Approval

As soon as reasonably practicable after execution of the Settlement Agreement, the Parties shall submit the Settlement, including all Exhibits, to the Court for its Preliminary Approval and shall jointly move the Court for entry of an order, which by its terms shall:

(a) Determine preliminarily that this Settlement fall within the range of reasonableness meriting possible final approval and dissemination of Class Notice to the Settlement Class;

(b) Determine preliminarily that the Class Representatives are members of the Settlement Class and that, for purposes of the Settlement, they satisfy the requirements of Rule 23 and that they adequately represent the interests of the Settlement Class Members, and appoint them as the Class Representatives of the Settlement Class;

(c) Conditionally certify the Settlement Class for purposes of the Settlement under Rule 23(b)(3) for settlement purposes only;

(d) Appoint Interim Class Counsel as Class Counsel pursuant to Rule 23(g);

(e) Schedule the Final Approval Hearing to: (i) determine finally whether the Settlement Class satisfies the applicable requirements of Rule 23 and should be finally certified for settlement purposes only; (ii) review objections, if any, regarding the Settlement; (iii) consider the fairness, reasonableness and adequacy of the Settlement; (iv) consider Class Counsel's application for an award of Attorneys' Fees and Expenses; (v) determine the validity of Requests for Exclusion and exclude from the Settlement Class those persons who validly and timely opt out; and (vi) consider whether the Court shall issue the Final Judgment and Order Approving Settlement and dismissing the Actions with prejudice;

(f) Set a briefing schedule for the Final Approval Hearing;

(g) Approve the proposed Class Notices and Notice Program;

(h) Approve the designation of KCC as the Settlement Administrator;

(i) Direct the Settlement Administrator to cause the Class Notices to be disseminated in the manner set forth in the Notice Program on or before the Notice Dates;

(j) Determine that the Class Notices and the Notice Program: (i) meet the requirements of Rule 23(c)(3) and due process; (ii) are the best practicable notice under the circumstances; (iii) are reasonably calculated, under the circumstances, to apprise Settlement Class Members of the pendency of the Action, their right to object to the proposed Settlement, opt out of the Settlement Class, or participate within the timeframe provided herein; and (iv) are reasonable and constitute due, adequate and sufficient notice to all those entitled to receive notice;

(k) Require each Settlement Class Member who wishes to opt out of the Settlement Class to submit a timely written Request for Exclusion, on or before the Opt Out and Objection Date, to the Claims Administrator, to Class Counsel, and to Defendants' Counsel, as specified in Section VIII of this Settlement Agreement;

(l) Rule that any Settlement Class Member who does not submit a timely written Request for Exclusion will be bound by all proceedings, orders and judgments in the Action;

(m) Require any Settlement Class Member who wishes to object to the fairness, reasonableness or adequacy of the Settlement Agreement, to the award of Attorneys' Fees and Expenses, or to the Incentive Awards, to submit to the Settlement Administrator and deliver to Class Counsel and Defendants' Counsel, by the Opt Out and Objection Date, a statement of his or her objection, as well as the specific reason for each objection, including any legal support the Settlement Class Member wishes to bring to the Court's attention and any evidence the Settlement Class Member wishes to introduce in support of his or her objection, and to state whether the Settlement Class Member and/or his or her counsel wishes to make an appearance at the Final Approval Hearing, or be forever barred from separately objecting; and

(n) Establish the following:

(i) The date and time of the Final Approval Hearing;

(ii) The Notice Dates: The Parties propose that the Class Settlement Notice Date be forty-five (45) days after the entry of the Preliminary Approval Order and fifty-five (55) days before the Final Approval Hearing, and the Settlement Fund distribution be no more than sixty (60) days after the Effective Date;

(iii) The Opt Out and Objection Date: The Parties propose that the Opt Out and Objection Date be the date that is thirty (30) days prior to the Final Approval Hearing;

(iv) Claims Deadlines: The Parties propose that the Claims Deadline for submission of Claims be one-hundred thirty-five (135) days after the Court first sets a date for the Final Approval Hearing.

IV. SETTLEMENT RELIEF

A. Settlement Fund and Cash Payments

1. Defendants shall establish a Settlement Fund by depositing $3,100,000.00 with the Escrow Agent according to the schedule set forth in Section IV.E below.

2. For each 16 ounce bottle of Wellesse Joint Movement Glucosamine purchased, Authorized Claimants shall be entitled to receive a payment of up to $15.00 from the Settlement Fund. For each 33 ounce bottle of Wellesse Joint Movement Glucosamine purchased, Authorized Claimants shall be entitled to receive a payment of up to $18.00 from the Settlement Fund. Authorized Claimants may not receive reimbursement for more than one hundred dollars ($100) in total recovery, except as provided in Paragraph IV. A. 3.

3. In the event that there is any remaining cash amount in the Settlement Fund after payment of Notice and Claim Administration Expenses, Attorneys' Fees, any necessary taxes, tax expenses, and any Court-approved service award to Plaintiffs as well as the tallied amount of all Authorized Claims, the Settlement Administrator shall divide the remaining cash amount equally by the number of Authorized Claimants and shall pay each such Authorized Claimant his or her share of the remaining cash amount.

4. To become an Authorized Claimant and receive the cash payment described in this Settlement, the Settlement Class Member must timely submit a Claim Form and either certify under penalty of perjury that the purchases for which the Claim Form is submitted were made during the Class Period or submit receipts verifying proof of purchase during the Class Period.

B. Injunctive Relief

1. For a period of at least three years from the Effective Date, Defendants will not make representations that Wellesse Joint Movement Glucosamine provides certain joint health benefits, as described below, unless at the time of making such representation, they possess and rely upon competent and reliable scientific evidence that substantiates that the representations are true. Defendants shall not be precluded from making any statement allowed or approved by regulatory agencies or governing bodies, including, but not limited to, the Food and Drug Administration.

2. Without admitting liability, and solely to avoid the cost of further litigation, Defendants agree not to make the following statements in the labeling of Wellesse Joint Movement Glucosamine products for a period of three years:

a. "Start to feel it in 7 days;"

b. "improves joint health," and related "joint health" statements;

c. "less joint discomfort;"

d. "protects and rebuilds cartilage," and similar statements concerning the protection or rebuilding of cartilage;

e. "for healthy joint support & mobility" or "for healthy joint support and flexibility;"

f. "Glucosamine is necessary to protect and rebuild cartilage tissue and keep joints strong & healthy;" and

g. "mobility, flexibility, & lubrication."

3. Defendants have implemented shipping of the Wellesse Joint Movement Glucosamine products with revised labeling that conforms to the terms of this Settlement, as set forth in Exhibit 10.

4. Defendants/retailers will not be requested to recall or remove

products already shipped or in the stream of commerce that do not conform to the terms of this Settlement.

C. Disbursements from the Settlement Fund

1. In accordance with the payment schedule set forth in Section IV.E below, money from the Settlement Fund shall be applied first to pay Notice and Claim Administration Expenses; next, to pay Attorneys' Fees, any necessary taxes, tax expenses, and any Court-approved service award to Plaintiffs; and then the balance of the Settlement Fund (the "Net Settlement Fund") will be used to pay Authorized Claims..

2. In the event that the aggregate amount of Authorized Claims exceeds the Net Settlement Fund, each Authorized Claimant's award shall be reduced on a *pro rata* basis. In the event that there is any remaining cash amount in the Settlement Fund after payment of Notice and Claim Administration Expenses, Attorneys' Fees, any necessary taxes, tax expenses, and any Court-approved service award to Plaintiffs, as well as the tallied amount of all Authorized Claims, the Settlement Administrator shall divide the remaining cash amount equally by the number of Authorized Claimants and shall pay each such Authorized Claimant his or her share of the remaining cash amount.

D. Extended Notice Period.

1. If after the initial three (3) month notice period concludes without the submission of at least $1,000,000 in Authorized Claims, the Notice period will be extended an for additional three (3) months.

E. Schedule of Payments into the Settlement Fund

1. Defendants shall cause payments not to exceed $3.1 million to be made into the Settlement Fund within fifteen (15) business days after entry of the Final Judgment and Order Approving Settlement. The Settlement Fund shall be deposited into an interest-bearing escrow account held by the Escrow Agent, which amount shall be used by the Settlement Administrator to pay Notice and Claim

Administration Expenses as such expenses become due and payable.

V. CLAIM FORM SUBMISSION AND REVIEW

A. Claim Forms will be distributed as part of the Notice Program as described below, available for online submission from the Settlement Website, available for download from the Settlement Website, and upon request, will be mailed or e-mailed to Settlement Class Members by the Settlement Administrator. Settlement Class Members may mail, fax, or submit via e-mail the Claim Form to the Settlement Administrator and may mail any accompanying bottles of the product purchased during the Class Period .

B. The Settlement Administrator shall provide periodic updates to Class Counsel and Defendants regarding Claim Form submissions beginning not later than one week before the Final Approval Hearing date and continuing on a monthly basis thereafter.

C. The Settlement Administrator shall begin to pay Authorized Claimants within thirty (30) days of the Effective Date.

D. All Notice and Claim Administration Expenses shall be paid from the Settlement Fund and not reimbursed to Defendants, whether or not the Final Judgment and Order Approving Settlement is entered and even if the Final Judgment and Order Approving Settlement is not upheld on appeal.

VI. RETENTION OF THE SETTLEMENT ADMINISTRATOR

A. Class Counsel, subject to the approval of Counsel for Defendants, which approval shall not be unreasonably withheld, shall retain a Settlement Administrator to help implement the terms of the proposed Settlement. All costs associated with the Settlement Administrator, including costs of providing notice to the Settlement Class Members and processing claims, shall be paid from the Settlement Fund.

B. The Settlement Administrator(s) shall assist with various administrative tasks, including, without limitation: (1) posting of the Full Notice

and Claim Forms to the Settlement Website for Settlement Class Members; (2) arranging for publication of all forms of Class Notice; (3) handling returned mail and e-mail not delivered to Settlement Class Members; (4) attempting to obtain updated address information for Settlement Class Members requesting that Claim Forms be mailed to them; (5) making any additional publication required under the terms of this Settlement; (6) answering written inquiries from Settlement Class Members and/or forwarding such inquiries to Class Counsel or their designee; (7) receiving and maintaining on behalf of the Court and the Parties any Settlement Class Member correspondence regarding requests for exclusion from the Settlement; (8) establishing the Settlement Website that posts notices, Claim Forms, and other related documents; (9) establishing a toll-free telephone number that will provide Settlement-related information to Settlement Class Members; (10) receiving and processing claims and distributing payments to Settlement Class Members; and (11) otherwise assisting with administration of the Settlement.

C. The contract(s) with the Settlement Administrator(s) shall obligate the Administrator to abide by the following performance standards:

1. The Administrator shall accurately and neutrally describe, and shall train and instruct its employees and agents to accurately and objectively describe, the provisions of this Settlement in communications with Settlement Class Members; and

2. The Administrator shall provide prompt, accurate, and objective responses to inquiries from Class Counsel or their designee, Defendants, and/or Defendants' counsel.

VII. NOTICE TO THE SETTLEMENT CLASS AND CAFA NOTICE

A. Notice to State and Federal Officials ("CAFA" Notice)

In compliance with the attorney general notification provision of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715, within ten (10) days after the motion for Preliminary Approval of Settlement is filed, Defendants shall

provide notice of this proposed Settlement to the Attorney General of the United States and all state attorneys general "CAFA Notice(s)." Defendants shall file with the Court a certification stating the date(s) on which the CAFA Notices were sent.

B. Class Notice

1. No later than forty-five (45) days after the entry by the Court of a Preliminary Approval Order, the Settlement Administrator shall cause the Class Notice to be disseminated to potential Settlement Class Members. The Parties agree that notice by a combination of print and Internet-based publication is the best means under the circumstances of this case to effect notice to the Settlement Class and that the Notice Program outlined in Exhibit 3 comports with the requirements of due process. Class Notice shall be disseminated pursuant to the Notice Program set forth in Exhibit , within 45 days of the issuance of the Preliminary Approval Order. A description of the Notice Program (Exhibit 3) and copies of the proposed forms of Class Notice are attached as Exhibits, 4,5 and 6.

2. At or prior to the Final Approval Hearing, the Settlement Administrator shall provide the Court with an affidavit attesting that Class Notice was disseminated pursuant to the Notice Program set forth below.

C. Notice Program

1. Full Notice:

The Full Notice, which shall be in substantially the form of Exhibit 4, shall:

a. include a short, plain statement of the background of the Action and the proposed Agreement;

b. describe the proposed Settlement relief as set forth in this Settlement;

c. inform Settlement Class Members that, if they do not exclude themselves from the Settlement Class, they may be eligible to receive relief;

d. describe the procedures for participating in the Settlement

including all applicable deadlines and advise Settlement Class Members of their rights, including their right to submit a Claim to receive an Award under the Agreement by timely submitting the enclosed Claim Form;

e. explain the scope of the Release;

f. state that any Award to Settlement Class Members under the Settlement is contingent on the Court's final approval of the Settlement;

g. identify Class Counsel and the amounts sought in attorneys' fees and expenses and Plaintiffs' service awards;

h. explain the procedures for opting out of the Settlement Class, including the applicable deadline for opting out;

i. explain the procedures for objecting to the Settlement , including the applicable deadline; and

j. explain that any judgment or orders entered in the Action, whether favorable or unfavorable to the Settlement Class, shall include and be binding on all Settlement Class Members who have not been excluded, even if they have objected to the proposed Settlement and even if they have another claim, lawsuit, or proceeding pending against Defendants.

2. Short Form Notice:

a. include a short, plain statement of the background of the Action and the proposed Agreement;

b. describe the proposed Settlement relief as set forth in this Settlement;

c. inform Settlement Class Members that, if they do not exclude themselves from the Settlement Class, they may be eligible to receive relief;

d. direct class members to the Settlement Administrator's website for a full explanation as to the procedures for participating in the Settlement

including all applicable deadlines and advise Settlement Class Members of their rights, including their right to submit a Claim to receive an Award under the Agreement by timely submitting the enclosed Claim Form and an explanation of the full release;

e. identify Class Counsel and the amounts sought in attorney's fees and expenses and Plaintiff's service awards;

f. direct Class Members to the Settlement Administrator's website to explain the procedures for objecting to the Settlement , including the applicable deadline; and explain that any judgment or orders entered in the Action, whether favorable or unfavorable to the Settlement Class, shall include and be binding on all Settlement Class Members who have not been excluded, even if they have objected to the proposed Settlement and even if they have another claim, lawsuit, or proceeding pending against Defendants; and

g. state that any Award to Settlement Class Members under the Settlement is contingent on the Court's final approval of the Settlement;

3. Publication of Notice:

No later than forty-five (45) days from an Order of Preliminary Approval, the Settlement Administrator will cause to be published in accordance with the Notice Program, attached as Exhibit 3 all forms of Class Notice, copies of which are attached as Exhibits 4, 5 and 6.

D. Settlement Website; Timing of Publication of Class Notice

1. Settlement Website: The Settlement Administrator shall establish an Internet website that will inform Settlement Class Members of the terms of this Agreement, their rights, dates, deadlines, and related information.

2. No later than ten (10) days from entry of the Preliminary Approval Order, the Settlement Administrator will post the Full Notice , Short-Form Notice, and Claim Form on the Settlement Website. The Full Notice , Short-Form Notice, and Claim Form shall remain available by these means until the

Effective Date. The Full Notice and the Claim Form may also be posted on the websites of Class Counsel at their option.

3. Upon Request: The Full Notice and the Claim Form shall also be sent via electronic mail or regular mail to Settlement Class Members who so request.

4. Toll-Free Telephone Number: The Settlement Administrator shall establish a toll-free telephone number that will provide Settlement-related information to Settlement Class Members.

VIII. OBJECTIONS AND REQUESTS FOR EXCLUSION

A. Objections

1. Any Settlement Class Member who intends to object to the fairness of the Settlement must do so in writing no later than the Objection Date. The written objection must be filed with the Court and served on the Class Counsel identified in the Full Notice and Defendants' counsel no later than the Objection Date. The written objection must include: (a) a heading which refers to the Action; (b) the objector's name, address, telephone number, and, if represented by counsel, the name of his/her counsel; (c) a statement that the objector purchased Wellesse Joint Movement Glucosamine during the Class Period, along with a description of the size of each Wellesse Joint Movement Glucosamine product purchased, the location(s) where the purchases were made, and the price paid for each unit; (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.

2. Any Settlement 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 Settlement Class Member's expense, to object to any aspect of the fairness, reasonableness, or

adequacy of this Agreement, including attorneys' fees. Settlement 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 Full Notice and to Defendants' counsel, and file the notice of appearance with the Court, no later than thirty (30) days before the Final Approval Hearing, or as the Court may otherwise direct.

3. Any Settlement Class Member who fails to comply with the provisions of Section VIII.A above 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 this Agreement and by all proceedings, orders, and judgments, including, but not limited to, the Release in the Action.

B. Requests for Exclusion

1. Any Settlement Class Member may request to be excluded from the Settlement Class. A Settlement Class Member who wishes to opt out of the Settlement Class must do so no later than the Opt-Out Date, which is no later than thirty (30) days before the Final Approval Hearing, or as the Court may otherwise direct. In order to opt out, a Settlement Class Member must send to the Settlement Administrator a written Request for Exclusion that is post-marked no later than the Opt-Out Date. The Request for Exclusion must be personally signed by the Settlement Class Member requesting exclusion and contain a request to be excluded from the Settlement Class.

2. Any Settlement Class Member who does not file a timely written Request for Exclusion shall be bound by all subsequent proceedings, orders and the Final Judgment and Order Approving Settlement in this Action, even if he or she has pending, or subsequently initiates, litigation, arbitration, or any other proceeding against Defendants relating to the Released Claims.

3. Any Settlement Class Member who properly requests to be excluded from the Settlement Class shall not: (a) be bound by any orders or

judgments entered in the Action relating to the Settlement; (b) be entitled to an Award from the Settlement Fund, or be affected by, the Settlement; (c) gain any rights by virtue of the Settlement; or (d) be entitled to object to any aspect of the Settlement.

4. The Settlement Administrator shall provide Class Counsel and Defendants' counsel with a final list of all timely Requests For Exclusion within fifteen (15) business days after the Opt-Out Date. Defendants shall file the final list of all timely Requests for Exclusion prior to or at the Final Approval Hearing.

IX. RELEASES

A. The Settlement shall be the sole and exclusive remedy for any and all Released Claims of all Releasing Parties against all Released Parties. No Released Party shall be subject to liability of any kind to any Releasing Party with respect to any Released Claim. Upon the Effective Date, and subject to fulfillment of all of the terms of this Settlement, each and every Releasing Party shall be permanently barred and enjoined from initiating, asserting, and/or prosecuting any Released Claim against any Released Party in any court or any other forum.

B. The following terms have the meanings set forth herein:

1. "Released Claims" means any and all actions, claims, demands, rights, suits, and causes of action of whatever kind or nature against the Released Persons, including damages, costs, expenses, penalties, and attorneys' fees, known or unknown, suspected or unsuspected, in law or equity arising out of or relating to the claim that the Wellesse Joint Movement Glucosamine labeling, advertising, and/or marketing was false, misleading, or deceptive, and which have been asserted or could have been asserted by the Settlement Class in the Action based on the facts alleged therein. Notwithstanding the above, Released Claims does not include claims for personal injury related to the use of Wellesse Joint Movement Glucosamine.

2. "Released Party(ies)" means Botanical Laboratories, Inc.,

Schwabe North America, Inc., and Botanical Laboratories, LLC, including all of their predecessors, successors, assigns, parents, subsidiaries, divisions, departments, and affiliates, and any and all of their past, present, and future officers, directors, employees, stockholders, partners, agents, servants, successors, attorneys, insurers, representatives, licensees, licensors, subrogees, and assigns. It is expressly understood that, to the extent a Released Party is not a Party to the Settlement , all such Released Parties are intended third-party beneficiaries of the Settlement.

3. "Releasing Party(ies)" means Plaintiffs and each Settlement Class Member who does not file a timely Request for Exclusion.

C. On the Effective Date, each Releasing Party shall be deemed to have released and forever discharged each Released Party from any and all liability for any and all Released Claims.

D. With respect to any and all Released Claims, and upon the Effective Date without further action, for good and valuable consideration, Plaintiffs, on behalf of themselves and the Settlement Class and as the representatives of the Settlement Class, shall, and Releasing Parties shall be deemed to, and by operation of the Final Judgment and Order Approving Settlement shall, to the fullest extent permitted by law, fully, finally, and forever expressly waive and relinquish with respect to the Released Claims, any and all provisions, rights, and benefits of Section 1542 of the California Civil Code and any and all similar provisions, rights, and benefits conferred by any law of any state or territory of the United States or principle of common law that is similar, comparable, or equivalent to Section 1542 of the California Civil Code, 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.**

E. Additional Mutual Releases

1. On the Effective Date, each of the Released Parties shall be deemed to have fully, finally, and forever released, relinquished, and discharged the Releasing Parties from all claims of every nature and description, known and unknown, relating to the initiation, assertion, prosecution, non-prosecution, settlement, and/or resolution of the Action or the Released Claims.

2. On the Effective Date, each of the Releasing Parties shall be deemed to have fully, finally, and forever released, relinquished, and discharged the Released Parties from all claims of every nature and description, including unknown claims, relating to the defense, settlement, and/or resolution of the Action or the Released Claims.

3. Except as to the rights and obligations provided for under this Settlement, Plaintiffs and Class Counsel and all of their respective past, present, and future predecessors, successors, assigns, devisees, relatives, heirs, legatees, and agents, including their respective past, present, and future predecessors, successors, assigns, devisees, relatives, heirs, legatees, and agents, hereby release and forever discharge Defendants and their attorneys from any and all charges, complaints, claims, debts, liabilities, demands, obligations, costs, expenses, actions, and causes of action of every nature, character, and description, whether known or unknown, asserted or un-asserted, suspected or unsuspected, fixed or contingent, which Defendants may now have, own, or hold or which Plaintiffs at any time may have, own, or hold, against Defendants and their attorneys by reason of any matter, cause, or thing whatsoever occurred, done, omitted, or suffered from the beginning of time to the date of this Settlement .

4. Except as to the rights and obligations provided for under this Settlement , Defendants and all of their respective past, present, and future predecessors, successors, assigns, devisees, relatives, heirs, legatees, and agents, including their respective past, present, and future predecessors, successors, assigns, devisees, relatives, heirs, legatees, and agents, hereby release and forever

discharge Plaintiffs Ed Hazlin, Karen Albence, and Class Counsel from any and all charges, complaints, claims, debts, liabilities, demands, obligations, costs, expenses, actions, and causes of action of every nature, character, and description, whether known or unknown, asserted or un-asserted, suspected or unsuspected, fixed or contingent, which Defendants may now have, own, or hold or which Defendants at any time may have, own, or hold, against Plaintiffs Ed Hazlin, Karen Albence, and Class Counsel by reason of any matter, cause, or thing whatsoever occurred, done, omitted, or suffered from the beginning of time to the date of this Settlement.

F. The Parties agree that the Court shall retain exclusive and continuing jurisdiction over the Parties and the Settlement Class Members to interpret and enforce the terms, conditions, and obligations under the Settlement .

X. ATTORNEYS' FEES AND EXPENSES AND PLAINTIFFS' SERVICE AWARDS

A. The award of Attorneys' Fees and Expenses shall be made from the Settlement Fund to Plaintiffs and the Settlement Class Members as set forth in Section IV above. Class Counsel shall make, and Defendants agree not to oppose, an application for an award of Attorneys' Fees and Expenses in the Action not to exceed 30% of the Settlement Fund or $930,000 plus actual costs. Class Counsel, in their sole discretion, shall be responsible for allocating and distributing the Attorneys' Fees and Expenses award to Class Counsel.

B. The Settlement Administrator shall pay the Attorneys' Fees and Expenses awarded by the Court from the Settlement Fund within seven (7) calendar days after the Effective Date, or thirty (30) calendar days after any order reversing, vacating, modifying, or remanding final order and judgment or reducing the Attorneys' Fees and Expenses. Defendants agree not to oppose an application for service awards in the amount of three thousand five hundred dollars ($3,500) to each Plaintiff. The service awards will be payable from the Settlement Fund , as set

forth in Section IV above.

C. The Claims Administrator will pay the service awards approved by the Court from the Settlement Fund within ten (10) calendar days of the Effective Date, up to the amount identified above as set forth in Section IV above.

XI. FINAL JUDGMENT AND ORDER APPROVING SETTLEMENT

This Agreement is subject to and conditioned upon the issuance by the Court of the Final Judgment and Order Approving Settlement that finally certifies the Settlement Class for the purposes of this Settlement, grants final approval of the Settlement, and provides the relief specified herein, which relief shall be subject to the terms and conditions of the Settlement and the Parties' performance of their continuing rights and obligations hereunder. Such Final Judgment and Order Approving Settlement shall be in substantially the form attached hereto as Exhibit 1.

XII. REPRESENTATIONS AND WARRANTIES

A. Defendants represent and warrant: (1) that they have the requisite corporate power and authority to execute, deliver, and perform the Settlement and to consummate the transactions contemplated hereby; (2) that the execution, delivery and performance of the Settlement and the consummation by it of the actions contemplated herein have been duly authorized by necessary corporate action on the part of Defendants; and (3) that the Settlement has been duly and validly executed and delivered by Defendants and constitutes their legal, valid, and binding obligation.

B. Plaintiffs represent and warrant that they are entering into the Settlement on behalf of themselves individually and as proposed representatives of the Settlement Class Members, of their own free will and without the receipt of any consideration other than what is provided in the Settlement or disclosed to, and authorized by, the Court. Plaintiffs represent and warrant that they have reviewed the terms of the Settlement in consultation with Class Counsel and believe them to

be fair and reasonable, and covenant that they will not file a Request for Exclusion from the Settlement Class or object to the Settlement. Class Counsel represent and warrant that they are fully authorized to execute the Settlement on behalf of Plaintiffs.

C. The Parties warrant and represent that no promise, inducement, or consideration for the Settlement has been made, except those set forth herein.

XIII. NO ADMISSIONS, NO USE

The Settlement and every stipulation and term contained in it is conditioned upon final approval of the Court and is made for settlement purposes only. Whether or not consummated, this Settlement shall not be: (a) construed as, offered in evidence as, received in evidence as, and/or deemed to be evidence of a presumption, concession, or an admission by Plaintiffs, Defendants, any Settlement Class Member or Releasing Party or Released Party, of the truth of any fact alleged or the validity of any claim or defense that has been, could have been, or in the future might be asserted in any litigation or the deficiency of any claim or defense that has been, could have been, or in the future might be asserted in any litigation, or of any liability, fault, wrongdoing, or otherwise of such Party; or (b) construed as, offered in evidence as, received in evidence as, and/or deemed to be evidence of a presumption, concession, or an admission of any liability, fault, or wrongdoing, or in any way referred to for any other reason, by Plaintiffs, Defendants, any Releasing Party or Released Party in the Action or in any other civil, criminal, or administrative action or proceeding other than such proceedings as may be necessary to effectuate the provisions of the Settlement.

XIV. TERMINATION OF THIS AGREEMENT

A. Any Party may terminate this Settlement by providing written notice to the other Party hereto within ten (10) days after the occurrence of any of the following events:

1. The Court does not enter an Order granting Preliminary

Approval that conforms in material respects to Exhibit 7 hereof; or

2. The Court does not enter a Final Judgment and Order Approving Settlement conforming in material respects to Exhibit 1, or if entered, such Final Judgment and Order Approving Settlement is reversed, vacated, or modified in any material respect by another court.

B. In the event that this Settlement terminates for any reason, all Parties shall be restored to their respective positions as of immediately prior to the date of execution of this Settlement. Upon termination, Sections III.A, XIII, and XV.E herein shall survive and be binding on the Parties, but this Settlement shall otherwise be null and void. In that event, within five (5) business days after written notification of such event is sent by Defendants' counsel or Class Counsel to the Escrow Agent, the Settlement Fund (including accrued interest), less expenses and any costs which have been disbursed or are determined to be chargeable as Notice and Claims Administration Expenses, shall be refunded by the Escrow Agent to Defendants' counsel for the benefit of Defendants. In such event, Defendants shall be entitled to any tax refund owing to the Settlement Fund. At the request of Defendants, the Escrow Agent or its designee shall apply for any such refund and pay the proceeds, after deduction of any fees or expenses incurred in connection with such application(s) for a refund, to Defendants. In no event will Defendants be entitled to recover any funds spent for Notice and Claims Administration Expenses prior to termination of this Agreement.

XV. MISCELLANEOUS PROVISIONS

A. Entire Agreement: The Settlement, including all Exhibits hereto, shall constitute the entire Settlement among the Parties with regard to the Settlement and shall supersede any previous agreements, representations, communications, and understandings among the Parties with respect to the subject matter of the Settlement. The Settlement may not be changed, modified, or amended except in a writing signed by one of Class Counsel and one of Defendants' counsel and, if

required, approved by the Court, except that the Exhibits portion to the Settlement may be modified by subsequent agreement of Defendants and Class Counsel, or by the Court.

B. Governing Law: The Settlement shall be construed under and governed by the laws of the State of California, applied without regard to laws applicable to choice of law.

C. Execution in Counterparts: The Settlement may be executed by the Parties in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. Facsimile signatures or signatures sent by e-mail shall be treated as original signatures and shall be binding.

D. Notices: Whenever this Settlement requires or contemplates that one Party shall or may give notice to the other, notice shall be provided in writing by first class US Mail and e-mail to:

1. If to Plaintiffs or Class Counsel:

Todd Carpenter
CARPENTER LAW GROUP
402 West Broadway, 29th Floor
San Diego, CA 92101
Tel: 619.347.3517
Fax: 619.756.6991
E-mail: todd@carpenterlawyers.com

2. If to Defendants or Defendants' counsel:

Shirli F. Weiss
DLA PIPER LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: 619.699.2700
Fax: 619.699.2701
E-mail: shirli.weiss@dlapiper.com

E. Stay of Proceedings: Upon the execution of this Settlement, all

discovery and other proceedings in the Action shall be stayed until further order of the Court, except for proceedings that may be necessary to implement the Agreement or comply with or effectuate the terms of this Settlement .

F. Good Faith: The Parties agree that they will act in good faith and will not engage in any conduct that will or may frustrate the purpose of this Settlement. The Parties further agree, subject to Court approval as needed, to reasonable extensions of time to carry out any of the provisions of the Settlement.

G. Protective Orders: All orders, agreements and designations regarding the confidentiality of documents and information ("Protective Orders") remain in effect, and all Parties and counsel remain bound to comply with the Protective Orders, including the provisions to certify the destruction of "Confidential" documents.

H. Confidentiality: The Parties and counsel agree that they will limit their publication of this Settlement or the underlying litigation to the statement that "the dispute has been resolved pursuant to a court-approved settlement."

I. Binding on Successors: The Settlement shall be binding upon, and inure to the benefit of, the successors of the Released Parties.

J. Arm's-Length Negotiations: The determination of the terms and conditions contained herein and the drafting of the provisions of this Settlement has been by mutual understanding after negotiation, with consideration by, and participation of, the Parties hereto and their counsel. This Agreement shall not be construed against any Party on the basis that the Party was the drafter or participated in the drafting. Any statute or rule of construction that ambiguities are to be resolved against the drafting party shall not be employed in the implementation of this Settlement, and the Parties agree that the drafting of this Settlement has been a mutual undertaking.

K. Waiver: The waiver by one Party of any provision or breach of the Settlement shall not be deemed a waiver of any other provision or breach of the

Settlement.

L. Variance: In the event of any variance between the terms of this Stipulation of Settlement and any of the Exhibits hereto, the terms of this Stipulation of Settlement shall control and supersede the Exhibit(s).

M. Exhibits: All Exhibits to this Stipulation of Settlement are material and integral parts of the Settlement, and are incorporated by reference as if fully rewritten herein.

N. Taxes: No opinion concerning the tax consequences of the Settlement to any Settlement Class Member is given or will be given by Defendants, Defendants' counsel, or Class Counsel; nor is any Party or their counsel providing any representation or guarantee respecting the tax consequences of the Settlement as to any Settlement Class Member. Each Settlement Class Member is responsible for his/her tax reporting and other obligations respecting the Settlement, if any.

O. Implementation Before Effective Date: The Parties may agree in writing to implement the Settlement or any portion thereof after the entry of the Final Judgment and Order Approving Settlement, but prior to the Effective Date. This provision shall not limit Defendants' discretionary right to pay claims prior to the Effective Date, as set forth in Sections V.C-D.

P. Modification in Writing: This Settlement may be amended or modified only by written instrument signed by one of Class Counsel and one of Defendants' counsel. Amendments and modifications may be made without additional notice to the Settlement Class Members unless such notice is required by the Court.

Q. Integration: This Settlement represents the entire understanding and agreement among the Parties and supersedes all prior proposals, negotiations, agreements, and understandings related to the subject matter of this Agreement. The Parties acknowledge, stipulate, and agree that no covenant, obligation, condition, representation, warranty, inducement, negotiation, or undertaking concerning any part or all of the subject matter of this Settlement has been made or

relied upon except as set forth expressly herein.

R. Retain Jurisdiction: The Court shall retain jurisdiction with respect to the implementation and enforcement of the terms of this Settlement, and all Parties hereto submit to the exclusive jurisdiction of the Court for purposes of implementing and enforcing the agreements embodied in this Settlement.

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement to be executed by their duly authorized representatives.

Dated: September 15, 2014

CARPENTER LAW GROUP

By /s/ Todd D. Carpenter
TODD D. CARPENTER
Attorneys for Plaintiffs
ED HAZLIN and KAREN ALBENCE

Dated: September 15, 2014

PATTERSON LAW GROUP

By /s/ James R. Patterson
JAMES R. PATTERSON
Attorneys for Plaintiffs
ED HAZLIN and KAREN ALBENCE

Dated: September 15, 2014

DLA PIPER LLP (US)

By /s/ Shirli F. Weiss
SHIRLI F. WEISS
Attorneys for Defendants

BOTANICAL LABORATORIES, INC.,
BOTANICAL LABORATORIES, LLC,
and SCHWABE NORTH AMERICA, INC.

EXHIBIT 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

CV NO. 13-CV-0618-DMS (JMA)

[PROPOSED] FINAL JUDGMENT AND ORDER APPROVING CLASS ACTION SETTLEMENT

This matter came on for hearing on _____, 2014 at _____. The Court has considered the Stipulation of Settlement filed _____, 2014 ("Stipulation"), Dkt. No. ____, oral and/or written objections and comments received regarding the proposed settlement, the record in the action and the arguments and authorities of counsel. Good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Judgment incorporates by reference the definitions in the Stipulation, and all terms used herein shall have the same meanings as set forth in the Stipulation unless set forth differently herein. The terms of the Stipulation are fully incorporated in this judgment as if set forth fully here.

2. The Court has jurisdiction over the subject matter of this Action and all Parties to the action, including all Class Members.

3. The Court approves the settlement as set forth in the Stipulation and finds that the settlement is in all respects fair, reasonable, adequate and just to the Settlement Class Members.

4. Pursuant to Federal Rules of Civil Procedure, Rule 23(c), the Court hereby finally certifies the following Class for settlement purposes:

> [All consumers who purchased a Wellesse Joint Movement Glucosamine product for personal use until the date notice is disseminated]

5. The Wellesse Joint Movement Glucosamine products covered by this judgment are Wellesse Joint Movement Glucosamine products, including all size variations.

6. Pursuant to Federal Rules of Civil Procedure, Rule 23(c)(3), all such Persons who satisfy the Class definition above, except those Persons who timely and validly excluded themselves from the Class, are Class Members bound by this Order.

7. Pursuant to Federal Rules of Civil Procedure, Rule 23(a), the Court finds that Plaintiffs Ed Hazlin and Karen Albence are members of the Class, their claims are typical of the Class claims, and they fairly and adequately protected the interests of the Class throughout the proceedings in the Action. Accordingly, the Court hereby appoints Ed Hazlin and Karen Albence as the Class Representatives.

8. The Court finds that the Class meets all requirements of Federal Rules of Civil Procedure, Rule 23(a) and (b)(3) for certification, for settlement purposes only, of the class claims alleged in the operative complaint, including: (a) numerosity; (b) commonality; (c) typicality; (d) adequacy of the class representative and Class Counsel; (e) predominance of common questions of fact and law Class; and (f) superiority. Because the class is being certified for settlement and not for litigation, the Court need not determine whether the case would be unmanageable as a class action if the litigation continued.

9. Having considered the factors set forth in Federal Rules of Civil Procedure, Rule 23(g)(1), the Court finds that Class Counsel have fairly and adequately represented the Class for purposes of entering into and implementing the settlement, and thus, hereby appoints Class Counsel as counsel to represent the Class Members.

10. The list of Persons excluded from the Class because they filed valid requests for exclusion is attached hereto as Exhibit A. The Persons listed in Exhibit A are not bound by this Judgment or the terms of the Stipulation.

11. The Court directed that Class Notice be given to Class Members pursuant to the notice program proposed by the Parties and approved by the Court. In accordance with the Court's Preliminary Approval Order and the Court-approved notice program, the Claims Administrator and the Notice Administrator caused the Class Notice to be disseminated as ordered. The Class Notice advised Class Members of the terms of the settlement; of the Final Approval Hearing, and their right to appear at such hearing; of their rights to remain in, or opt out of, the Class

and to object to the settlement; procedures for exercising such rights; and the binding effect of this Judgment, whether favorable or unfavorable, to the Class.

12. The distribution of the Class Notice constituted the best notice practicable under the circumstances, and fully satisfied the requirements of Federal Rules of Civil Procedure, Rule 23, the requirements of due process, 28 U.S.C. §1715, and any other applicable law.

13. Pursuant to Federal Rules of Civil Procedure, Rule 23(e)(2), the Court finds after a hearing and based upon all submissions of the Parties and other interested persons, that the settlement proposed by the Parties is fair, reasonable, and adequate. The terms and provisions of the Stipulation are the product of lengthy, arms-length negotiations conducted in good faith and with the assistance of the Honorable Dickran Tevrizian. Approval of the Stipulation will result in substantial savings of time, money and effort to the Court and the Parties, and will further the interests of justice.

14. All Class Members who have not timely and validly filed opt-outs are thus Class Members who are bound by this Judgment and by the terms of the Stipulation.

15. The Stipulation and this Order are not admissions of liability or fault by Defendants or the Released Parties, or a finding of the validity of any claims in the Action or of any wrongdoing or violation of law by Defendants or the Released Parties. Neither this Judgment, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be offered as evidence or received in evidence in any pending or future civil, criminal, or administrative action or proceeding to establish any liability of, or admission by Defendants, the Released Parties, or any of them. Notwithstanding the foregoing, nothing in this Final Judgment shall be interpreted to prohibit the use of this Judgment in a proceeding to consummate or enforce the Stipulation or Judgment, or to defend

against the assertion of Released Claims in any other proceeding, or as otherwise required by law.

16. The Court has considered the submissions by the Parties and all other relevant factors, including the result achieved and the efforts of Class Counsel in prosecuting the claims on behalf of the Class. Plaintiffs initiated the Action, acted to protect the Class, and assisted his counsel. The efforts of Class Counsel have produced the Stipulation entered into in good faith, and which provides a fair, reasonable, adequate and certain result for the Class. Class Counsel have made application for an award of attorneys' fees and expenses in connection with the prosecution of the Action. The fee and expense award requested is approximately ___% of the value of the constructive common fund which the Court finds to be a fair, reasonable and justified attorneys' fee and expense award under the circumstances. The Court hereby awards $_____ as attorneys' fees and $_____ in costs. Class Counsel shall be responsible for distributing and allocating the attorneys' fees and expense award to Plaintiffs' Counsel in their sole discretion.

17. Plaintiffs Hazlin and Albence, who have agreed to the terms of the Stipulation, and whose claims will be finally and fully resolved by this Judgment, are entitled to a service award in the amount of $_____.

18. As of the Effective Date, the Class Representatives and all Settlement Class Members shall be forever barred from bringing or prosecuting, in any capacity, any of the Released Claims against any Released Parties and shall conclusively be deemed to have released and forever discharged the Released Parties from all Released Claims.

19. The Class Representatives and all Settlement Class Members shall, as of the Effective Date, conclusively be deemed to have acknowledged that the Released Claims include claims, rights, demands, causes of action, liabilities, or suits that are not known or suspected to exist as of the Effective Date. The Class

Representatives and all Settlement Class Members nonetheless release all such Released Claims against the Released Parties. Further, as of the Effective Date, the Class Representatives and all Settlement Class Members shall be deemed to have waived any and all protections, rights and benefits of California Civil Code section 1542 and any comparable statutory or common law provision of any other jurisdiction.

20. The Court hereby dismisses with prejudice the Action, and all Released Claims against the Released Parties and without costs to any of the Parties as against the others. Notwithstanding the foregoing, this Order does not dismiss any claims that have been or may be asserted in the future by any persons or entities who have validly and timely requested exclusion from the Settlement Class.

21. Without affecting the finality of the Judgment, the Court reserves jurisdiction over the implementation, administration and enforcement of this Order, the Judgment and the Stipulation, and all matters ancillary thereto.

22. The Court finding that no reason exists for delay in ordering final judgment pursuant to Federal Rules of Civil Procedure, Rule 54(b), the clerk is hereby directed to enter the Judgment forthwith.

23. The Parties are hereby authorized without needing further approval from the Court, to agree to and adopt such modifications and expansions of the Stipulation, including without limitation, the forms to be used in the claims process, which are consistent with this Judgment and do not limit the rights of Class Members under the Stipulation.

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All other relief not expressly granted to the Settlement Class Members is denied.

IT IS SO ORDERED.

DATED: _____

_____
THE HONORABLE KAREN S. CRAWFORD
UNITED STATES DISTRICT COURT JUDGE

EXHIBIT 2

WELLESS JOINT MOVEMENT GLUCOSAMINE SETTLEMENT

CLAIM FORM

To receive money under the settlement you must complete this Claim Form and mail or fax it to:
[Claims Administrator]
[Address]
[City, State]
You may also submit a claim form electronically at www._____.com

You must choose one of these options:

- **If you *do not have* your receipts and/or other documents demonstrating your proof of purchase:**
  - fill out this Claim Form below;
  - sign the Verification statement at the end of the Claim Form under penalty of perjury; AND
  - return this completed Claim Form *no later than* _____, 2014.
  - Please note that by signing the Claim Form Verification, you are verifying under Penalty of Perjury that you purchased a Joint Movement Glucosamine product(s) during the Class Period. The Class Period is anytime up until entry of the Order granting Preliminary Approval;
  OR
- **If you *have* receipts and or other documents demonstrating your proof of purchase:**
  - fill out this Claim Form below and
  - submit documentation of Proof of Purchase (such as a copy of a receipt or credit card statement showing your purchase of Joint Movement Glucosamine)

  Note that if you send in receipts or other documentation demonstrating your proof of purchase, you are not required to sign a Verification statement.

Settlement Class Members can receive a cash payment for each bottle of Joint Movement Glucosamine purchased during the Class Period. The Class Period is any time up until the Order Granting Preliminary Approval. For each 16 ounce bottle of Wellesse Joint Movement Glucosamine purchased during the Class Period, Settlement Class Members may receive payment of up to $15.00 from the Settlement Fund. For each 33 ounce bottle of Wellesse Joint Movement Glucosamine purchased during the Class Period, Settlement Class Members may receive payment of up to $18.00 from the Settlement Fund. Each Class Member's total reimbursement from the Settlement Fund cannot exceed $100.00. Depending upon the number of claims made, the payments per-bottle may be decreased proportionally or increased proportionally.

CLASS MEMBER AND PRODUCT PURCHASE(S) INFORMATION (Please complete)

Name: Telephone:

Address:

City: State: Zip Code:

Prior to October 2, 2014, I purchased _____ 16 ounce bottles of Wellesse Joint Movement Glucosamine.

Prior to October 2, 2014, I purchased _____ 33 ounce bottles of Wellesse Joint Movement Glucosamine.

Proofs of my purchases are ____, are not ____, attached (check one).

VERIFICATION STATEMENT (Sign ONLY if *Not* providing Proof of Purchase)

I AFFIRM UNDER PENALTY OF PERJURY THAT THE INFORMATION I PROVIDED ON THIS CLAIM FORM IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I UNDERSTAND THAT THE DECISION OF THE CLAIM ADMINISTRATOR IS FINAL AND BINDING.

SIGNATURE: _____ DATE: _____

CLAIM FORMS MUST BE POSTMARKED, FAXED OR SUBMITTED ONLINE BY [MONTH DAY, 2014].

QUESTIONS? VISIT WWW._____.COM OR CALL 1-800-XXX-XXXX.

EXHIBIT 3

KCC

Ed Hazlin and Karen Albence v. Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC

No. 13-CV-00618-DMS (JMA)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Analysis

The following known factors were considered when determining our recommendation:

1. Class members are unknown consumers who must be reached through a consumer media campaign.
2. Class members are located throughout the U.S., including large cities and rural areas.
3. Effective reach and notice content is vital to convey the importance of the information affecting Class members' rights, as well as to withstand challenge and collateral review.
4. Multiple exposures to notice are desirable so that Class members are reminded to act before deadlines approach.

Objective

To design a notice program that will effectively and efficiently reach Class members. The Federal Judicial Center's *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* considers 70-95% reach among class members reasonable.

Proposed Notice Strategies

The proposed Notice Plan utilizes a schedule of paid notices in leading consumer magazines and on a variety of websites, including Facebook social media, to provide the necessary reach among the Class. In addition, to comply with the California Legal Remedies Act (CLRA) the Notice Plan includes four notice placements in the *San Diego Union Tribune*.

Plan Delivery

The Notice Plan reaches approximately 70.6% of likely Class members on average 1.8 times each. Coverage will be further enhanced by the CLRA notice placements.

Target Audience

Class members include all U.S consumers who purchased a Wellesse Joint Movement Glucosamine product, within the applicable statute of limitations, for personal use until the date notice is disseminated. To verify the notice program's effectiveness, GfK MediaMark Research & Intelligence, LLC (MRI)[1] data was studied among adults who use glucosamine as a vitamin or dietary supplement ("Glucosamine Consumers"). This broad, over inclusive target group best represents the Class.

[1] GfK MRI is a nationally accredited research firm that provides consumer demographics, product and brand usage, and audience/exposure in all forms of advertising media. Established in 1979, MRI measures the usage of nearly 6,000 product and service brands across 550 categories, along with readership of hundreds of magazines and newspapers, internet usage, television viewership, national and local radio listening, yellow page usage, and out-of-home exposure. Based on a yearly face-to-face interview of 26,000 consumers in their homes, MRI's Survey of the American Consumer™ is the primary source of audience data for the U.S. consumer magazine industry and the most comprehensive and reliable source of multi-media audience data available.

KCC

Knowing the characteristics, interests, and habits of a target group aids in the media selection process.

- Demographic highlights of Glucosamine Consumers include the following:
  - 98.3% speak English most often;
  - 90.9% have graduated from high school and 63.6% have attended college or beyond;
  - 90.5% live in a household consisting of 1-4 people and 81.1% live in a household consisting of two or more people;
  - 89.1% are 35 years of age or older, 80.2% are 45 years of age or older and 61.0% are 55 years of age or older;
  - 86.0% are white;
  - 86.0% live in a metropolitan CBSA;[2]
  - 81.4% have a household income of $30,000 or more, 72.2% have a household income of $40,000 or more, and 54.5% have a household income of $60,000 or more;
  - 79.9% own a home;
  - 72.9% have lived at their current address for five or more years;
  - 68.8% own a home valued at $100,000 or more;
  - 61.9% are married; and
  - 58.7% are women.

- On average, Glucosamine Consumers are:
  - 57 years old;
  - have a household income of $81,624; and
  - own a home valued at $273,589.[3]

- Also important is the fact that, compared to the general adult population, Glucosamine Consumers are:
  - 2.16 times more likely to be 65 years of age or older and 51.2% more likely to be 55-64 years of age;
  - 70.9% more likely to own a home valued at $500,000 or more;
  - 42.6% more likely to live in a household consisting of two people and 34.3% more likely to live alone;
  - 26.8% more likely to have lived at their current address for five or more years;
  - 26.6% more likely not to be employed;
  - 26.1% more likely to have a household income of $150,000 or more;
  - 26.0% more likely to have graduated from college or beyond;
  - 21.7% more likely to reside in the West Census Region;
  - 17.7% more likely to own a home;
  - 15.3% more likely to be married;
  - 13.7% more likely to be women; and
  - 13.3% more likely to be white.

Notice Strategy

The following notice strategy is recommended to reach the Class:

[2] The Office of Management and Budget defines metropolitan and micropolitan statistical areas (metro and micro areas) as geographic entities for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. The term "Core Based Statistical Area" (CBSA) is a collective term for both metro and micro areas. A metro area contains a core urban area of 50,000 or more population, and a micro area contains an urban core of at least 10,000 (but less than 50,000) population. Each metro or micro area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

[3] The average age for U.S. adults is 46, the average household income is $74,610, and the average home value is $236,749.

KCC

1. **Consumer Magazines**: To establish a reach base, notice placements well appear in leading consumer publications among Glucosamine Consumers.

Publication	Issuance	Notice Size	# of Insertions
Arthritis Today	Bi-Monthly	Third Page	1
Better Homes & Gardens	Monthly	Third Page	1
National Geographic	Monthly	Half Page	1
People	Weekly	Third Page	2
Reader's Digest	Monthly	Full Page (Digest)	1
TOTAL			**6**

The publications include:

Arthritis Today

- Circulation: 676,814
- Adult Audience: 4,167,000
- Bi-monthly magazine issued by the Arthritis Foundation
- Targets the health-conscious adult market, extending reach among those actively seeking to improve arthritis health
- Reaches 3.2% of Glucosamine Consumers
- Readers are 80.4% more likely to be Glucosamine Consumers, as compared to the general population

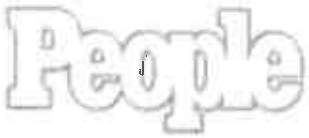
Better Homes and Gardens

- Circulation: 7,615,581
- Adult Audience: 36,043,000
- Monthly magazine focuses on home decorating and gardening, as well as food and entertainment and personal and family well being
- Reaches 18.1% of Glucosamine Consumers
- Readers are 17.0% more likely to be Glucosamine Consumers, as compared to the general population
- Extends reach among middle aged females and homemakers

NATIONAL GEOGRAPHIC

- Circulation: 4,029,881
- Adult Audience: 31,231,000

- Monthly magazine with editorial focusing on culture, nature, geography, ecology, science and technology and encompassing people and places of the world
- Reaches 15.1% of Glucosamine Consumers
- Readers are 12.4% more likely to be Glucosamine Consumers, as compared to the general population
- Extends reach among affluent, educated adults



- Circulation: 3,542,185
- Adult Audience: 42,356,000
- Weekly entertainment magazine featuring celebrity news, biographies and gossip
- Reaches 16.3% of Glucosamine Consumers
- Provides a large number of pass along readers

- Circulation: 4,288,529
- Adult Audience: 23,618,000
- Monthly general interest and family magazine
- Reaches 14.9% of Glucosamine Consumers
- Readers are 46.4% more likely to be Glucosamine Consumers, as compared to the general adult population
- Audience skews slightly older

2. **Internet Banners**: 83.5% of Glucosamine Consumers have access to the internet at home using a computer. 78.3% of Glucosamine Consumers have looked at or used the internet in the past 30 days. In addition, compared to the general population, Glucosamine Consumers are 5.7% more likely to have access to the internet at home using a computer. Accordingly, 70 million *unique* impressions over will be purchased over a one to two month period targeted to adults 35+. Activity will appear on Xaxis Premium Network (XPN) and the social media site Facebook. Both the banner notices and Facebook text ads will include an embedded link to the case website.

Tactic	Target	Impressions
XPN – Run of Network	Adults 35+	25,000,000
Facebook	Adults 35+	45,000,000
TOTAL		**70,000,000**

KCC

XPN allows access to several thousand premium, high quality websites. Sample sites include:

3. **CLRA Newspaper Placements:** To fulfill the CLRA notice requirement, four eighth-page notices (3.96" x 6.75") will appear once a week for four consecutive weeks in the Legal/Classified section of the *San Diego Union Tribune* Metro Distribution.

Response Mechanisms

KCC advocates the utilization of a website and toll-free number to allow the Class opportunities to solicit information and communicate about the case.

1. **Case Website:** An informational website with an easy to remember domain name will be established, allowing Class members the ability to obtain additional information and documents about the settlement. The website address will be prominently displayed in all printed notice materials and accessible through a hyperlink embedded in the internet text ads and banner notices.

2. **Toll-Free Number:** A toll-free number allows a simple way for Class members to learn more about the settlement in the form of frequently asked questions and answers and to request to have more information mailed directly to them. The toll-free number will be prominently displayed in all printed notice materials.

EXHIBIT 4

Welcome to the Informational Website for the Class Action Settlement in:

Ed Hazlin and Karen Albence v. Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC, No. 13-CV-00618-DMS (JMA)UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NOTICE OF PENDANCY AND PROPOSED SETTLEMENT OF CLASS ACTION AND FINAL APPROVAL HEARING

IF YOU PURCHASED A WELLESSE JOINT MOVEMENT GLUCOSAMINE PRODUCT IN THE U.S. BEFORE October 2, 2014, YOU MAY BE ENTITLED TO RECEIVE UP TO $15.00 TO $18.00 FOR EACH PRODUCT YOU PURCHASED, NOT TO EXCEEED $100.00 PER PERSON IN TOTAL CLAIMS.

A Federal Court authorized this notice.
This is not a solicitation from a lawyer.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT	
SUBMIT A CLAIM FORM	The only way to apply for money of up to $15.00 to $18.00 per product purchased; pay-out per person not to exceed one hundred dollars ($100.00).
EXCLUDE YOURSELF	Get out of the lawsuits and the settlement. Get no settlement benefits.
OBJECT	Write to the Court about why you don't like the settlement.
DO NOTHING	Get no Cash Payment. Give up your rights.

Important Dates and Deadlines

Your rights and options – and the **deadlines** to exercise them – are set forth immediately below and explained more fully in this notice.

Deadline to opt-out of settlement: [30 Days Prior to Final Approval]

Deadline to object to settlement: [30 Days Prior to Final Approval]

Deadline to submit Claim Form: [90 Days After the Date First Set for Final Approval]

BASIC INFORMATION

WHAT IS THIS LAWSUIT ABOUT?

On May 30, 2013, Ed Hazlin and Karen Albence, through Class Counsel, filed a Second Amended Class Action complaint on behalf of themselves and all other consumers who purchased Wellesse Joint Movement Glucosamine products against Botanical Laboratories, LLC, Botanical Laboratories, Inc. and Schwabe North America, Inc. ("Defendants"). The lawsuit is entitled: *Ed Hazlin and Karen Albence v. Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC*, No. 13-CV-00618-DMS (JMA). According to the allegations of the complaint, Defendants' advertising for Wellesse Joint Movement Glucosamine was likely to mislead consumers because, according to Plaintiffs, Wellesse Joint Movement Glucosamine does not improve joint health, mobility, flexibility, and lubrication. Plaintiff's complaint included causes of action for violations of California's Unfair Competition Law ("UCL"), Bus. & Prof. code §17200, *et seq.*, California's Consumers Legal Remedies Act ("CLRA"), Civ. Code §1750, et seq., and breach of express warranty.

Defendants deny all of the Plaintiffs' claims.

The parties have agreed to settle the lawsuit on the terms explained in this notice.

WHO IS INCLUDED IN THE SETTLEMENT CLASS?

You are a member of the Settlement Class if you purchased one or more of Defendants' Wellesse Joint Movement Glucosamine products in the United States at any time until May 21, 2014.

THE SETTLEMENT BENEFITS – WHAT YOU MAY GET

CASH PAYMENT FROM THE CLAIM PROCESS

The Settlement will provide each Settlement Class member who submits a valid claim form with a cash payment of up to $15.00 for each purchase of a 16 ounce bottle of Joint Movement Glucosamine and up to $18.000 for each purchase of a 33 ounce bottle of Joint Movement Glucosamine.

The total aggregate value of all claims made or redeemed by the Settlement Class will not exceed $100 per person. If after the deadline for submission of Claim Forms, the total dollar amount of approved claims exceeds the funds remaining in the Settlement Fund after payment of Notice and Claims Administration Expenses, Attorneys Fees and Expenses and any Court awarded service fees to Plaintiffs, the dollar amount of cash payments distributed to the Class will be reduced on a pro-rata basis. In the event that the dollar amount of approved claims submitted by Settlement Class Members does not meet or exceed the amount remaining in the Settlement Fund after payment of costs and expenses of settlement administration, the Court's award of attorneys' fees, and a service award to the Class Representatives as well as the tallied amount of all Authorized Claims, the Settlement Administrator shall divide the remaining cash amount equally by the number of Authorized Claimants and shall pay each such Authorized

Claimant his or her share of the remaining cash amount.

Each Settlement Class member who submits a valid Claim Form is eligible to receive a cash award.

WHAT ELSE DOES THE SETTLEMENT PROVIDE?

For a period of at least three years from the Effective Date of the Settlement, Defendants will not make the following statements on the label of Wellesse Joint Movement Glucosamine products unless at the time of making such representation, they possess and rely upon competent and reliable scientific evidence that substantiates that the representations are true:

a. "Start to feel it in 7 days";

b. "improves joint health," and related "joint health" statements;

c. "less joint discomfort";

d. "protects and rebuilds cartilage," and similar statements;

e. "for healthy joint support & mobility" or "for healthy joint support and flexibility";

f. "Glucosamine is necessary to protect and rebuild cartilage tissue and keep joints strong & healthy;" and

g. "mobility, flexibility, & lubrication.

HOW YOU SUBMIT A CLAIM FORM

HOW CAN I GET A CASH PAYMENT?

You must return a completed Claim Form to receive a cash payment.

The claim form can be downloaded at: www.

The Claim Forms are available at www._____ or by calling 1-800-xxx-xxxx.

HOW DO I SEND IN A CLAIM?

The Claim Forms are simple and easy to complete.

The **Claim Form** requires your mailing address and signature. The Claim Form requires that you submit, either: 1) your request for payment for each purchase you list that you made during the Class Period under penalty of perjury if you do not have your proof of purchase documentation; or 2) submit your valid proof of purchase for each purchase you made during the Class Period.

Please return a Claim Form if you think that you have a claim. Returning a Claim Form

is the only way to receive a payment from this settlement.

WHEN IS THE CLAIM FORM DUE?

You can return Claim Forms by mail, fax or by internet.

If you mail or fax your Claim Form, it must be postmarked or faxed no later than _____.

If you electronically send your Claim Form, it must be submitted no later than _____

WHO DECIDES MY CLAIM? CAN I DISPUTE THE DECISION?

The Claim Forms will be reviewed by an independent Settlement Claims Administrator according to criteria agreed to by the parties to the Settlement.

The Settlement Claims Administrator may contact you if he or she needs additional information or otherwise wants to verify information in your Claim Form.

The Settlement Claims Administrator's determination is final. Neither you nor Defendants can appeal or contest the decision of the Claims Administrator. By submitting your Claim Form, you agree that the Claim Administrator will resolve your claim and you release all claims related to the damages described on your Claim Form.

WHEN WOULD I GET MY CASH PAYMENT?

The Court will hold a hearing on _____ to decide whether to approve the settlement. If the Court approves the settlement, after that there may be appeals. It is always uncertain whether these appeals can be resolved, and resolving them can take time, perhaps more than a year. If there are no appeals or other delays, you should be sent your Cash Payment in approximately _____.

EXCLUDING YOURSELF FROM THE SETTLEMENT

HOW DO I GET OUT OF THE SETTLEMENT?

If you do not wish to be included in the Settlement Class and receive settlement benefits, you must send a letter stating that you want to be excluded from these lawsuits. Be sure to include your name, address, telephone number, and your signature. You must mail your exclusion request post-marked no later than _____ to:

[INSERT CLAIM ADMINISTRATOR INFO]

If you asked to be excluded, you will not get any settlement payment, and you cannot object to the settlement. You will not be legally bound by anything that happens in this lawsuit. You may be able to sue (or continue to sue) Defendants in the future.

If you have a pending lawsuit against Defendant, speak to your lawyer immediately. You may need to exclude yourself from this lawsuit in order to continue your own lawsuit. Remember, the exclusion date is _____.

THE LAWYERS REPRESENTING YOU

DO I HAVE LAWYERS IN THIS CASE?

The Court appointed the law firms of Carpenter Law Group and Patterson Law Group, PLC to represent you and other class members. These lawyers are called Class Counsel. You will not be charged for these lawyers. If you want to be represented by your own lawyer, you may hire one at your own expense.

HOW WILL THE LAWYERS BE PAID?

Class Counsel will ask the Court to award them attorneys' fees and expenses. As part of this Settlement, the Settlement Claims Administrator will pay the reasonable attorneys' fees and costs of Class Counsel in an amount to be determined by the Court. Class Counsel intends to submit a motion for attorneys' fees and costs to the Court not to exceed 30% ($930,000.00) of the total settlement fund, $3,100,000.00, plus actual expenses incurred. Class Counsel's attorneys' fees and expenses will be paid from the Settlement Fund.

The Settlement Claims Administrator will also pay the costs to administer the settlement, review the Claim Forms, and the costs of notifying Class Members about this settlement. The Claim Form review, administration and notice costs are estimated to be $550,000.00.

OBJECTING TO THE SETTLEMENT

HOW DO I TELL THE COURT THAT I DO NOT LIKE THE SETTLEMENT?

If you are a Settlement Class Member, you can object to the settlement if you do not like any part of it and the Court will consider your views. To object, you must send a letter to the Court and the parties saying that you object to the settlement in *Ed Hazlin and Karen Albence v. Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC*, No. 13-CV-00618-DMS (JMA). Be sure to include your name, address, telephone number, your signature, and *a statement stating under penalty of perjury that you are a member of the Settlement Class*, as well as the reasons you object to the settlement. This objection ***must be received*** at these three different places no later than _____. Send your objection to:

Clerk of the Court
United States District Court
Southern District of California
880 Front Street, Suite 4290
San Diego, CA 92101-8900

Todd D. Carpenter
Carpenter Law Group
402 West Broadway, 29th Floor
San Diego, CA 92101

Shirli Weiss
DLA PIPER LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: 619.699.2700
Fax: 619.699.2701
E-mail: shirli.weiss@dlapiper.com

WHAT IS THE DIFFERENCE BETWEEN OBJECTING AND EXCLUDING?

Objecting is telling the Court that you do not like something about the settlement. You can object only if you stay in the Settlement Class. Excluding yourself is telling the Court that you do not want to be part of the Settlement Class or the lawsuit. If you exclude yourself, you have no basis to object because the case no longer affects you.

THE COURT'S FINAL APPROVAL HEARING

WHEN AND WHERE WILL THE COURT DECIDE WHETHER TO APPROVE THE SETTLEMENT?

The Court will hold a Final Approval Hearing at _____ on _____ at the United States District Court for the Southern District of California, 880 Front Street, San Diego, CA 92101-8900 , in Courtroom ____. At this hearing, the Court will consider whether the settlement is fair, reasonable and adequate to the Settlement Class. If there are objections, the Court will consider them. The Court will listen to people who have asked to speak at the hearing. After the hearing, the Court will decide whether to approve the settlement. We do not know how long this decision will take.

DO I HAVE TO COME TO THE HEARING?

No. Class Counsel will answer questions the Court may have. But, you are welcome to come at your own expense. If you submit an objection, you do not have to come to the Court to talk about it. As long as you delivered your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

MAY I SPEAK AT THE HEARING?

You may ask the Court for permission to speak at the Final Approval Hearing. To do so, you must send a letter saying it is your "Notice of Intention to Appear in *Ed Hazlin and Karen Albence v. Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC*, No. 13-CV-00618-DMS (JMA). Be sure to include your name, address, telephone number, your signature and *a statement under penalty of perjury that you are a member of the Settlement Class*. Your Notice of Intention to Appear must be post-marked no later than _____, and be sent to the Clerk of the Court, Class Counsel, and Defense Counsel at the three addresses listed above.

IF YOU DO NOTHING

WHAT HAPPENS IF I DO NOTHING AT ALL?

You ***must*** return a Claim Form to receive a cash payment. If you do nothing, you will get no money from the settlement. But, unless you exclude yourself, you will not be able to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against Defendants about the legal issues in this case.

GETTING MORE INFORMATION

ARE THERE MORE DETAILS ABOUT THE SETTLEMENT?

This notice summarizes the proposed settlement. More details are in the Stipulation of Settlement. You can get a copy of the Stipulation of Settlement by writing to **[INSERT CLAIMS ADMINISTRATOR INFO]** or on the internet at **[INSERT INTERNET ADDRESS]**.

If you have questions about how to complete a Claim Form, you can call the Settlement Claims Administrator at _____.

PLEASE DO NOT CALL OR WRITE TO THE COURT FOR INFORMATION OR ADVICE.

Dated: _____, 2014

BY ORDER OF THE U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EXHIBIT 5

LEGAL NOTICE

IF YOU PURCHASED A WELLESSE JOINT MOVEMENT GLUCOSAMINE PRODUCT YOU MAY BE ENTITLED TO RECEIVE UP TO $15.00 TO $18.00 FOR EACH PRODUCT YOU PURCHASED, NOT TO EXCEEED $100.00.

The United States District Court for the Southern District of California authorized this notice. This is not a solicitation from a lawyer.

Para una notification en Espanol, visite nuestro sitio web, www._____.com

WHAT IS THIS SETTLEMENT ABOUT?

Plaintiff claims that Defendants, Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC's ("Defendants"), Wellesse Joint Movement Glucosamine did not provide certain health benefits as advertised, including joint health benefits, mobility, flexibility, and lubrication. Defendants strongly deny the allegations made in the lawsuit. The Court has not decided who is right and who is wrong. Instead, the parties decided to settle the dispute.

WHAT DOES THE SETTLEMENT PROVIDE?

Each Settlement Class Member who submits a valid claim form may be entitled to receive cash payment of up to $15.00 to $18.00 for each bottle of Wellesse Joint Movement Glucosamine purchased prior to October 2,, 2014, not to exceed one hundred dollars ($100) in total recovery. Defendants will make payments of $3.1 million into a Settlement Fund to reimburse Settlement Class Members for the Wellesse Joint Movement Glucosamine they purchased, to pay for costs and expenses of settlement administration not to exceed $550,000.00,, an award of attorneys' fees not to exceed $930,000.00, and a service award to the Class Representatives, not to exceed $3,500.00. In the event that the dollar amount of approved claims submitted by Settlement Class Members exceeds the amount remaining in the Settlement Fund after payment of costs and expenses of settlement administration, the Court's award of attorneys' fees, and a service award to the Class Representatives, payments on approved Claims to Settlement Class Members shall be reduced pro rata. In the event that the dollar amount of approved claims submitted by Settlement Class Members does not meet or exceed the amount remaining in the Settlement Fund after payment of costs and expenses of settlement administration, the Court's award of attorneys' fees, and a service award to the Class Representatives as well as the tallied amount of all Authorized Claims, the Settlement Administrator shall divide the remaining cash amount equally by the number of Authorized Claimants and shall pay each such Authorized Claimant his or her share of the remaining cash amount.

AM I A CLASS MEMBER?

You're a Class Member if you purchased a Wellesse Joint Movement Glucosamine product anywhere in the nation prior to October 2,, 2014.

WHAT ARE MY LEGAL OPTIONS?

To ask for cash and remain in the Class, you must mail, fax, or submit online a completed claim form by [Month, Day, 2014]. If you do not wish to participate in the settlement, you may exclude yourself from the Class by [Month, Day, 2014], or you may stay in the Class and object to the settlement by [Month, Day, 2014]. Visit www._____ for important information about these options.

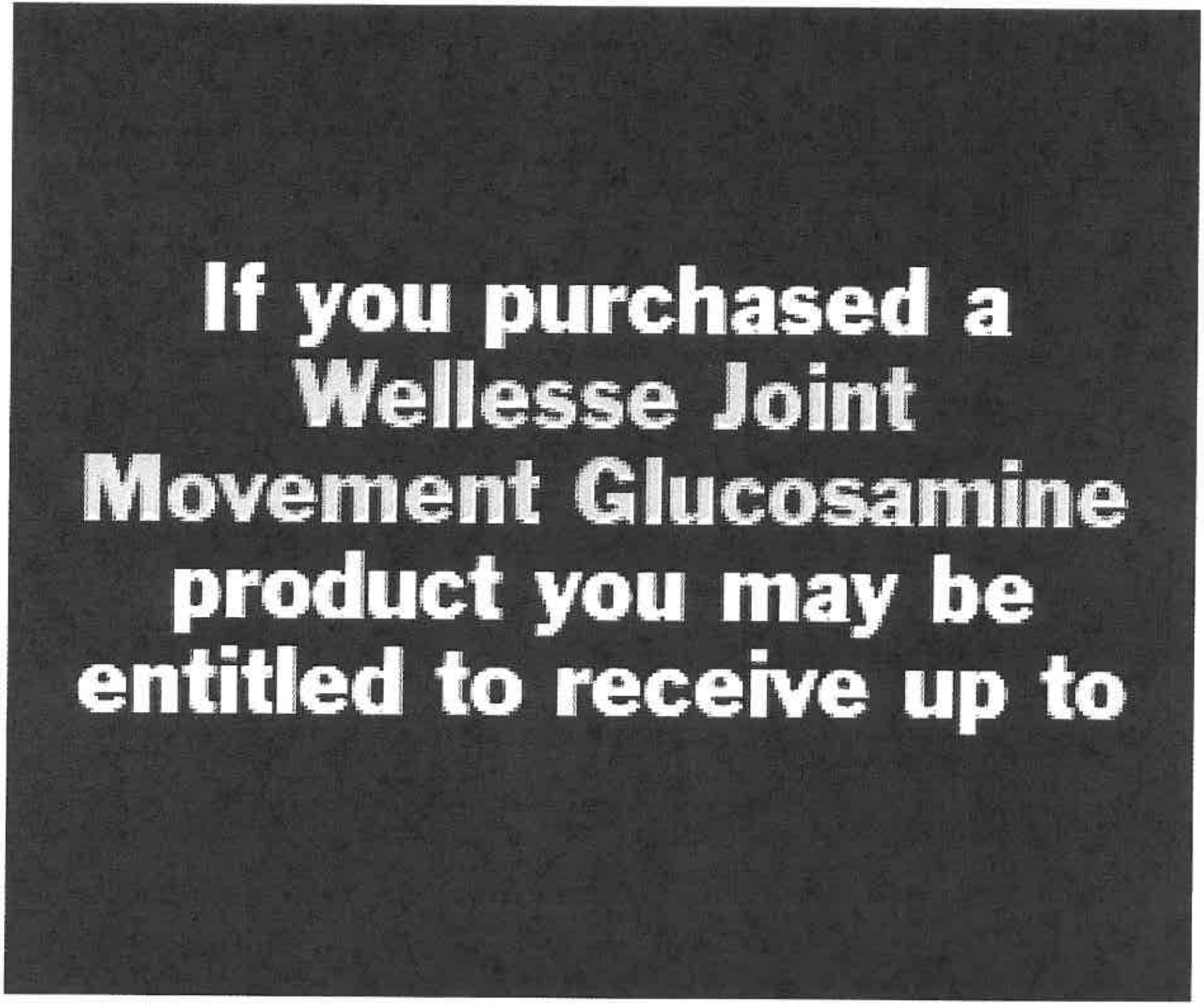
HEARING ON THE PROPOSED SETTLEMENT:
The Court will hold a Final Approval Hearing on _____, 2014 at _____ (a.m./p.m.), to determine whether the proposed settlement is fair, reasonable, and adequate, to approve attorney fees and expenses, and any service award for the Class Representatives. The Final Approval Hearing will take place at U.S. District Court, Southern District of California, 940 Front Street, San Diego, CA 92101. You do not have to attend the hearing.

HOW CAN I GET MORE INFORMATION?
For more information or to view all relevant documents in the litigation, or if you have questions, visit www._____, or call 1-800-XXX-XXXX.

EXHIBIT 6

If you purchased a Wellesse Joint Movement Glucosamine product


If you
purchased a
Wellesse
Joint
Movement
Glucosamine
product


If you purchased a
Wellesse Joint
Movement Glucosamine
product you may be
entitled to receive up to

LEGAL NOTICE

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WHAT IS THIS SETTLEMENT ABOUT?
Plaintiff claims that Defendants, Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC's ("Defendants"), Wellesse Joint Movement Glucosamine did not provide certain health benefits as advertised, including joint health benefits, mobility, flexibility, and lubrication. Defendants strongly deny the allegations made in the lawsuit. The Court has not decided who is right and who is wrong. Instead, the parties decided to settle the dispute.

WHAT DOES THE SETTLEMENT PROVIDE?
Each Settlement Class Member who submits a valid claim form may be entitled to receive cash payment of up to $15.00 to $18.00 for each bottle of Wellesse Joint Movement Glucosamine purchased prior to May 21, 2014, not to exceed one hundred dollars ($100) in total recovery. Defendants will make payments of $3.1 million into a Settlement Fund to reimburse Settlement Class Members for the Wellesse Joint Movement Glucosamine they purchased, to pay for costs and expenses of settlement administration not to exceed _____, an award of attorneys' fees not to exceed $930,000.00, and a service award to the Class Representatives, not to exceed $3,500.00. In the event that the dollar amount of approved claims submitted by Settlement Class Members exceeds the amount remaining in the Settlement Fund after payment of costs and expenses of settlement administration, the Court's award of attorneys' fees, and a service award to the Class Representatives, payments on approved Claims to Settlement Class Members shall be reduced pro rata.

AM I A CLASS MEMBER?
You're a Class Member if you purchased a Wellesse Joint Movement Glucosamine product anywhere in the nation prior to May 21, 2014.

WHAT ARE MY LEGAL OPTIONS?
To ask for cash and remain in the Class, you must mail, fax, or submit online a completed claim form by [Month, Day, 2014]. If you do not wish to participate in the settlement, you may exclude yourself from the Class by [Month, Day, 2014], or you may stay in the Class and object to the settlement by [Month, Day, 2014]. Visit www._____ for important information about these options.

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The Court will hold a Final Approval Hearing on _____, 2014 at _____ (a.m./p.m.), to determine whether the proposed settlement is fair, reasonable, and adequate, to approve attorney fees and expenses, and any service award for the Class Representatives. The Final Approval Hearing will take place at U.S. District Court, Southern District of California, 940 Front Street, San Diego, CA 92101. You do not have to attend the hearing.

HOW CAN I GET MORE INFORMATION?
For more information or to view all relevant documents in the litigation, or if you have questions, visit www._____, or call 1-800-XXX-XXXX.

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HOW CAN I GET MORE INFORMATION? For more information or to view all relevant documents in the litigation, or if you have questions, visit www._____, or call 1-800-XXX-XXXX.

Joint Movement Settlement

You could get $15-18 for each Wellesse Joint Movement Glucosamine product you purchased.

EXHIBIT 7

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

CV NO. 13-CV-0618-DMS (JMA)

[PROPOSED] ORDER PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT

WHEREAS, Plaintiffs Ed Hazlin and Karen Albence ("Plaintiffs") in this action entitled *Hazlin v. Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC*, No. 13-CV-0618-DMS (JMA) (the "Action") and Defendants Botanical Laboratories, Inc., Schwabe North America, Inc., and Botanical Laboratories, LLC ("Defendants") have entered into a Stipulation of Settlement ("Stipulation"), filed September 15, 2014, after discovery and arms-length settlement discussions;

AND, WHEREAS, the Court has received and considered the Stipulation, including the accompanying exhibits, and the record in this Action;

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

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 Class Is Preliminarily Certified.

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

Pursuant to Federal Rules of Civil Procedure, Rule 23, and for settlement purposes only, the Court hereby preliminarily certifies this Action as a class action on behalf of the following Settlement Class:

> All persons who purchased Wellesse Joint Movement Glucosamine products in the United States up to the date of the entry of the Preliminary Approval Order.

Excluded from the Settlement Class are: (i) those who purchased Wellesse Joint Movement Glucosamine products for purposes of resale; (ii) those with claims for personal injuries arising from the ingestion of one or more Wellesse Joint

Movement Glucosamine products; (iii) Defendants and their officers, directors and employees; (iv) any person who files a valid and timely Request for Exclusion; and (v) the Judge(s) to whom this Action is assigned and any members of their immediate families.

Certification of the Settlement Class shall be solely for settlement purposes and without prejudice to the Parties in the event that the Stipulation is not finally approved by this Court or otherwise does not take effect. Certification of the Settlement Class shall be vacated and shall have no effect in the event that the Stipulation is not finally approved by this Court or otherwise does not take effect.

With respect to the Settlement Class, the Court preliminarily finds the prerequisites for a class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been met to certify a class for settlement purposes, in that: (a) the Settlement Class is so numerous that joinder of all individual Settlement Class Members is impracticable; (b) there are questions of law and fact common to the Settlement Class and those common questions of law and fact predominate over any individual questions; (c) the claims of the Class Representative are typical of the claims of the Class; (d) the Class Representative and Class Counsel will fairly and adequately represent the interests of the Settlement Class; and (e) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Class Counsel and the Class Representatives are hereby found to be adequate representatives of the Settlement Class for settlement purposes pursuant to Rule 23 of the Federal Rules of Civil Procedure. Because the class is being certified for settlement, the Court need not determine whether the case would be unmanageable as a class action if the case were tried. The Court hereby appoints Ed Hazlin and Karen Albence as the Class Representatives of the Settlement Class. Having considered the factors set forth in Rule 23(g)(1), the Court hereby designates Todd D. Carpenter of Carpenter Law Group and James R. Patterson of Patterson Law

Group, whom the Court finds are experienced and adequate counsel, as Class Counsel.

The Stipulation Is Preliminarily Approved and Final Approval Schedule Set.

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

The Court has conducted a preliminary assessment of the fairness, reasonableness, and adequacy of the Stipulation, 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 Stipulation.

Pursuant to of the Federal Rules of Civil Procedure, Rule 23(e) the Court will hold a final approval hearing on _____, 2014, at _____ a.m./p.m., in the Courtroom of the Honorable Karen S. Crawford, United States District Court for the Southern District of California, 940 Front Street, San Diego, CA 92101, for the following purposes:

finally determining whether the Settlement Class meets all applicable requirements of the Federal Rules of Civil Procedure, Rule 23 and, thus, whether the Settlement Class claims should be certified for purposes of effectuating the settlement;

determining whether the proposed settlement of the Action on the terms and conditions provided for in the Stipulation is fair, reasonable and adequate and should be approved by the Court;

considering the application of Class Counsel for an award of attorneys' fees and expenses as provided for under the Stipulation;

considering the application for a service award to Plaintiffs as provided for under the Stipulation;

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

determining whether the release by the Settlement Class Members of the Released Claims as set forth in the Stipulation should be provided; and

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

The Court may adjourn the Final Approval Hearing and later reconvene such hearing without further notice to the Settlement Class Members.

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

The Parties may further modify the Stipulation 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 Stipulation with such modifications as may be agreed to by the Parties, if appropriate, without further notice to Settlement Class Members.

Opening papers in support of final approval of the Stipulation and any application for attorneys' fees and expenses and/or Plaintiffs' service award must be filed with the Court and served at least 30 days prior to the Final Approval Hearing. Reply papers, if any, must be filed and served at least 10 days prior to the Final Approval Hearing.

The Court Approves the Form and Method of Class Notice.

The Court approves, as to form and content, the proposed Notice Plan (Exhibit 3), Long-form Notice, Short Form Notice and Publication Notice (collectively the "Class Notice"), which are Exhibits 4 5, and 6, respectively, to the Stipulation of Settlement on file with this Court.

The Court finds that the distribution of Class Notice substantially in the manner and form set forth in this Order and the Stipulation of Settlement meet the

requirements of Federal Rules of Civil Procedure, Rule 23 and due process, is the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all Persons entitled thereto.

The Court approves the designation of KCC, 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 Settlement Class Member inquiries, as set forth in the Stipulation and this Order under the direction and supervision of the Court.

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 online or by mail or fax, the Stipulation and all exhibits thereto, and such other information as may be of assistance to Settlement Class Members or required under the Stipulation.

The Settlement Administrator is ordered to complete dissemination of the Class Notice no later than 45 days after the entry by the Court of an order granting Preliminary Approval.

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 out of the Settlement Fund in accordance with the applicable provisions of the Stipulation.

Procedure for Settlement Class Members to Participate In the Settlement.

Settlement Class Members who wish to claim a settlement award must submit their Claim Form and supporting documentation no later than 135 days after the Court first sets a date for the Final Approval Hearing. Such deadline may be further extended without notice to the Settlement Class by Court order, by agreement between the Parties, or as set forth in the Stipulation.

Procedure for Requesting Exclusion from the Class.

Any Person falling within the definition of the Class may, upon his or her request, be excluded from the Class. Any such Person must submit a request for exclusion to the Settlement Administrator postmarked or delivered no later than 30 days before the date first set for the Final Approval Hearing (the "Opt-Out Date"), as set forth in the Class Notice. Requests for exclusion purportedly filed on behalf of groups of persons are prohibited and will be deemed to be void.

Any Settlement Class Member who does not send a signed request for exclusion postmarked or delivered on or before the Opt-Out Date will be deemed to be a Settlement Class Member for all purposes and will be bound by all further orders of the Court in this Action and by the terms of the settlement, if finally approved by the Court. The written request for exclusion must request exclusion from the Class, must be signed by the potential Settlement Class Member and include a statement indicating that the Person desires to be excluded from the Settlement Class. All Persons who submit valid and timely requests for exclusion in the manner set forth in the Stipulation shall have no rights under the Stipulation and shall not be bound by the Stipulation or the Final Judgment and Order.

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

Procedure for Objecting To the Settlement.

Any Settlement 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 Settlement Class Member desires to submit to the Court no later than 30 days prior to the date first set for the Final Approval Hearing (the "Objection Date"). The objection must also be served on Class Counsel and Defendants' 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:

Todd D. Carpenter
CARPENTER LAW GROUP
402 West Broadway, 29th Floor
San Diego, CA 92101
Telephone: 619-347-2517

Shirli F. Weiss
DLA PIPER LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101
Telephone: 619-699-2700

The written objection must include: (a) a heading which refers to the Action; (b) the objector's name, address, telephone number and, if represented by counsel, of his/her counsel; (c) a statement that the objector purchased Wellesse Joint Movement Glucosamine prior to the date Class Notice was disseminated; (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.

Any Settlement 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 Settlement Class Member's expense, to object to any aspect of the fairness, reasonableness, or adequacy of this Agreement, including attorneys' fees. Settlement Class Members or their attorneys who intend to make an appearance at the Final Hearing must serve a notice of intention to appear on Class Counsel identified in the Class Notice and to Defendants' counsel, and file the notice of appearance with the Court, no later than twenty (20) days before the Final Approval Hearing.

Any Settlement 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

Agreement and by all proceedings, orders and judgments, including, but not limited to, the Release, in the Action.

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 Stipulation.

IT IS SO ORDERED.

DATED: _____

_____
THE HONORABLE KAREN S. CRAWFORD
UNITED STATES DISTRICT COURT JUDGE

EXHIBIT 8

Claims Protocol

This Claims Protocol (the "Protocol") is part of the Stipulation of Settlement ("Agreement") and shall be used by the Settlement Administrator to review and process those Claims submitted pursuant to the Agreement and otherwise implement the terms of the claim review and administration process. All capitalized terms used in this Protocol shall have the same meaning given them in the Agreement.

1. Settlement Administrator's Role and Duties

a) The Settlement Administrator shall be selected by the agreement of the Parties and recommended to and approved by the Court.

b) The Settlement Administrator must consent, in writing, to serve and shall abide by the obligations of the Agreement, this Protocol, and the Orders issued by the Court.

c) The Settlement Administrator shall coordinate with the Escrow Agent regarding the funds in the escrow account. However, the Claim Administrator shall have no authority, under any circumstance, to withdraw or disburse any escrowed funds without the written instructions of Defendant(s) and Class Counsel.

d) The Settlement Administrator shall have access to information about the balance of the escrowed funds to perform calculations relating to (i) the costs and expenses associated with disseminating the Class Notice; (ii) the costs and expenses associated with claims administration; and (iii) the total amount due to Authorized Claimants.

e) The Settlement Administrator shall warrant that it knows of no reason why it cannot fairly and impartially administer the claim review process set forth in the Agreement. If the Settlement Administrator, Defendants, or Class Counsel learns of a conflict of interest as to a Claim, that party shall give written notice to the other parties, who shall resolve any such circumstances by further written agreement. Any unresolved dispute over such conflict of interest shall be submitted to the Court for resolution. The Settlement Administrator shall indemnify and defend the Parties and their counsel against any liability arising from the Settlement Administrator's breach of this provision.

f) The Settlement Administrator shall keep a clear and careful record of all communications with Settlement Class Members, all claims decisions, all expenses, and all tasks performed in administering the notice and claim review processes.

g) The Settlement Administrator shall provide periodic reports to Class Counsel and Defendants regarding Claim Form submissions beginning not later than one week after the Preliminary Approval Hearing date and/or the initial dissemination of notice and continuing on a weekly basis thereafter.

h) The actual cost of the Settlement Administrator shall be paid, from time to time, as determined by submitted and approved invoices, from the escrowed funds.

i) The Settlement Administrator shall take all reasonable efforts to administer the Claims efficiently and avoid unnecessary fees and expenses. The Settlement Administrator shall only be reimbursed for fees and expenses supported by detailed and clear timesheets and receipts for costs. As soon as work commences, the Settlement Administrator shall provide a detailed written accounting of all fees and expenses on a monthly basis to Class Counsel and Defendants' counsel, and shall respond promptly to inquiries by these counsel concerning fees and expenses.

j) The Parties are entitled to observe and monitor the performance of the Settlement Administrator to assure compliance with the Agreement and this Protocol. The Settlement Administrator shall promptly respond to all inquiries and requests for information made by Defendants or its counsel or Class Counsel.

2. Providing and Submitting Claim Forms

a) The Claim Form, which is in substantially the same form attached as Exhibit 1 to the Agreement, shall be available as part of the Class Notice, on the Settlement Website, or by contacting the Settlement Administrator. The Claim Form on the Settlement Website and the hard copy Claim Form shall be identical in content.

b) The Settlement Administrator shall establish and maintain the Settlement Website, which shall be easily accessible through commonly used Internet Service Providers for the submission of claims. The Settlement Website shall be designed to permit Settlement Class Members to readily and easily submit Claims and obtain information about the Settlement Class Members' rights and options under the Agreement. The Settlement Website shall be maintained continuously until the Effective Date.

c) The Settlement Administrator also shall establish a toll-free telephone number that will have recorded information answering frequently asked questions about the Agreement, including, but not limited to, the instructions about how to request a Claim Form and/or Class Notice as well as an option to reach a live operator.

3. Claim Form Review and Processing

a) Settlement Class Members may timely submit a Claim to the Settlement Administrator up to the Claims Deadline. Settlement Class Members shall be eligible for the relief provided in the Agreement, provided Class Members complete and timely submit the Claim Form to the Settlement Administrator by the Claim Deadline.

b) The Settlement Administrator shall complete the claim review process within the time period specified in Section V of the Agreement.

c) The Settlement Administrator shall gather and review the Claim Forms received pursuant to the Agreement, and fulfill valid claims.

i. Settlement Class Members who submit timely and valid a Claim Form shall be designated as Authorized Claimants. The Settlement Administrator shall examine the Claim Form before designating the Settlement Class Member as an Authorized Claimant to determine that the information on the Claim Form is reasonably complete and contains sufficient information to enable the mailing and/or emailing of the settlement payment to the Settlement Class Member.

ii. No Settlement Class Member may submit more than one Claim Form. Each Class Member is entitled to seek reimbursement for each unit of JOINT MOVEMENT GLUCOSAMINE purchased by the claimant with a limit of one hundred dollars ($100.00) imposed on the aggregate total of units. The Settlement Administrator shall identify any Claim Forms that appear to seek relief on behalf of the same Settlement Class Member ("Duplicative Claim Forms"). The Settlement Administrator shall determine whether there is any duplication of Claims, if necessary by contacting the claimant(s) or their counsel. The Settlement Administrator shall designate any such Duplicative Claims as invalid claims to the extent they allege the same damages or allege damages on behalf of the same Settlement Class Member.

iii. The Settlement Administrator shall exercise, in its discretion, all usual and customary steps to prevent fraud and abuse and take any reasonable steps to prevent fraud and abuse in the claim process. The Settlement Administrator may, will identify any potential fraudulent claims and notify Defendants' Counsel and Class Counsel of its recommendation to deny in whole or in part any claim to prevent actual or possible fraud or abuse. Defendants' Counsel and Class Counsel shall meet and confer to reach agreement on the fulfillment of any potentially fraudulent claims or claims recommended by the Claims Administrator to be denied.

iv. By agreement of the Parties, the Parties can instruct the Settlement Administrator to take whatever steps they deem appropriate to preserve the Settlement Fund to further the purposes of the Agreement if the Settlement Administrator identifies actual or possible fraud or abuse relating to the submission of Claims, including, but not limited to, denying in whole or in part any Claim to prevent actual or possible fraud or abuse.

v. Claims filed after deadline: The Claims Administrator shall, in its discretion, following consultation and agreement with counsel, reasonable agreement not to be withheld, decide whether to accept Claim Forms submitted after the Claims Deadline.

d) The Settlement Administrator shall provide periodic reports to Class Counsel and Defendants' counsel regarding the implementation of the Agreement and this Protocol.

e) If a Claim Form cannot be processed without additional information, the Settlement Administrator shall promptly notify the Parties and mail a letter that advises the claimant of the additional information and/or documentation needed to validate the claim. The claimant shall have thirty-five (35) days from the date of the postmarked letter sent by the Settlement Administrator to respond to the request from the Settlement Administrator and the claimant shall be so advised.

   i. In the event the claimant timely provides the requested information, the Claim shall be deemed validated and shall be processed for payment.

   ii. In the event the claimant does not timely provide the information, the Claim may be denied or reduced to the claim amount reasonably supported by the documentation without further communication with the claimant.

f) If a Claim is reduced or denied because the Settlement Administrator determined that the additional information and/or documentation was not sufficient to prove up the Claim, the Settlement Administrator shall provide a report to Class Counsel and Defendants' counsel who shall meet and confer in an attempt to resolve these Claims. If Class Counsel reasonably recommends payment of the Claim or payment of a reduced claim amount and Defendants agrees (and Defendants' agreement shall not be unreasonably withheld), then the Settlement Administrator shall be instructed pay those Claims.

g) The Settlement Administrator shall provide all information gathered in investigating Claims, including, but not limited to, copies of all correspondence and email and all notes of the Settlement Administrator, the decision reached, and all reasons supporting the decision, if requested by Class Counsel or Defendants.

EXHIBIT 9

CARPENTER LAW GROUP
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Telephone: (619) 756-6990
Facsimile: (619) 756-6991

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

Case No.: 13-CV-0618-DMS (JMA)

THIRD AMENEDED CLASS ACTION COMPLAINT FOR:

1. VIOLATION OF THE UNFAIR COMPETITION LAW, Business and Professions Code §17200 *et seq.*;
2. VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT, Civil Code §1750, *et seq.*; and
3. BREACH OF EXPRESS WARRANTY.

JUDGE: HON. DANA M. SABRAW
COURTROOM: 13A

DEMAND FOR JURY TRIAL

Plaintiffs ED HAZLIN and KAREN ALBENCE bring this action on behalf of themselves and all others similarly situated against Defendants BOTANICAL LABORATORIES, INC. ("BLI"), BOTANICAL LABORATORIES, L.L.C. ("BLLLC"), SCHWABE NORTH AMERICA, INC. ("SCHWABE") and Does, 1 through 20 (collectively "Defendants") and state:

NATURE OF ACTION

1. Defendants distribute, market and sell "Wellesse Joint Movement Glucosamine", a line of Glucosamine-based supplements that purportedly provide a variety of health benefits centered around improving joint health, mobility, flexibility and lubrication. Defendants represent that the primary active ingredients in its Wellesse JMG products are "glucosamine," "chondroitin" (Chondroitin Sulfate), and "MSM". Through an extensive and uniform nationwide advertising campaign, Defendants represent that Wellesse JMG "improves joint health," provides "less joint discomfort," and "protects and rebuilds cartilage tissue." Defendants further warranted at some point in the class period that the claimed benefits can be received in seven days ("Start to feel it in 7 Days"). Defendants have also represented that, "[c]linical studies show that Glucosamine and Chondroitin in combination are beneficial in maintaining healthy joint function, cartilage and flexibility." *See generally* Exhibit, "A", Product Labels attached to the Second Amended Complaint ("SAC").

2. The statements represented on the Wellesse JMG product packaging are "structure-function" claims which must be limited to a description of the role that a dietary ingredient is "intended to affect the structure or function in humans." 21 U.S.C. § 343 (r)(6). In order to make a structure-function claim, the dietary supplement manufacturer is required to have substantiation that such statements are truthful and not misleading. *Id.*

3. Defendants do not have any competent, reliable scientific evidence

that substantiates their representations about the health benefits of consuming Wellesse JMG. In fact, all available scientific evidence demonstrates that the Wellesse JMG products have no efficacy at all, are ineffective in the improvement of joint health, and provide no benefits related to increasing the mobility, flexibility or lubrication of human joints. Numerous scientifically valid studies have been conducted on the ingredients, including the core or primary ingredient in Wellesse JMG, glucosamine, and they have universally demonstrated that glucosamine and glucosamine in combination with other ingredients such as chondroitin and MSM have absolutely no scientific value in the treatment of joint pain or discomfort.

4. Further, pursuant to 21 C.F.R. § 101.93, Defendants are prohibited from making "disease claims" about their product. Disease claims are generally described as statements which claim to diagnose, mitigate, treat, cure or prevent disease where the statements claim "explicitly or implicitly, that the product…Has an effect on the characteristic signs or symptoms of a specific disease or class of diseases, using scientific or lay terminology." *Id.* Defendants make representations on the product label for the Wellesse JMG products which directly relate to the treatment of Osteoarthritis. The Mayo Clinic defines symptoms of osteoarthritis as follows:

- ***Pain.*** Your joint may hurt during or after movement.
- ***Tenderness.*** Your joint may feel tender when you apply light pressure to it.
- ***Stiffness.*** Joint stiffness may be most noticeable when you wake up in the morning or after a period of inactivity.
- ***Loss of flexibility.*** You may not be able to move your joint through its full range of motion.
- ***Grating sensation.*** You may hear or feel a grating sensation when you use the joint.
- ***Bone spurs.*** These extra bits of bone, which feel like hard lumps, may form

around the affected joint.

See http://www.mayoclinic.com/health/osteoarthritis/DS00019/DSECTION=symptoms (last viewed February 21, 2013).

5. Defendants represent that the active ingredients in Wellesse JMG products provide relief for nearly all of these symptoms. The product labeling states, "Joint Movement Glucosamine Liquid provides EXTRA STRENGTH Glucosamine and scientifically supported levels of Chondroitin plus MSM to maintain healthy movement of your joints. Keep your joints lubricated for improved mobility and flexibility with just 1 oz a day…" *See* product label, attached as Exhibit "A" to the SAC. The product label further warrants that Wellesse JMG, "Improves Joint Health so you can enjoy the benefits of less joint discomfort and get back to the activities you love." These bold claims are in addition to other misrepresentations claiming: "Glucosamine at EXTRA STRENGTH levels protects and rebuilds cartilage tissue to keep your joints flexible and your body active"; and that Wellesse JMG "Improves Joint Health". Taken together, these statements explicitly and implicitly represent that Wellesse JMG is intended to prevent, treat, or otherwise cure symptoms associated with Osteoarthritis.

6. Defendants did not obtain the requisite New Drug Application prior to marketing and selling its Wellesse JMG product. As such, making these statements and representations without a New Drug Application ("NDA") approval from the FDA constitute misbranding and false and misleading conduct pursuant to 21 C.F.R. § 101.93.

7. Defendants convey their uniform, deceptive message to consumers through a variety of media including their website and online promotional materials, and, most important, at the point of purchase, on the front of the

Products' packaging/labeling where it cannot be missed by consumers. The front of the Wellesse JMG product label states in bold print, "Improves Joint Health" and also "Mobility, Flexibility & Lubrication." At some point during the class period, an earlier version of the product label also claimed consumers would, "Start to feel it in 7 Days." The only reason a consumer would purchase Wellesse JMG is to obtain the advertised joint-health benefits, which the Wellesse JMG products do not provide.

8. As a result of Defendants' deceptive advertising and false claims regarding the efficacy of the Wellesse JMG product, Plaintiff and the proposed class have purchased a product which does not perform as represented and they have been harmed in the amount they paid for the product, which, in the case of Plaintiff Hazlin is approximately $22.00 per 33.8 fluid ounce bottle. Plaintiff Karen Albence paid approximately $15.00 to $20.00 for a 16.0 fluid ounce bottle.

9. Plaintiffs bring this action on behalf of themselves and other similarly situated consumers who have purchased Defendants' Wellesse JMG products to halt the dissemination of this false, misleading and deceptive advertising message, correct the false and misleading perception it has created in the minds of consumers, and obtain redress for those who have purchased these Products. Based on violations of state unfair competition laws and Defendants' breach of express warranty, Plaintiffs seek injunctive and monetary relief for consumers who purchased the Wellesse JMG products.

JURISDICTION AND VENUE

10. This Court has original jurisdiction pursuant to 28 U.S.C. §1332(d)(2). The matter in controversy, exclusive of interest and costs, exceeds the sum or value of $5,000,000 and is a class action in which there are in excess of 100 class members and many members of the Class are citizens of a state different from Defendants.

11. This Court has personal jurisdiction over Defendants because Defendants are authorized to conduct and do conduct business in California. Defendants have marketed, promoted, distributed, and sold the Wellesse JMG product in California and Defendants have sufficient minimum contacts with this State and/or sufficiently avail themselves of the markets in this State through their promotion, sales, distribution and marketing within this State to render the exercise of jurisdiction by this Court permissible.

12. Venue is proper in this Court pursuant to 28 U.S.C. §§1391(a) and (b) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred while he resided in this judicial district. Venue is also proper under 18 U.S.C. §1965(a) because Defendants transact substantial business in this District.

PARTIES

13. Plaintiff Ed Hazlin resides in San Diego County, California. In or around February of 2010, Plaintiff was exposed to and saw Defendants' representations regarding the joint health benefits of Wellesse JMG by reading the Wellesse JMG product label in a Costco retail store near his home in El Cajon. In reliance on the claims listed on the product label described herein and above, and particularly those claims listed on the front of the product label, that Wellesse JMG would, "Improve Joint Health," and provide "Mobility, Flexibility & Lubrication", and "Start to Feel it in 7 Days," Plaintiff purchased the Wellesse JMG product at a Wal-Mart located at 605 Fletcher Parkway, El Cajon California 92020. He paid approximately $20.00 for the product. At the time, Mr. Hazlin was experiencing pain and stiffness in his joints. He purchased the product believing it would provide the advertised joint health benefits and improve his joint soreness and comfort. Plaintiff made an additional purchase of the product during the class period. Relying on similar misleading representations, including that Wellesse JMG was "For Healthy Joint Support & Mobility" and that "Clinical studies show that

Glucosamine and Chondroitin in combination are beneficial in maintaining healthy joint function, cartilage and flexibility," and that Glucosamine "is necessary to protect and rebuild cartilage tissue and keep joints strong and healthy," Plaintiff made an additional purchase within the class period on or around November of 2010 at a Costco located at 8125 Fletcher Parkway, El Cajon, California 91942. As a result, Plaintiff suffered injury in fact and lost money. Had Plaintiff known the truth about Defendants' misrepresentations and omissions, he would not have purchased the Wellesse JMG product.

14. Plaintiff Karen Albence resides in San Diego County, California. In or around March of 2013, Plaintiff was exposed to and saw Defendants' representations regarding the joint health benefits of Wellesse JMG by reading the Wellesse JMG product label in a Ralph's grocery retail store near her home in San Diego. In reliance on the claims listed on the product label described herein and above, and particularly those claims listed on the front of the product label, that Wellesse JMG would, "Improve Joint Health," and provide "Mobility, Flexibility & Lubrication" Plaintiff purchased the Wellesse JMG product at a Ralph's grocery store. She paid approximately $15.00 to $20.00 for the product. Ms. Albence purchased the product believing it would provide the advertised joint health benefits and improve her joint soreness and comfort. As a result, Plaintiff suffered injury in fact and lost money. Had Plaintiff known the truth about Defendants' misrepresentations and omissions, she would not have purchased the Wellesse JMG product.

15. Defendant Botanical Laboratories, L.L.C. ("BLLLC") is a Limited Liability Company organized and existing under the laws of the state of Delaware. BOTANICAL LABS's headquarters and principle place of business is at 1441 West Smith Road, Ferndale, Washington 98248. Botanical Labs manufactures, advertises markets, distributes, and/or sells the Wellesse JMG products to tens of thousands of

consumers in California and throughout the United States.

16. Defendant Botanical Laboratories, Inc. ("BLI") is a Washington corporation, organized and existing under the laws of the state of Washington. BLI's headquarters and principle place of business is at 1441 West Smith Road, Ferndale, Washington 98248. BLI manufactures, advertises markets, distributes, and/or sells the Wellesse JMG products to tens of thousands of consumers in California and throughout the United States.

17. Defendant Schwabe North America, Inc. is a Wisconsin corporation, organized and existing under the laws of the state of Wisconsin. Schwabe's headquarters and principle place of business is at 825 Challenger Drive, Green Bay, Wisconsin 54311. Schwabe manufactures, advertises markets, distributes, and/or sells the Wellesse JMG products to tens of thousands of consumers in California and throughout the United States.

18. Plaintiff is informed and believes, and thus alleges, that at all times herein mentioned, each of the Defendants was the agent, employee, representative, partner, joint venturer, and/or alter ego of the other Defendant and, in doing the things alleged herein, was acting within the course and scope of such agency, employment, representation, on behalf of such partnership or joint venture, and/or as such alter ego, with the authority, permission, consent, and/or ratification of the other Defendant.

FACTUAL ALLEGATIONS

The Wellesse JMG Products

19. In the last decade, Defendants have distributed, marketed and sold the Wellesse JMG product on a nation-wide basis. The Wellesse JMG product is sold at a variety of grocery chains and low cost retailers, including Wal-Mart and Costco. The Wellesse JMG product is available in a variety of sized bottles from 16 ounces to 33.8 Fluid Ounces. Plaintiff Hazlin purchased a 33.8 fluid once bottle for

approximately $22.00. Plaintiff Albence purchased a 16 fluid ounce bottle for approximately $15.00 to $20.00. The Wellesse JMG line of glucosamine products prominently advertises its three core ingredients: "2000 mg Glucosamine;" "1200 mg Chondroitin" and "500 mg MSM". The various bottle sizes are indistinguishable from an "efficacy" standpoint as Plaintiffs allege that the core ingredients in the products are identical and that the products are each completely inefficacious.

20. Since the inception of the Wellesse JMG product line, Defendants have consistently advertised that Wellesse JMG "improves joint health," provides "less joint discomfort," and "protects and rebuilds cartilage tissue." Defendants further warranted that the claimed benefits can be received in seven days ("Start to feel it in 7 Days"). The product labeling represents, "Joint Movement Glucosamine Liquid provides EXTRA STRENGTH Glucosamine and scientifically supported levels of Chondroitin plus MSM to maintain healthy movement of your joints. Keep your joints lubricated for improved mobility and flexibility with just 1 oz a day…" *See* product label, attached to the SAC as Exhibit "A". The product label further warrants that Wellesse JMG, "Improves Joint Health so you can enjoy the benefits of less joint discomfort and get back to the activities you love." Id. These claims are in addition to other misrepresentations claiming: "Glucosamine at EXTRA STRENGTH levels protects and rebuilds cartilage tissue to keep your joints flexible and your body active"; and that Wellesse JMG "Improves Joint Health". Id. As more fully set forth herein, the scientific evidence regarding the use of glucosamine, taken alone or in combination with other ingredients, does not provide **any** of the joint health benefits represented by Defendants.

21. Since launching the Wellesse JMG product, Defendants have consistently conveyed the message to consumers throughout the United States, including California, that the Wellesse JMG product provides superior joint

comfort on an expedited basis – within 7 days compared to other Glucosamine products. It does not. Defendants' superior joint comfort claims are false, misleading and deceptive; not only do they not provide the advertised benefit within 7 days, they provide no benefit at all.

22. In addition to the three primary ingredients which Defendants prominently promote as providing the purported joint-health benefits, Defendants' Wellesse JMG product contains smaller amounts of other purported ingredients, including: Vitamin D3, sodium and lesser composition and coloring ingredients. These minor ingredients are also not effective in providing the joint health benefits represented by Defendants, but in any event the focus of this action is on the uniform false and deceptive representations and omissions that Defendants makes about glucosamine, chondroitin and MSM on the package labeling of each of the Wellesse JMG products.

23. Even though numerous clinical studies have found that glucosamine in, alone, or in combination with chondroitin and other supplements, is ineffective, Defendants continue to state on the Products' packaging and labeling that Wellesse JMG helps to, inter alia: improve joint health, provides less joint discomfort, and protect and rebuild cartilage tissue.

24. Plaintiff and Class members have been and will continue to be deceived or misled by Defendants' deceptive joint health benefit claims. Each plaintiff purchased and consumed Wellesse JMG during the Class period and in doing so, read and considered the joint health benefit representations on the Wellesse JMG product label and based their decisions to purchase the Wellesse JMG product on the joint health benefit claims. Mr. Hazlin based his purchase decision in large part on the representation that it would provide benefits faster than other brands, including within 7 days. Defendants' joint health benefit claims were a material factor in influencing Plaintiffs' decisions to purchase and use Wellesse

JMG. Plaintiffs would not have purchased Wellesse JMG had they known that the Product does not provide the represented joint comfort. Representative Product Packaging Labels are attached to the SAC as Exhibit, "A".

25. Independent scientific studies confirm that the representations made on the Wellesse JMG product label, relied upon by Plaintiffs in making their purchases, are false and misleading. Despite knowledge of these studies, Defendants continued to make the described representations, misleading Plaintiffs and members of the class into believing the Wellesse JMG product had actual efficacy and would provide the benefits described in its advertising.

26. Defendants knew or should have known that glucosamine alone and taken in combination with the other ingredients present in Wellesse JMG have no actual medicinal value and do not provide any of the warranted benefits as represented by Defendant's Wellesse JMG products' labels. In fact, there is no scientific study demonstrating that any glucosamine product can "regenerate cartilage tissue" as claimed by the Wellesse JMG product label. To the contrary, as numerous studies have confirmed, neither glucosamine, chondroitin, or any other supplements or ingredients actually regenerate cartilage or provide joint comfort or relief from pain:

27. For example, a 1999 study involving 100 subjects by Houpt et al., entitled *Effect of glucosamine hydrochloride in the treatment of pain of osteoarthritis of the knee,* 26(11) J. Rheumatol. 2423-30 (1999), found that glucosamine hydrochloride performed no better than placebo at reducing pain at the conclusion of the eight week trial.

28. In February 2004, a Supplement to the American Journal of Orthopedics published an article entitled "*Restoring Articular Cartilage in the Knee.*" The authors concluded that adult cartilage cannot be regenerated because it is not vascularized, meaning that blood does not flow to damaged cartilage which

prevents any mechanism for regeneration.

29. Likewise, a 2004 study by McAlindon, et al., entitled, *Effectiveness of Glucosamine For Symptoms of Knee Osteoarthritis: Results From and Internet-Based Randomized Double-Blind Controlled Trial,* 117(9) Am. J. Med. 649-9 (Nov. 2004), concluded that "glucosamine was no more effective than placebo in treating symptoms of knee osteoarthritis" - in short, that glucosamine is ineffective. Id. at 646 ("we found no difference between the glucosamine and placebo groups in any of the outcome measures, at any of the assessment time points").

30. A 2004 study by Cibere, et al., entitled, "*Randomized, Double-Blind, Placebo-Controlled Glucosamine Discontinuation Trial In Knee Osteoarthritis*", 51(5) Arthritis Care & Research 738-45 (Oct. 15, 2004), studied users of glucosamine who had claimed to have experienced at least moderate improvement after starting glucosamine. These patients were divided into two groups - one that continued using glucosamine and one that was given a placebo. For six months, the primary outcome observed was the proportion of disease flares in the glucosamine and placebo groups. A secondary outcome was the time to disease flare. The study results reflected that there were no differences in either the primary or secondary outcomes for glucosamine and placebo. The authors concluded that the study provided no evidence of symptomatic benefit from continued use of glucosamine - in other words, any prior perceived benefits were due to the placebo effect and not glucosamine. Id. at 743 ("In this study, we found that knee OA disease flare occurred as frequently, as quickly, and as severely in patients who were randomized to continue receiving glucosamine compared with those who received placebo. As a result, the efficacy of glucosamine as a symptom-modifying drug in knee OA is not supported by our study.").

31. A large (1,583 subjects), 24-week, multi-center RCT study sponsored by the National Institute of Health ("NIH"), published in the New England Journal

of Medicine (the "2006 GAIT Study"), concluded: "[t]he analysis of the primary outcome measure did not show that either [glucosamine or chondroitin], alone or in combination, was efficacious. . . ." Clegg, D., et al., *Glucosamine, Chondroitin Sulfate, and the Two in Combination for Painful Knee Osteoarthritis,* 354 New England J. of Med. 795, 806 (2006).

32. The 2006 GAIT Study authors rigorously evaluated the effectiveness of glucosamine hydrochloride and chondroitin, alone and in combination, on osteoarthritis for six months. According to the study's authors, "[t]he analysis of the primary outcome measure did not show that either supplement, alone or in combination, was efficacious. . . ." 2006 GAIT Study at 806.

33. Subsequent GAIT studies in 2008 and 2010 reported that glucosamine and chondroitin did not rebuild cartilage and were otherwise ineffective - even in patients with moderate to severe knee pain for which the 2006 reported results were inconclusive. *See* Sawitzke, A.D., et al., *The Effect of Glucosamine and/or Chondroitin Sulfate on the Progression of Knee Osteoarthritis: A GAIT Report,* 58(10) J. Arthritis Rheum. 3183-91 (Oct. 2008); Sawitzke, A.D., *Clinical Efficacy And Safety Of Glucosamine, Chondroitin Sulphate, Their Combination, Celecoxib Or Placebo Taken To Treat Osteoarthritis Of The Knee: 2 Year Results From GAIT,* 69(8) Ann Rhem. Dis. 1459-64 (Aug. 2010).

34. The GAIT studies are consistent with the reported results of prior and subsequent studies. For example, the National Collaborating Centre for Chronic Conditions ("NCCCC") reported "the evidence to support the efficacy of glucosamine hydrochloride as a symptom modifier is poor" and the "evidence for efficacy of chondroitin was less convincing." NCCCC, Osteoarthritis National Clinical Guideline for Care and Management of Adults, Royal College of Physicians, London 2008. Consistent with its lack of efficacy findings, the NCCCC Guideline did not recommend the use of glucosamine or chondroitin for

treating osteoarthritis. Id. at 33.

35. In a 2007 report, Vlad, et al. reviewed all studies involving glucosamine hydrochloride and concluded that "[g]lucosamine hydrochloride is not effective." Glucosamine for Pain in Osteoarthritis, 56:7 Arthritis Rheum. 2267-77 (2007); *see also* id. at 2275 ("we believe that there is sufficient information to conclude that glucosamine hydrochloride lacks efficacy for pain in OA").

36. In October 2008, the American College of Rheumatology's Journal, Arthritis & Rheumatism published a report on a double blind study conducted at multiple centers in the United States examining joint space width loss with radiograph films in patients who were treated with glucosamine hydrochloride. The authors concluded that after two years of treatment with this supplement, the treatment did not demonstrate a clinically important difference in joint space width loss. Sawitzke et al., *Glucosamine for Pain in Osteoarthritis: Why do Trial Results Differ*?, Arthritis Rheum., 58:3183-3191 (2008).

37. In December 2008, the American Academy of Orthopaedic Surgeons published clinical practice guidelines for the "Treatment of Osteoarthritis of the Knee (Non-Arthroplasty)," and recommended that "glucosamine and sulfate or hydrochloride should not be prescribed for patients with symptomatic OA of the knee." Richmond et al., *Treatment of osteoarthritis of the knee* (nonarthroplasty), J. Am. Acad. Orthop. Surg. Vol. 17 No. 9 591-600 (2009). This recommendation was based on a 2007 report from the Agency for Healthcare Research and Quality (AHRQ), which states that "the best available evidence found that glucosamine hydrochloride, chondroitin sulfate, or their combination did not have any clinical benefit in patients with primary OA of the knee." Samson, et al., *Treatment of Primary and Secondary Osteoarthritis of the Knee,* Agency for Healthcare Research and Quality, 2007 Sep 1. Report No. 157.

38. Even studies not concerning the type of glucosamine in the Wellesse

JMG demonstrate that glucosamine does not provide the joint health benefits that Defendants represent. For example, a study by Rozendaal, et al., entitled, *Effect of Glucosamine Sulfate on Hip Osteoarthritis*, 148 Ann. of Intern. Med. 268-77 (2008), assessing the effectiveness of glucosamine on the symptoms and structural progression of hip osteoarthritis during two years of treatment, concluded that glucosamine was no better than placebo in reducing symptoms and progression of hip osteoarthritis.

39. In March 2009, Harvard Medical School published a study conclusively proving that the ingestion of glucosamine could not affect the growth of cartilage. The study took note of the foregoing 2006 and 2008 studies, which "cast considerable doubt" upon the value of glucosamine. The authors went on to conduct an independent study of subjects ingesting 1500 mg of glucosamine, and proved that ***only trace amounts of glucosamine*** entered the human serum, far below any amount that could possibly affect cartilage (emphasis added). Moreover, even those trace amounts were present only for a few hours after ingestion. The authors noted that a 1986 study had found no glucosamine in human plasma after ingestion of four times the usual 1500 mg of glucosamine chloride or sulphate. Silbert, *Dietary Glucosamine Under Question*, Glycobiology 19(6):564-567 (2009).

40. In April 2009, the Journal of Orthopedic Surgery published an article entitled, "*Review Article: Glucosamine*." The article's authors concluded that, based on their literature review, there was "little or no evidence" to suggest that glucosamine was superior to a placebo even in slowing down cartilage deterioration, much less regenerating it. Kirkham, et al., *Review Article: Glucosamine*, Journal of Orthopedic Surgery, 17(1): 72-6 (2009).

41. In 2009, a panel of scientists from the European Food Safety Authority ("EFSA") (a panel established by the European Union to provide independent scientific advice to improve food safety and consumer protection), reviewed

nineteen studies submitted by an applicant, and concluded that "a cause and effect relationship has not been established between the consumption of glucosamine hydrochloride and a reduced rate of cartilage degeneration in individuals without osteoarthritis." EFSA Panel on Dietetic Products, Nutrition and Allergies, *Scientific Opinion on the substantiation of a health claim related to glucosamine hydrochloride and reduced rate of cartilage degeneration and reduced risk of osteoarthritis*, EFSA Journal (2009), 7(10):1358.

42. In a separate opinion from 2009, an EFSA panel examined the evidence for glucosamine (either hydrochloride or sulfate) alone or in combination with chondroitin sulfate and maintenance of joints. The claimed effect was "joint health," and the proposed claims included "helps to maintain healthy joint," "supports mobility," and "helps to keep joints supple and flexible." Based on its review of eleven human intervention studies, three meta-analyses, 21 reviews and background papers, two animal studies, one in vitro study, one short report, and one case report, the EFSA panel concluded that "a cause and effect relationship has not been established between the consumption of glucosamine (either as glucosamine hydrochloride or as glucosamine sulphate), either alone or in combination with chondroitin sulphate, and the maintenance of normal joints." EFSA Panel on Dietetic Products, Nutrition and Allergies, *Scientific Opinion on the substantiation of health claims related to glucosamine alone or in combination with chondroitin sulphate and maintenance of joints and reduction of inflammation*, EFSA Journal (2009), 7(9):1264.

43. A 2010 meta-analysis by Wandel, et al., entitled *Effects of Glucosamine, Chondroitin, Or Placebo In Patients With Osteoarthritis Or Hip Or Knee: Network Meta- Analysis*, BMJ 341:c4675 (2010), examined prior studies involving glucosamine and chondroitin, alone or in combination, and whether they relieved the symptoms or progression of arthritis of the knee or hip. The study

authors reported that glucosamine and chondroitin, alone or in combination, did not reduce joint pain or have an impact on the narrowing of joint space: "Our findings indicate that glucosamine, chondroitin, and their combination do not result in a relevant reduction of joint pain nor affect joint space narrowing compared with placebo." Id. at 8. The authors further concluded "[w]e believe it unlikely that future trials will show a clinically relevant benefit of any of the evaluated preparations." Id.

44. On July 7, 2010, Wilkens, et al., reported that there was no difference between placebo and glucosamine for the treatment of low back pain and lumbar osteoarthritis and that neither glucosamine, nor a placebo, were effective in reducing pain related disability. The researchers also concluded that, "Based on our results, it seems unwise to recommend glucosamine to all patients" with low back pain and lumbar osteoarthritis. Wilkens, et al., *Effect of Glucosamine on Pain-Related Disability in Patients With Chronic Low Back Pain and Degenerative Lumbar Osteoarthritis*, 304(1) JAMA 45-52 (July 7, 2010).

45. In 2011, Miller and Clegg, after surveying the clinical study history of glucosamine and chondroitin, concluded that, "[t]he cost-effectiveness of these dietary supplements alone or in combination in the treatment of OA has not been demonstrated in North America." Miller, K. and Clegg, D., *Glucosamine and Chondroitin Sulfate*, Rheum. Dis. Clin. N. Am. 37 103-118 (2011).

46. In June 2011, the Journal of Pharmacy & Pharmaceutical Sciences published an article entitled, "*The Glucosamine Controversy; A Pharmacokinetic Issue.*" The authors concluded that regardless of the formulation used, no or marginal beneficial effects were observed as a result of low glucosamine bioavailability. Aghazadeh-Habashi and Jamali, *The Glucosamine Controversy; A Pharmacokinetic Issue, Journal of Pharmacy & Pharmaceutical Sciences*, 14(2): 264-273 (2011).

47. In 2012, a report by Rovati, et al. entitled *Crystalline glucosamine sulfate in the management of knee osteoarthritis: efficacy, safety, and pharmacokinetic properties,* Ther Adv Muskoloskel Dis 4(3) 167-180, noted that glucosamine hydrochloride "ha[s] never been shown to be effective."

48. In 2012, EFSA examined the evidence to determine if glucosamine sulphate or glucosamine hydrochloride, could substantiate a claimed effect of "contributes to the maintenance of normal joint cartilage." Based on its review of 61 references provided by Merck Consumer Healthcare, the EFSA panel concluded that "a cause and effect relationship has not been established between the consumption of glucosamine and maintenance of normal joint cartilage in individuals without osteoarthritis." EFSA Panel on Dietetic Products, Nutrition and Allergies, *Scientific Opinion on the substantiation of a health claim related to glucosamine and maintenance of normal joint cartilage*, EFSA Journal 2012, 10(5): 2691.

49. To date, there are only two studies, both of which are more than a decade old, purporting to claim that the ingestion of glucosamine can affect the growth or deterioration of cartilage, both sponsored by a glucosamine supplement manufacturer: Pavelka et. aI. *Glucosamine Sulfate Use and Delay of Progression of Knee Osteoarthritis*, Arch. Intern. Med., 162: 2113-2123 (2002); Reginster et. aI. *Long-term Effects of Glucosamine Sulphate On Osteoarthritis Progress: A Randomised, Placebo-Controlled Clinical Trial*, Lancet, 357: 251-6 (2001). As noted in the April 2009 Journal of Orthopedic Surgery article, the methodologies in those studies had "inherently poor reproducibility," and even minor changes in posture by the subjects during scans could cause false apparent changes in cartilage. The authors of the Journal of Orthopedic Surgery article explained the manufacturer-sponsored studies' findings by noting that "industry-sponsored trials report positive effects more often than do non-sponsored trials and more find pro-

industry results." No reliable scientific medical study has shown that glucosamine and chondroitin, alone or in combination, have a structure modifying effect that will regenerate cartilage that has broken down or worn away.

50. As a result, Plaintiffs and the Class members have been damaged by their purchases of the Wellesse JMG product and have been deceived into purchasing Products that they believed, based on Defendants' representations, provided joint health benefits and overall joint comfort when, in fact, they do not.

51. Defendants have reaped enormous profits from their false marketing and sale of the Wellesse JMG products.

CLASS DEFINITION AND ALLEGATIONS

52. Plaintiffs brings this action on behalf of themselves and all other similarly situated Class members pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure and seeks certification of the following Class against Defendants for violations of California state laws:

> **Nation-wide Class Action**
> All consumers who purchased a Wellesse JMG product in the United States, within the applicable statute of limitations, for personal use until the date notice is disseminated.
>
> Excluded from this Class are Defendants and their officers, directors and employees, and those who purchased a Wellesse JMG product for the purpose of resale.

53. ***Numerosity***. The members of the Class are so numerous that joinder of all members of the Class is impracticable. Plaintiffs are informed and believe that the proposed Class contains thousands of purchasers of the Wellesse JMG products who have been damaged by Defendants' conduct as alleged herein. The precise number of Class members is unknown to Plaintiffs.

54. ***Existence and Predominance of Common Questions of Law and Fact.*** This action involves common questions of law and fact, which predominate over any questions affecting individual Class members. These common legal and factual questions include, but are not limited to, the following:

(a) whether the claims discussed above are true, or are misleading, or objectively reasonably likely to deceive;

(b) whether Defendants' alleged conduct violates public policy;

(c) whether the alleged conduct constitutes violations of the laws asserted;

(d) whether Defendants engaged in false or misleading advertising;

(e) whether Plaintiffs and Class members have sustained monetary loss and the proper measure of that loss; and

(f) whether Plaintiffs and Class members are entitled to other appropriate remedies, including corrective advertising and injunctive relief.

55. ***Typicality***. Plaintiffs' claims are typical of the claims of the members of the Class because, *inter alia*, all Class members were injured through the uniform misconduct described above and were subject to Defendants' deceptive joint health benefit claims that accompanied each and every Wellesse JMG product Defendant sold. Plaintiffs are advancing the same claims and legal theories on behalf of themselves and all members of the Class.

56. ***Adequacy of Representation***. Plaintiffs will fairly and adequately protect the interests of the members of the Class. Plaintiffs have retained counsel experienced in complex consumer class action litigation, and Plaintiffs intend to prosecute this action vigorously. Plaintiffs have no adverse or antagonistic interests to those of the Class.

57. ***Superiority***. A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other

financial detriment suffered by individual Class members is relatively small compared to the burden and expense that would be entailed by individual litigation of their claims against Defendants. It would thus be virtually impossible for Plaintiffs and Class members, on an individual basis, to obtain effective redress for the wrongs done to them. Furthermore, even if Class members could afford such individualized litigation, the court system could not. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

58. The Class also may be certified because Defendants have acted or refused to act on grounds generally applicable to the Class thereby making appropriate final declaratory and/or injunctive relief with respect to the members of the Class as a whole.

59. Plaintiffs seek preliminary and permanent injunctive and equitable relief on behalf of the entire Class, on grounds generally applicable to the entire Class, to enjoin and prevent Defendants from engaging in the acts described, and requiring Defendants to provide full restitution to Plaintiffs and Class members.

60. Unless a Class is certified, Defendants will retain monies received as a result of their conduct that were taken from Plaintiffs and Class members. Unless a Class-wide injunction is issued, Defendants will continue to commit the violations alleged, and the members of the Class and the general public will continue to be misled.

///

COUNT I

Violation of Business & Professions Code §17200, *et seq.*

61. Plaintiffs repeat and re-allege the allegations contained in the paragraphs above, as if fully set forth herein.

62. Plaintiffs bring this claim on behalf of themselves and on behalf of the Class. As alleged herein, Plaintiffs have suffered injury in fact and lost money or property as a result of Defendants' conduct because they purchased a Wellesse JMG product in reliance on Defendants' joint-health benefit claims, including *inter alia*, that the Wellesse JMG product:

- "Improves Joint Health;"
- Provides "less joint discomfort;"
- "protects and rebuilds cartilage tissue;"
- Provides "Mobility, Flexibility & Lubrication;"
- [As to Plaintiff Hazlin] That the claimed benefits could be achieved within seven days, "Start To Feel It In 7 Days,"
- That Wellesse JMG was "For Healthy Joint Support & Mobility" and that "Clinical studies show that Glucosamine and Chondroitin in combination are beneficial in maintaining healthy joint function, cartilage and flexibility," and that Glucosamine "is necessary to protect and rebuild cartilage tissue and keep joints strong and healthy;"

(*See* Exhibit, "A") but Plaintiffs did not receive any benefits. The product labeling further represents, "Joint Movement Glucosamine Liquid provides EXTRA STRENGTH Glucosamine and scientifically supported levels of Chondroitin plus MSM to maintain healthy movement of your joints. Keep your joints lubricated for improved mobility and flexibility with just 1 oz a day…" *See* product label, attached to the SAC as Exhibit "A". It also warrants, "Improves

Joint Health so you can enjoy the benefits of less joint discomfort and get back to the activities you love." Other misrepresentations include: "Glucosamine at EXTRA STRENGTH levels protects and rebuilds cartilage tissue to keep your joints flexible and your body active"; and that Wellesse JMG "Improves Joint Health".

63. Plaintiffs did not receive a product that provided any joint comfort at all, and provided no comfort within the proscribed 7 day period.

64. The Unfair Competition Law, Business & Professions Code §17200, et seq. ("UCL"), and similar laws in other states, prohibit any "unlawful," "fraudulent" or "unfair" business act or practice and any false or misleading advertising. In the course of conducting business, Defendants committed unlawful business practices by, *inter alia*, making the above referenced claims in paragraph 63 and as alleged throughout herein (which also constitutes advertising within the meaning of §17200) and omissions of material facts related to the numerous scientific studies which demonstrate no joint-health benefits derived from the consumption of the ingredients present in Wellesse JMG, and violating Civil Code §§1572, 1573, 1709, 1711, 1770 and Business & Professions Code §§17200, et seq., 17500, et seq., and the common law.

65. Plaintiffs and the Class reserve the right to allege other violations of law, which constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

66. Defendants' actions also constitute "unfair" business acts or practices because, as alleged above, *inter alia*, Defendants engaged in false advertising, misrepresented and omitted material facts regarding the Wellesse JMG product, and thereby offended an established public policy, and engaged in immoral, unethical, oppressive, and unscrupulous activities that are substantially injurious to consumers.

67. As stated in this Complaint, Plaintiffs allege violations of consumer protection, unfair competition and truth in advertising laws in California and other states, resulting in harm to consumers. Defendants' acts and omissions also violate and offend the public policy against engaging in false and misleading advertising, unfair competition and deceptive conduct towards consumers. This conduct constitutes violations of the unfair prong of Business & Professions Code §17200, et seq.

68. There were reasonably available alternatives to further Defendants' legitimate business interests, other than the conduct described herein.

69. Business & Professions Code §17200, et seq. also prohibits any "fraudulent business act or practice."

70. Defendants' actions, claims, nondisclosures and misleading statements, as more fully set forth above, were also false, misleading and/or likely to deceive the consuming public within the meaning of Business & Professions Code §17200, et seq.

71. Plaintiffs and other members of the Class have in fact been deceived as a result of their reliance on Defendants' material representations and omissions, which are described above. This reliance has caused harm to Plaintiffs and other members of the Class who each purchased a Wellesse JMG product. Plaintiffs and the other Class members have suffered injury in fact and lost money as a result of these unlawful, unfair, and fraudulent practices.

72. As a result of their deception, Defendants have been able to reap unjust revenue and profit.

73. Unless restrained and enjoined, Defendants will continue to engage in the above-described conduct. Accordingly, injunctive relief is appropriate.

74. Plaintiffs, on behalf of themselves, all others similarly situated, and the general public, seeks restitution and disgorgement of all money obtained from

Plaintiffs and the members of the Class collected as a result of unfair competition, an injunction prohibiting Defendants from continuing such practices, corrective advertising and all other relief this Court deems appropriate, consistent with Business & Professions Code §17203.

COUNT II
Violations of the Consumers Legal Remedies Act –
Civil Code §1750 *et seq.*

75. Plaintiffs repeat and re-allege the allegations contained in the paragraphs above, as if fully set forth herein.

76. Plaintiffs bring this claim each individually and on behalf of the Class.

77. This cause of action is brought pursuant to the Consumers Legal Remedies Act, California Civil Code §1750, et seq. (the "Act") and similar laws in other states. Plaintiffs are "consumers" as defined by California Civil Code §1761(d). The Products in the Wellesse JMG line of glucosamine chondroitin products are "goods" within the meaning of the Act.

78. Defendants violated and continue to violate the Act by engaging in the following practices proscribed by California Civil Code §1770(a) in transactions with Plaintiff and the Class which were intended to result in, and did result in, the sale of the Wellesse JMG products:

(5) Representing that [the Products] have . . . approval, characteristics, . . . uses [and] benefits . . . which [they do] not have . . . .

* * *

(7) Representing that [the Products] are of a particular standard, quality or grade . . . if [they are] of another.

* * *

(9) Advertising goods . . . with intent not to sell them as advertised.

* * *

(16) Representing that [the Products have] been supplied in accordance with a previous representation when [they have] not.

79. Defendants violated the Act by representing and failing to disclose material facts on the Wellesse JMG labeling and packaging and associated advertising, as described above, when they knew, or should have known, that the representations were false and misleading and that the omissions were of material facts they were obligated to disclose.

80. Pursuant to §1782(d) of the Act, Plaintiff and the Class seek a court order enjoining the above-described wrongful acts and practices of Defendants and for restitution and disgorgement.

81. Pursuant to §1782 of the Act, Plaintiff Hazlin notified Defendant BLI in writing by certified mail of the particular violations of §1770 of the Act and demanded that BLI rectify the problems associated with the actions detailed above and give notice to all affected consumers of Defendants' intent to so act. BLI failed to respond to Plaintiff Hazlin's letter or agree to rectify the problems associated with the actions detailed above and give notice to all affected consumers within 30 days of the date of written notice pursuant to §1782 of the Act. Therefore, Plaintiff further seeks claims for actual, punitive and statutory damages, as appropriate against BLI.

82. Also, pursuant to §1782 of the Act, Plaintiffs notified Defendants BLLLC and SCHWABE in writing by certified mail of the particular violations of §1770 of the Act and demanded that they rectify the problems associated with the actions detailed above and give notice to all affected consumers of their intent to so act.

83. Copies of the letters are attached to the SAC as Exhibit B.

84. If Defendants BLLLC and SCHWABE fail to rectify or agree to rectify the problems associated with the actions detailed above and give notice to all affected consumers within 30 days of the date of written notice pursuant to §1782 of the Act, Plaintiffs will amend this complaint to add claims for actual, punitive and statutory damages, as appropriate.

85. Defendants' conduct is fraudulent, wanton and malicious.

86. Pursuant to §1780(d) of the Act, attached to the SAC as Exhibit C is the affidavit showing that this action has been commenced in the proper forum.

COUNT III
Breach of Express Warranty

87. Plaintiffs repeat and re-allege the allegations contained in the paragraphs above, as if fully set forth herein.

88. Plaintiffs bring this claim each individually and on behalf of the Class.

89. The Uniform Commercial Code section 2-313 provides that an affirmation of fact or promise, including a description of the goods, becomes part of the basis of the bargain and creates an express warranty that the goods shall conform to the promise and to the description.

90. At all times, California and other states have codified and adopted the provisions in the Uniform Commercial Code governing the express warranty of merchantability.

91. As discussed above, Defendants expressly warranted on each and every Product label of the Wellesse JMG products that the product lived up to the represented joint-health benefits described herein and listed on the product labels. The joint-health benefit claims made by Defendants are affirmations of fact that became part of the basis of the bargain and created an express warranty that the goods would conform to the stated promise. Plaintiff placed importance on Defendants' representations.

92. All conditions precedent to Defendants' liability under this contract have been performed by Plaintiff and the Class.

93. Defendants were provided notice of these issues by, *inter alia*, the instant Complaint.

94. Defendants breached the terms of this contract, including the express warranties, with Plaintiffs and the Class by not providing a Product that provided joint comfort and/or easing joint flare-ups and/or relieving occasional joint stiffness as represented.

95. As a result of Defendants' breach of their contract, Plaintiffs and the Class have been damaged in the amount of the price of the Products they purchased.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for a judgment:

A. Certifying the Class as requested herein;

B. Awarding Plaintiffs and the proposed Class members damages;

C. Awarding restitution and disgorgement of Defendants' revenues to Plaintiffs and the proposed Class members;

D. Awarding declaratory and injunctive relief as permitted by law or equity, including: enjoining Defendants from continuing the unlawful practices as set forth herein, and directing Defendants to identify, with Court supervision, victims of their conduct and pay them all money they are required to pay;

E. Ordering Defendants to engage in a corrective advertising campaign;

F. Awarding attorneys' fees and costs;

G. Providing such further relief as may be just and proper.

/ / /

/ / /

/ / /

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial of her claims by jury to the extent authorized by law.

Dated: September 15, 2014

CARPENTER LAW GROUP

By: */s/ Todd D. Carpenter*

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EXHIBIT 10

EXHIBIT 11

Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide 2010

Major Checkpoints

- ❑ ***Will notice effectively reach the class?***
  The percentage of the class that will be exposed to a notice based on a proposed notice plan can always be calculated by experts. A high percentage (e.g., between 70–95%) can often reasonably be reached by a notice campaign.
- ❑ ***Will the notices come to the attention of the class?***
  Notices should be designed using page-layout techniques (e.g., headlines) to command class members' attention when the notices arrive in the mail or appear on the Internet or in printed media.
- ❑ ***Are the notices informative and easy to understand?***
  Notices should carry all of the information required by Rule 23 and should be written in clear, concise, easily understood language.
- ❑ ***Are all of the rights and options easy to act upon?***
  There should be no unnecessary hurdles that make it difficult for class members to exercise their rights to opt out, object, submit a claim, or make an appearance.

Before Certification/Preliminary Settlement Approval

- ❑ ***Can any manageability problems from notice issues be overcome?***
  Consider potential problems in reaching and communicating with class members—e.g., language barriers, class size, geographic scope—and whether a notice plan will be able to overcome such problems.
- ❑ ***Can a high percentage of the proposed class be reached (i.e., exposed to a notice)?***
  Consider the breakdown of known and unknown class members, the age of any mailing lists, and the parties' willingness to spend necessary funds to fully reach the class.
- ❑ ***Is it economically viable to adequately notify the class?***
  If the cost to reach and inform a high percentage of the class is not justified by a proposed settlement, an opt-out class may not be appropriate. Inability to support proper notice may also be evidence that the settlement is weak.
- ❑ ***Will unknown class members understand that they are included?***
  If a well-written notice will leave class members in doubt as to whether they are included, consider whether the class definition, or the class certification, is appropriate.

Upon Certification/Preliminary Settlement Approval

- ❑ ***Do you have a "best practicable" notice plan from a qualified professional?***
  A proper notice plan should spell out how notice will be accomplished, and why the proposed methods were selected. If individual notice will not be used to reach everyone, be careful to obtain a first-hand detailed report explaining why not. See "Notice Plan" section below.

- ❑ ***Do you have unbiased evidence supporting the plan's adequacy?***
  Be careful if the notice plan was developed by a vendor who submitted a low bid and might have incentives to cut corners or cover up any gaps in the notice program. In order to find the "best practicable" notice as Rule 23 requires, your own expert report may be advisable. This is especially true in the diminished adversarial posture in which settlement places the parties. It is also true at preliminary approval, before outsiders are aware of the proposed notice plan, which itself may limit the parties' awareness, in turn impacting your final approval decision.
- ❑ ***Have plain language forms of notice been created?***
  Draft forms of the notices should be developed, in the shape, size, and form in which they will actually be disseminated, for your approval before authorizing notice to the class. See "Notice Documents" below.
- ❑ ***Will a qualified firm disseminate notice and administer response handling?***
  There are many experienced firms that compete for administration of notice dissemination and claims and response handling. Appointing a qualified firm is important because errors may require re-notification, drain funds, delay the process, and threaten recognition of your final judgment.

Notice Plan

- ❑ ***Is the notice plan conducive to reaching the demographics of the class?***
  The notice plan should include an analysis of the makeup of the class. There may be more women than men; it may skew older; it may be less educated than average. Each audience can be matched with the most efficient and effective methods of notice for reaching those people.
- ❑ ***Is the geographic coverage of the notice plan sufficient?***
  Notice for a class action should take steps to reach people wherever they may be located, and also take into account where most class members reside.
  - ○ ***Is the coverage broad and fair? Does the plan account for mobility?***
    Class members choose to live in small towns as well as large cities. Be careful with notice exclusively targeted to large metropolitan newspapers. Class members move frequently (14–17% per year according to the U.S. Census Bureau), so purchasers in one state may now reside in another.
  - ○ ***Is there an extra effort where the class is highly concentrated?***
    Evidence may show that a very large portion of class members reside in a certain state or region, and notice can be focused there, while providing effective, but not as strong, notice elsewhere.
- ❑ ***Does the plan include individual notice?***
  If names and addresses are reasonably identifiable, Rule 23(c)(2) requires individual notice. Be careful to look closely at assertions that mailings are not feasible.
  - ○ ***Did you receive reliable information on whether and how much individual notice can be given?***
    Consider an expert review of the information you have been provided regarding the parties' ability to give individual notice. The parties may have agreed to submit a plan that does not provide sufficient individual notice in spite of the rule.

- ***Will the parties search for and use all names and addresses they have in their files?***
  If the parties suggest that mailings are impracticable, look to distinguish between truly unreasonable searches (e.g., the defendant has nuggets of data that could be matched with third-party lists by a new computer program and several man-years) and situations where a search would be difficult but not unreasonably burdensome (e.g., lists reside directly in the defendant's records but are outdated or expensive to mail to because of the volume). Rule 23 generally requires the latter.
- ***Will outdated addresses be updated before mailing?***
  The plan should detail steps to update addresses before mailing, including postal service change-of-address records, and third-party address databases if the list is very old. Watch out for potentially ineffective "last known address" mailings.
- ***Has the accuracy of the mailing list been estimated after updating efforts?***
  Look for information that indicates how accurate the mailing addresses will be after the planned address updating effort.
- ***Has the percentage of the class to be reached by mail been calculated?***
  The parties should be able to indicate how great a percentage of the overall class will be reached by individual notice, so that the extent of any necessary additional notice can be determined.
- ***Are there plans to re-mail notices that are returned as undeliverable?***
  Even after updating addresses before mailing, mail will be returned as undeliverable. Further lookup tactics and sources are often available, and it is reasonable to re-mail these notices.
- ***Will e-mailed notice be used instead of postal mailings?***
  If available, parties should use postal mailing addresses, which are generally more effective than e-mail in reaching class members: mail-forwarding services reach movers, and the influx of "SPAM" e-mail messages can cause valid e-mails to go unread. If e-mail will be used—e.g., to active e-mail addresses the defendant currently uses to communicate with class members—be careful to require sophisticated design of the subject line, the sender, and the body of the message, to overcome SPAM filters and ensure readership.

☐ ***Will publication efforts combined with mailings reach a high percentage of the class?***
The lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70–95%. A study of recent published decisions showed that the median reach calculation on approved notice plans was 87%.

☐ ***Are the reach calculations based on accepted methodology?***
An affiant's qualifications are important here. Reach calculation methodology is commonly practiced in advertising and media-planning disciplines. Claims administrators are often accountants by training and may lack personal knowledge or the training to conduct reach analyses.

- ***Is the net reach calculation thorough, conservative, and not inflated?***
  Circulation figures for separate dissemination methods cannot simply be added to determine reach. Total audience must be calculated for each publication and the net must be calculated for a combination of publications. Be sure the reach calculation removes overlap between those people exposed to two or more dissemination methods (e.g., a person who receives a mailing may also be exposed to the notice in a publication).

- ***Do the reach calculations omit speculative reach that only might occur?***
  Watch for estimated reach calculations that are based in part on speculative notice that might occur, e.g., news coverage about the lawsuit or settlement. Often, these news articles do not ultimately explain class members' rights, and the content is not in the court's control.
- ***Is any Internet advertising being measured properly?***
  Audiences of Internet websites are measured by "impressions." Total, or "gross," impressions of the entire website do not reveal how many people will view the notice "ad" appearing periodically on a particular page. Inflated audience data via Internet ads is common. It is very expensive to reach a significant percentage of a mass audience with Internet banner ads. Watch for suggestions that Internet ads and social network usage can replace all other methods. Reach, awareness, and claims will likely be very low when such a program is complete.

❑ ***Is non-English notice necessary?***
Consider the demographics of the class to determine whether notice is necessary in Spanish or another language. The number of class members whose native language is not English should guide you on whether to actively disseminate notice in other languages, or to simply make foreign language notices available at a website.

❑ ***Does the notice plan allow enough time to act on rights after notice exposure?***
Class members need time to receive a notice by mail or in a publication. A minimum of 30 days is necessary from completed dissemination before deadlines, with 60–90 days preferred. This allows for re-mailings, fulfillment of requests for more information, and consideration of rights and options.

❑ ***Will key documents be available at a neutral website?***
Class members should have access to information beyond the notice. Besides the summary notice and detailed notice (following the FJC examples at www.fjc.gov), it is reasonable to post the following documents at a neutral administrator's website dedicated to the case: the plaintiffs' complaint, the defendants' answer, your class-certification decision (in the event of a class certified for trial), and the settlement agreement and claim form (in the event of a settlement). Other orders, such as your rulings on motions to dismiss or for summary judgment, should ordinarily be made available as well.

❑ ***Can the class get answers from a trained administrator or from class counsel?***
Even the best notice will generate questions from class members. A toll-free number call center, an interactive website staffed by trained administrators, and class counsel who are accessible to the people they represent are reasonable steps to help class members make informed decisions.

Notice Documents (also *see Plain Language Notice Guide, below)*

❑ ***Have you approved all of the forms of the notices?***
Before authorizing the parties to begin disseminating notices, you should ask for and approve all forms of notice that will be used. This includes a detailed notice; a summary notice; and information that will appear at the website and in any other form, such as an Internet banner, TV notice, and radio notice. See www.fjc.gov for illustrative notice forms for various cases. It is best to see and approve the forms of notice the way they will be disseminated, in their actual sizes and designs.

- ❑ ***Are the notices designed to come to the attention of the class?***
  The FJC's illustrative notices, as also described in the accompanying "***Plain Language Notice Guide***," explain how to be sure the notices are "noticed" by the casual-reading class member. With "junk mail" on the rise, and the clutter of advertising in publications, legal notices must stand out with design features long-known to communications pros.
  - ○ ***Does the outside of the mailing avoid a "junk mail" appearance?***
    Notices can be discarded unopened by class members who think the notices are junk mail. A good notice starts with the envelope design, examples of which are at www.fjc.gov.
  - ○ ***Do the notices stand out as important, relevant, and reader-friendly?***
    It is important to capture attention with a prominent headline (like a newspaper article does). This signals who should read the notice and why it is important. The overall layout of the notice will dictate whether busy class members will take time to read the notice and learn of their rights.
- ❑ ***Are the notices written in clear, concise, easily understood language?***
  Required by Rule 23 since 2003, it is also simply good practice to recognize that communicating legal information to laypeople is hard to do.
- ❑ ***Do the notices contain sufficient information for a class member to make an informed decision?***
  Consider the amount of information provided in the notice. Watch for omission of information that the lawyers may wish to obscure (such as the fee request) but that affects class members nonetheless.
- ❑ ***Do the notices include the Rule 23 elements? Even the summary notice?***
  Summary notices, whether mailed or published, encourage readership, and the FJC illustrative notices show that even summary notices can include all elements required by Rule 23(c)(2)(B). But an overly short summary notice, one that mostly points interested readers to a detailed notice, can result in most class members (who read only the summary notice) being unaware of basic rights.
- ❑ ***Have the parties used or considered using graphics in the notices?***
  Depending on the class definition or the claims in the case, a picture or diagram may help class self-identify as members, or otherwise determine whether they are included.
- ❑ ***Does the notice avoid redundancy and avoid details that only lawyers care about?***
  It is tempting to include "everything but the kitchen sink" in the detailed notice. Although dense notices may appear to provide a stronger binding effect by disclosing all possible information, they may actually reduce effectiveness. When excess information is included, reader burnout results, the information is not communicated at all, and claims are largely deterred.
- ❑ ***Is the notice in "Q&A" format? Are key topics included in logical order?***
  The FJC illustrative notices take the form of answers to common questions that class members have in class action cases. This format, and a logical ordering of the important topics (taking care to include all relevant topics) makes for a better communication with the class.
- ❑ ***Are there no burdensome hurdles in the way of responding and exercising rights?***
  Watch for notice language that restricts the free exercise of rights, such as onerous requirements to submit a "satisfactory" objection or opt-out request.

- ❑ ***Is the size of the notice sufficient?***
  Consider the balance between cost efficiency and effectiveness. A smaller publication notice will save money, but too small and it will not afford room for a noticeable headline, will not fit necessary information, and will not be readable if using fine print.

Claims Process

- ❑ ***Is a claims process actually necessary?***
  In too many cases, the parties may negotiate a claims process which serves as a choke on the total amount paid to class members. When the defendant already holds information that would allow at least some claims to be paid automatically, those claims should be paid directly without requiring claim forms.
- ❑ ***Does the claims process avoid steps that deliberately filter valid claims?***
  Close attention to the nature of a necessary claims process may help eliminate onerous features that reduce claims by making claiming more inconvenient.
- ❑ ***Are the claim form questions reasonable, and are the proofs sought readily available to the class member?***
  Watch for situations where class members are required to produce documents or proof that they are unlikely to have access to or to have retained. A low claims rate resulting from such unreasonable requirements may mean that your eventual fairness decision will overstate the value of the settlement to the class and give plaintiff attorneys credit for a greater class benefit than actually achieved.
- ❑ ***Is the claim form as short as possible?***
  A long, daunting claim form is more likely to be discarded or put aside and forgotten by recipients. Avoid replicating notice language or injecting legalistic terminology into the claim form which will deter response and confuse class members.
- ❑ ***Is the claim form well-designed with clear and prominent information?***
  Consider whether the claim form has simple, clearly worded instructions and questions, all presented in an inviting design. The deadlines and phone numbers for questions should be prominent.
- ❑ ***Have you considered adding an online submission option to increase claims?***
  As with many things, convenience is of utmost importance when it comes to claims rates. Today, many class members expect the convenience of one-click submission of claims. Technology allows it, even including an electronic signature. Claim forms should also be sent with the notice, or published in a notice, because many will find immediate response more convenient than going to a website.
- ❑ ***Have you appointed a qualified firm to process the claims?***
  You will want to be sure that the claims administrator will perform all "best practice" functions and has not sacrificed quality in order to provide a low price to win the administration business.

- ❑ ***Are there sufficient safeguards in place to deter waste, fraud, and/or abuse?***
  The claims process, the claim form itself, and the claims administrator all play roles in ensuring that approved claims are valid claims, so that payments go to class members who meet the criteria. Closely monitoring the process, perhaps through a special master—or at least by requiring the parties to file full reports of claims made—is a good idea.

After Notice/Before Trial or Final Settlement Approval

- ❑ ***Did the notice plan achieve what it promised?***
  Look for evidence that the notice plan reached the class members as well as anticipated.
- ❑ ***What is the reaction of the class?***
  You will want to look at the number and nature of any objections, as well as the number of opt-outs and claims. Special note: waiting for the claims deadline to expire before deciding on final approval ensures that you can look at a full picture of the fairness of the settlement. By so doing you will be able to judge the actual value of the settlement to the class and calculate attorney fees in relation to that value.
- ❑ ***Have you made sufficient findings in the record?***
  Consider, based on the evidence, making detailed findings so as to inhibit appellate review or to withstand a subsequent collateral review of your judgment.
- ❑ ***Is any subsequent claims-only notice necessary?***
  If you find the settlement fair, reasonable, and adequate, but the number of claims is low, you may consider additional notice to the class after final approval.

Federal Judicial Center Plain Language Notice Guide

"Thumbnail" representations of illustrative notices at www.fjc.gov (click on "Class Action Notices Page")

Detailed Notice—First Page

- Page one is an overall summary of the notice. The objective is to use the fewest words to say the most. It is a snapshot of the case, of the reasons for the notice, and of the rights that class members have.

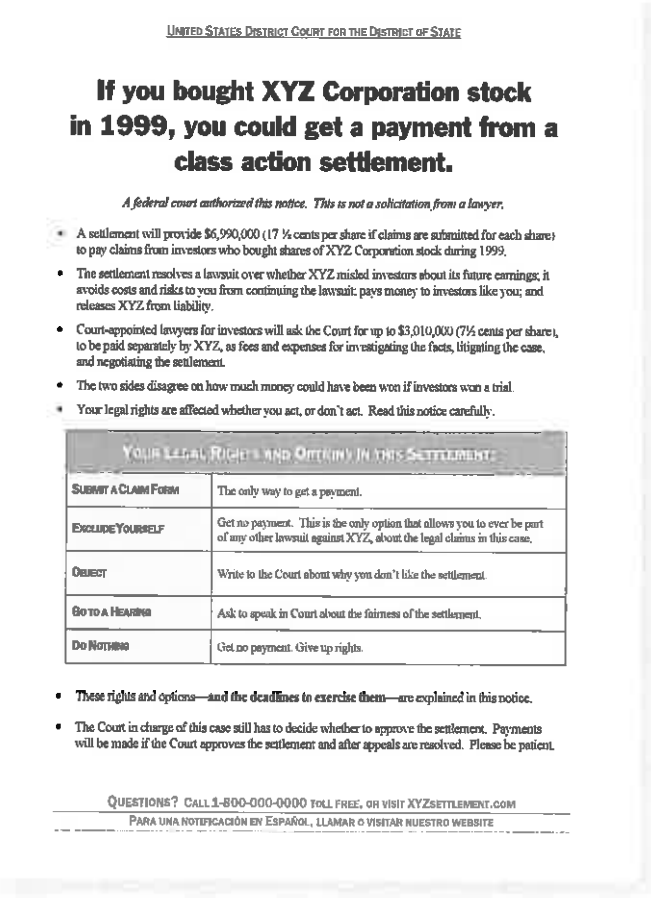
- The court's name at the top conveys the importance of the notice.

- A headline in a large font captures attention. It conveys what the notice is about and who is included, and it suggests a benefit to reading the entire notice.

- The words in italics below the headline communicate the official nature of the notice and provide a contrast from a lawyer's solicitation. Be sure to avoid a traditional legalistic case caption.

- Short bullet points highlight the nature of the case and the purpose of the notice. Bullet points also communicate who is included, the benefits available (if it is a settlement), and steps to be taken—identifying deadlines to observe. The first page should pique class members' interest and encourage them to read the entire notice.

- The table of rights explains the options available. These are deliberately blunt. Be careful to avoid redundancy with the information inside the notice.



UNITED STATES DISTRICT COURT FOR THE DISTRICT OF STATE

If you bought XYZ Corporation stock in 1999, you could get a payment from a class action settlement.

A federal court authorized this notice. This is not a solicitation from a lawyer.

- A settlement will provide $6,990,000 (17 ½ cents per share if claims are submitted for each share) to pay claims from investors who bought shares of XYZ Corporation stock during 1999.
- The settlement resolves a lawsuit over whether XYZ misled investors about its future earnings; it avoids costs and risks to you from continuing the lawsuit; pays money to investors like you; and releases XYZ from liability.
- Court-appointed lawyers for investors will ask the Court for up to $3,010,000 (7½ cents per share), to be paid separately by XYZ, as fees and expenses for investigating the facts, litigating the case, and negotiating the settlement.
- The two sides disagree on how much money could have been won if investors won a trial.
- Your legal rights are affected whether you act, or don't act. Read this notice carefully.

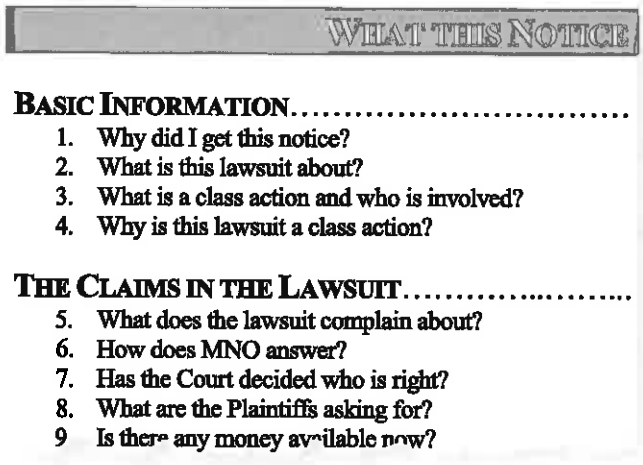
YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:	
SUBMIT A CLAIM FORM	The only way to get a payment.
EXCLUDE YOURSELF	Get no payment. This is the only option that allows you to ever be part of any other lawsuit against XYZ, about the legal claims in this case.
OBJECT	Write to the Court about why you don't like the settlement.
GO TO A HEARING	Ask to speak in Court about the fairness of the settlement.
DO NOTHING	Get no payment. Give up rights.

- These rights and options—**and the deadlines to exercise them**—are explained in this notice.
- The Court in charge of this case still has to decide whether to approve the settlement. Payments will be made if the Court approves the settlement and after appeals are resolved. Please be patient.

QUESTIONS? CALL 1-800-000-0000 TOLL FREE, OR VISIT XYZSETTLEMENT.COM
PARA UNA NOTIFICACIÓN EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

- The first page should prominently display a phone number, e-mail address, or website where the class can obtain answers to questions.

- If appropriate for the class, include a non-English (e.g., Spanish) language note about the availability of a copy of the notice in that language.



WHAT THIS NOTICE

BASIC INFORMATION.....

1. Why did I get this notice?
2. What is this lawsuit about?
3. What is a class action and who is involved?
4. Why is this lawsuit a class action?

THE CLAIMS IN THE LAWSUIT.....

5. What does the lawsuit complain about?
6. How does MNO answer?
7. Has the Court decided who is right?
8. What are the Plaintiffs asking for?
9. Is there any money available now?

Detailed Notice—Table of Contents

- Organize the topics into different sections and place the information in a logical order.

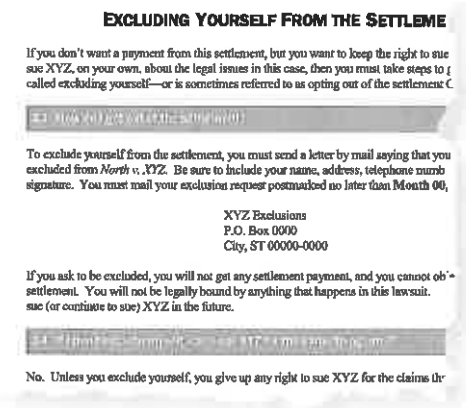
- A "Q&A" or "Answers to Common Questions" format helps class members find the information that is important to their decision-making process.

- Customize the topics to the facts of the case, but keep the overall notice short: 8–11 pages should be plenty even for complex matters.

- Don't avoid obvious questions (or answers) that class members will have.

Federal Judicial Center Plain Language Notice Guide

"Thumbnail" representations of illustrative notices at www.fjc.gov (click on "Class Action Notices Page")



EXCLUDING YOURSELF FROM THE SETTLEME

If you don't want a payment from this settlement, but you want to keep the right to sue sue XYZ, on your own, about the legal issues in this case, then you must take steps to called excluding yourself—or is sometimes referred to as opting out of the settlement

To exclude yourself from the settlement, you must send a letter by mail saying that you excluded from *North v. XYZ*. Be sure to include your name, address, telephone numb signature. You must mail your exclusion request postmarked no later than Month 00,

XYZ Exclusions
P.O. Box 0000
City, ST 00000-0000

If you ask to be excluded, you will not get any settlement payment, and you cannot ob settlement. You will not be legally bound by anything that happens in this lawsuit. sue (or continue to sue) XYZ in the future.

No. Unless you exclude yourself, you give up any right to sue XYZ for the claims th

Detailed Notice—Inside Content

- Short answers are best. Be sure that the text answers the question being asked and does not "spin" the information in a way to achieve a desired result—e.g., do not use language that encourages class members to accept a proposed settlement.

- Watch for redundant and lengthy information, but also substantive omissions. Be frank and open for better reader comprehension and, as a result, a stronger binding effect.

- Every detail does not belong in the notice, but all rights and options do. Explain settlement benefits and state the fees that the lawyers will seek. Watch for burdensome requirements that might inhibit objections, opt outs, or claims.

- Use plain language. You may closely follow the illustrative models at www.fjc.gov.

Summary Notice

- The summary notice should be short but comprehensive. Refer to all of the requirements of Rule 23 in a simple and clear summary fashion. Follow the FJC models wherever possible.

- The "Legal Notice" banner at the top helps stop a publisher from typesetting the word "advertisement" at the top, which would create a perception that the notice is a solicitation. Do not use the legal case caption style.

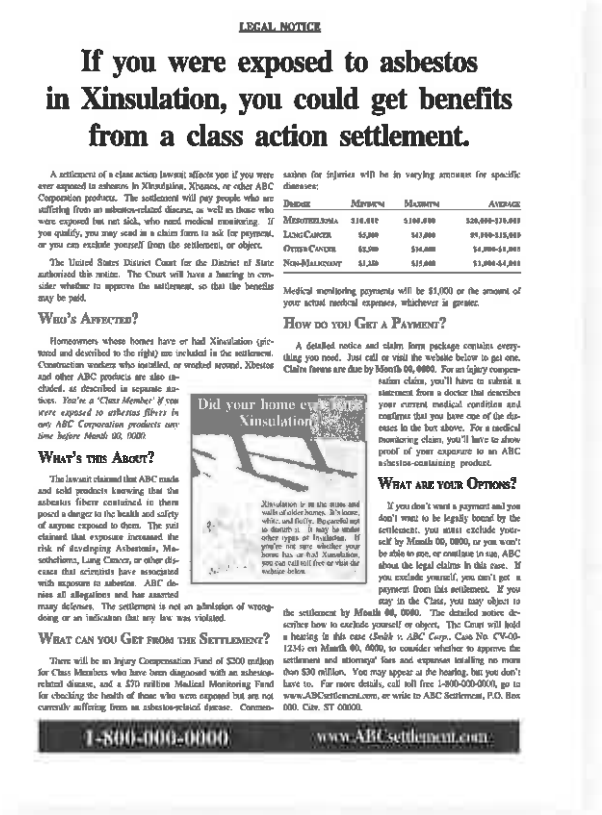
- The headline in large font captures the attention of readers who glance at the page. It flags what the notice is about, who is included, and it signals a benefit to be derived by reading the notice.

- The initial paragraphs provide a snapshot of all key information.

- Be sure to explain class membership in a simple way. Consider a graphic to help readers understand that they are included.

- Make a brief but clear reference to the substance of the case and the claims involved.

- Identify clearly what class members could get and how they would get it. These are the most common questions from class members.



LEGAL NOTICE

If you were exposed to asbestos in Xinsulation, you could get benefits from a class action settlement.

A settlement of a class action lawsuit affects you if you were ever exposed to asbestos in Xinsulation, Xtuncs, or other ABC Corporation products. The settlement will pay people who are suffering from an asbestos-related disease, as well as those who were exposed but not sick, who need medical monitoring. If you qualify, you may send in a claim form to ask for payment, or you can exclude yourself from the settlement, or object.

The United States District Court for the District of State authorized this notice. The Court will have a hearing to consider whether to approve the settlement, so that the benefits may be paid.

WHO'S AFFECTED?

Homeowners whose homes have or had Xinsulation (pictured and described to the right) are included in the settlement. Construction workers who installed, or worked around, Xbestos and other ABC products are also included, as described in separate notices. *You're a 'Class Member' if you were exposed to asbestos fibers in any ABC Corporation products any time before Month 00, 0000.*

WHAT'S THIS ABOUT?

The lawsuit claimed that ABC made and sold products knowing that the asbestos fibers contained in them posed a danger to the health and safety of anyone exposed to them. The suit claimed that exposure increased the risk of developing Asbestosis, Mesothelioma, Lung Cancer, or other diseases that scientists have associated with exposure to asbestos. ABC denies all allegations and has asserted many defenses. The settlement is not an admission of wrongdoing or an indication that any law was violated.

WHAT CAN YOU GET FROM THE SETTLEMENT?

There will be an Injury Compensation Fund of $200 million for Class Members who have been diagnosed with an asbestos-related disease, and a $70 million Medical Monitoring Fund for checking the health of those who were exposed but are not currently suffering from an asbestos-related disease. Compensation for injuries will be in varying amounts for specific diseases:

Disease	Minimum	Maximum	Average
Mesothelioma	$10,000	$100,000	$20,000-$70,000
Lung Cancer	$5,000	$45,000	$9,000-$15,000
Other Cancer	$2,500	$10,000	$4,000-$8,000
Non-Malignancy	$1,250	$15,000	$3,000-$4,000

Medical monitoring payments will be $1,000 or the amount of your actual medical expenses, whichever is greater.

HOW DO YOU GET A PAYMENT?

A detailed notice and claim form package contains everything you need. Just call or visit the website below to get one. Claim forms are due by Month 00, 0000. For an injury compensation claim, you'll have to submit a statement from a doctor that describes your current medical condition and confirms that you have one of the diseases in the list above. For a medical monitoring claim, you'll have to show proof of your exposure to an ABC asbestos-containing product.

Did your home ever have Xinsulation

Xinsulation is in the attics and walls of older homes. It's loose, white, and fluffy. Be careful not to disturb it. It may be under other types of insulation. If you're not sure whether your home has or had Xinsulation, you can call toll free or visit the website below.

WHAT ARE YOUR OPTIONS?

If you don't want a payment and you don't want to be legally bound by the settlement, you must exclude yourself by Month 00, 0000, or you won't be able to sue, or continue to sue, ABC about the legal claims in this case. If you exclude yourself, you can't get a payment from this settlement. If you stay in the Class, you may object to the settlement by Month 00, 0000. The detailed notice describes how to exclude yourself or object. The Court will hold a hearing in this case (*Smith v. ABC Corp.*, Case No. CV-00-1234) on Month 00, 0000, to consider whether to approve the settlement and attorneys' fees and expenses totaling no more than $30 million. You may appear at the hearing, but you don't have to. For more details, call toll free 1-800-000-0000, go to www.ABCsettlement.com, or write to ABC Settlement, P.O. Box 000, City, ST 00000.

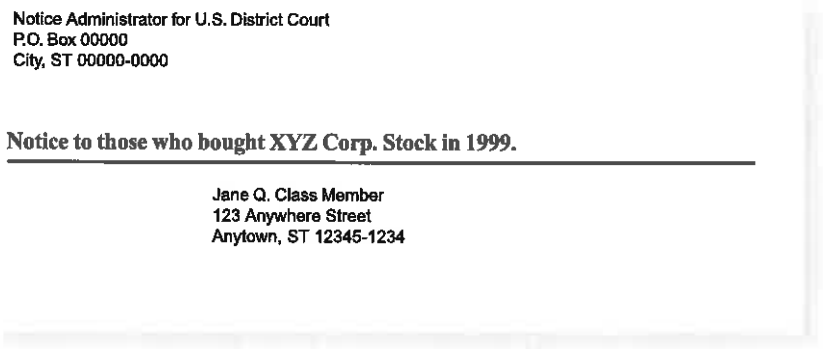
1-800-000-0000 www.ABCsettlement.com

- Be sure to include clear references to opt out, objection, and appearance rights. State the amount of the lawyers' fee request.

- Include a prominent reference to the call center and website.

Outside of Mailing

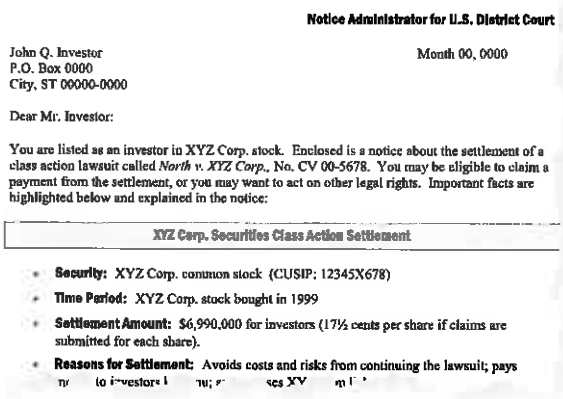
- Design the notice to make it distinguishable from "junk mail."
- A reference to the court's name (at the administrator's address) ensures that the class recognizes the notice's legitimacy.
- "Call-outs" on the front and back encourage the recipient to open and read the notice when it arrives with other mail.


Notice Administrator for U.S. District Court
P.O. Box 00000
City, ST 00000-0000

Notice to those who bought XYZ Corp. Stock in 1999.

Jane Q. Class Member
123 Anywhere Street
Anytown, ST 12345-1234

- The call-out on the front (shown on example above) identifies what the notice is about and who is affected. On the back you may highlight the settlement benefits, or the rights involved.
- Use these techniques even if the mailed notice is designed as a self-mailer, i.e., a foldover with no envelope.


Notice Administrator for U.S. District Court

John Q. Investor
P.O. Box 0000
City, ST 00000-0000

Month 00, 0000

Dear Mr. Investor:

You are listed as an investor in XYZ Corp. stock. Enclosed is a notice about the settlement of a class action lawsuit called *North v. XYZ Corp.*, No. CV 00-5678. You may be eligible to claim a payment from the settlement, or you may want to act on other legal rights. Important facts are highlighted below and explained in the notice:

XYZ Corp. Securities Class Action Settlement

- **Security:** XYZ Corp. common stock (CUSIP: 12345X678)
- **Time Period:** XYZ Corp. stock bought in 1999
- **Settlement Amount:** $6,990,000 for investors (17½ cents per share if claims are submitted for each share).
- **Reasons for Settlement:** Avoids costs and risks from continuing the lawsuit; pays

Cover Letter (when compliance with PSLRA is needed)

- Identify the court's administrator as the sender—this conveys legitimacy.
- The content should be very short. Remember that this is not the notice.
- A reference in bold type to the security involved flags the relevance of the letter.
- The bullet points track each PSLRA cover letter requirement. Avoid lengthy explanations that are redundant with the notice. Be blunt for clarity.
- The content in the FJC's PSLRA cover letter can simply be customized for the case at hand. The design encourages interest, reading, and action.

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

Case No. 13cv0618 DMS JMA

CLASS ACTION

DECLARATION OF TODD D. CARPENTER IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Judge: Hon. Karen S. Crawford
Location: Courtroom 1C
Date: October 2, 2014
Time: 11:00 a.m.

I, Todd D. Carpenter, hereby declare as follows:

1. I am an attorney at law, licensed to practice before all courts in the State of California and I am the founder and owner of Carpenter Law Group. I started Carpenter Law Group on January 1, 2013. Prior to starting Carpenter Law Group, I was a shareholder at the law firm of Bonnett, Fairbourn. Friedman & Balint, P.C., a Phoenix-based law firm specializing in complex litigation.

2. I have personal knowledge of the facts stated in this declaration except as to those facts stated on information and belief or those facts, which I otherwise believe to be true. If called as a witness I could and would competently testify to the matters stated herein.

3. On March 15, 2013, Ed Hazlin, through Class Counsel, filed a class action complaint against Defendant Botanical Laboratories, LLC in the United States District Court for the Southern District of California captioned Ed Hazlin v. Botanical Laboratories, LLC, No. 13-CV-00618-DMS (JMA), on behalf of himself and all other consumers similarly situated who purchased Wellesse Joint Movement Glucosamine products. According to the allegations of the complaint, Defendants' advertising for Wellesse Joint Movement Glucosamine was likely to mislead consumers because, according to Plaintiffs, Wellesse Joint Movement Glucosamine does not improve joint health, mobility, flexibility, and lubrication. Plaintiff's complaint alleged causes of action for violations of California's Bus. & Prof. code § 17200, et seq., California's Consumers Legal Remedies Act ("CLRA"), Civ. Code § 1750, et seq., and breach of express warranty.

4. On May 20, 2013, Class Counsel filed a First Amended Class Action complaint, captioned Ed Hazlin v. Botanical Laboratories, LLC, No. 13-CV-00618-DMS (JMA). On May 30, 2013, Plaintiff Hazlin filed a Notice of Withdrawal of Document, withdrawing the First Amended Complaint.

5. On May 30, 2013, Class Counsel filed a Second Amended Class Action complaint, captioned Ed Hazlin and Karen Albence v. Botanical Laboratories, Inc.,

Schwabe North America, Inc., and Botanical Laboratories, LLC, No. 13-CV-00618-DMS (JMA), which added Plaintiff Karen Albence and Defendants Botanical Laboratories, Inc. and Schwabe North America, Inc. The Second Amended Class Action Complaint alleged a class of California consumers who purchased a Wellesse Joint Movement Glucosamine within the applicable statute of limitations and alleged the same causes of action as were alleged in the First Amended Complaint.

6. On June 25, 2013, Defendants filed a Motion to Dismiss Plaintiffs' claims in their entirety. On August 8, 2013, the Court denied Defendants' Motion to Dismiss Plaintiffs' claims.

7. On August 22, 2013, Defendants filed their answer to the Second Amended Class Action Complaint, expressly denying the allegations therein and raising affirmative defenses.

8. Prior to commencement of the Action, Class Counsel undertook an extensive investigation of the facts, which included review of Defendants' publicly available advertisements for Wellesse Joint Movement Glucosamine, and review and analysis of scientific studies and articles relating to the ingredients in Wellesse Joint Movement Glucosamine and in competitor joint health supplement products. In advance of the settlement conferences conducted with the assistance of the Court and mediation with the assistance of the Hon. Dickran Tevrizian, Ret. (described below) and in connection with the Parties' negotiations, the Parties requested and exchanged pre-mediation discovery, including information relating to the sales of Wellesse Joint Movement Glucosamine. In connection with the Fed. R. Civ. P. 26(f) process, the Parties also had negotiations regarding a protocol relating to the discovery of electronically stored information ("ESI") and a Proposed Protective Order. On November 27, 2013, the Parties served their initial disclosures pursuant to Fed. R. Civ. P. 26(a). Once permitted by the Court, Plaintiffs served their first sets of interrogatories, requests for admissions, and document requests.

9. Armed with this extensive data, the Parties were able to engage in informed, arms'-length negotiations of possible settlement alternatives and were able to reach a resolution of their dispute.

10. Plaintiffs, corporate representatives of Defendants, and their counsel, participated in settlement conferences with the assistance of the Honorable Jan Adler during an Early Neutral Evaluation conference held on October 25, 2013. In preparation for and following the settlement conferences with the Court, Counsel for the Parties have also conducted extensive settlement negotiations between themselves.

11. On December 17, 2013, Plaintiffs, corporate representatives of Defendants, and their counsel, participated in mediation with the assistance of the Honorable Dickran Tevrizian, (Ret.). In preparation for the mediation and as part of settlement negotiations, the Parties exchanged briefs in support of their respective positions and Defendants provided additional national product sales information and pricing information regarding Wellesse Joint Movement Glucosamine, as well as proposed changes to the Wellesse Joint Movement Glucosamine product labels and associated label statements. This mediation involved all Parties and lasted approximately twelve (12) hours, during which the Parties successfully reached an agreement in principle, which is now finalized as reflected in this Settlement. Stipulation of Settlement and Release Between Plaintiffs and Defendants ("Stipulation of Settlement"); separately entered in the record.

12. The proposed settlement class is defined as: all persons who purchased Wellesse Joint Movement Glucosamine products in the United States prior to or on May 21, 2014. Excluded from the Settlement Class are: (i) those who purchased the Wellesse Joint Movement Glucosamine products for purpose of resale; (ii) those with claims for personal injuries arising from the ingestion of one or more Wellesse Joint Movement Glucosamine products; (iii) Defendants and their officers, directors, and employees; (iv) any person who files a valid and timely Request for Exclusion; and (v) the Judge(s) to whom this Action is assigned and any members of their immediate families.

13. The proposed settlement is a "common fund settlement" in the amount of 3.1 million dollars. The Settlement Fund includes Notice and Claim Administration Expenses, Attorneys' Fees and Expenses and any Court-approved service award to the Plaintiffs.

14. Plaintiff's research indicates that during the operative statute of limitations applicable to Plaintiffs' claims, Defendants sold approximately 8 million units of the Joint Movement Glucosamine products at an average retail purchase price of approximately $15.00 per bottle. Defendant sells two sizes of the product, a 16oz and 33 oz bottle.

15. As will be explained in more detail below, based on my years of experience and my own independent investigation and evaluation, I am of the opinion that the settlement for the consideration and on the terms set forth in the Stipulation of Settlement is fair, reasonable, and adequate and it is in the best interests of the settlement class in light of all known facts and circumstances and the expenses and risks inherent in litigation. Were the class not certified, most class members would likely not make any individual claims. Moreover, I am familiar with other class action settlements involving Glucosamine and Chondroitin products and have a strong understanding of the trends in the value of settlements.

16. For example, the largest manufacturer of glucosamine supplements, Rexall, entered into a global, nationwide settlement in April 2014 ("Rexall Settlement")[1]. *See* Exhibit A (attached hereto). The basic terms of the Rexall Settlement are as follows:

- Class members with adequate proof of purchase were entitled to reimbursement of $5 for each purchase, up to ten purchases;

- Class members without adequate proof of purchase were entitled to reimbursement of $3 per purchase, up to four purchases;

[1] The settlement encompassed 6 actions: *See Cardenas and Padilla v. NBTY, Inc and Rexall Sundown, Inc.*, No. 2:11-cv-01615-LKK-CKD (E.D. Cal.) (filed June 14, 2011); *Jennings v. Rexall Sundown, Inc.*, No. 1:11-cv-11488-WGY (D. Mass.) (filed August 22, 2011); *Padilla v. Costco Wholesale Corp.*, No. 1:11-cv-07686 (N.D. Ill.) (filed October 28, 2011); *Linares and Gonzales v. Costco Wholesale, Inc.*,No. 3:11-cv-02547-MMA-RBB (S.D. Cal.) (filed November 2, 2, 2011); *Pearson v. Target Corp.*, No. 1:11-cv-07972 (N.D.Ill.) (filed November 9, 2011); and *Blanco v. CVS Pharmacy, Inc.*, No. 5:13-cv-00406-JGB-SP (C.D. Cal.) (filed March 4, 2013).

- Rexall was required to pay a minimum of $2 million into a common fund, with unclaimed funds remitting to a cy pres fund to the Orthopedic Research and Education Foundation;

- Rexall agreed to remove alleged false representations from its labels and advertisings;

- Rexall agreed to pay and not object to the Court awarding a total of $4.5 million to Class counsel as fees and expenses;[2]

- Rexall agreed to pay a $5,000 incentive award to each named plaintiff; and

- Rexall agreed to pay a minimum of $1.5 million, and a maximum of $2.5 million, in administration costs.

17. The settlement was finally approved on January 13, 2014. *See*, *Pearson v. NBTY, Inc.*, No. 1:11-cv-7972 (N.D. Ill. Jan. 13, 2014). In approving that settlement, the court recognized that only 30,245 claims were filed, representing 0.25% of the 12 million proposed class members, and only a total of $865,284.00 of the available constructive common fund went to benefit the class. Id. at 14.

18. As a Glucosamine & Chondroitin manufacturer, *Rexall* had the preeminent market share in Glucosamine product sales, estimated at between $400 and $500 million for the four year class period. By comparison, retail sales for the Joint Movement Glucosamine products manufactured by Defendants are approximately $120 million for a similar time period; approximately one quarter the size and value of the Rexall retail sales.

19. Yet here, Plaintiffs' counsel achieved a far greater result for the class in any objective measure. Under the terms of the proposed class settlement:

- A common fund of $3.1 Million is established (every dollar is paid out by Defendants; none of the value "reverts");

[2] The fees were divided into two aggregate payments. Rexall agreed to pay $2.5 million to the firm of Denlea & Carton LLP, and $2 million to the firms of Bonnett, Fairbourn, Friedman & Balint, P.C.; Stewart M. Weltman LLC ; and Levin Fishbein Sedran & Berman.

- Defendants agreed to pay up to $550,000 in administration costs;
- Claimants with documentation of their purchases can receive $15.00 or $18.00 per bottle (equivalent to approximately the average retail purchase price for each product), without having to sign under penalty of perjury;
- Claimants without proof of purchase can receive $15.00 to $18.00 per bottle up to $100.00 by filling out a simple claim form and signing under penalty of perjury;
- All leftover money in the fund after initial payments is distributed pro-rata to the actual claimants with no money going to a cy pres award;
- Defendants agreed to a simple claim form so that less information was required to submit an undocumented claim;
- Defendants agreed to remove all of the alleged false representations from its labels.

20. Under the terms of the proposed settlement, each individual claimant will receive approximately a full refund for each product they purchased for up to 5 or 6 bottles of product; a total value capped at $100.00. This is simply an extraordinary recovery given that this is a settlement and not an award of damages following trial. The vast majority of purchasers of retail supplements do not retain their purchase information. Defendants did not maintain purchase information for their customers during the proposed class period. Thus, the vast majority of claimants are going to be consumers who did not retain evidence of their purchase; *i.e.* they did not retain their receipts. In this respect, the proposed settlement offers consumers who do not have evidence of their proof of purchase up to 8 times more money than the settlement in Rexall. And it offers them five to six times as much on a per bottle basis.

21. Finally, even after accounting for the cost of settlement administration ($550,000.00), Plaintiffs' counsel requests for attorneys' fees and costs, (approximately 30% = $930,000.00), the proposed settlement will pay out approximately $1,480,000.00 in actual cash benefits to the proposed class; $600,000 more than was actually paid out in the *Rexall* settlement to a much larger proposed class of consumers.

22. The Stipulation of Settlement also provides that Settlement Class members who do not opt out and file a timely claim will receive a pro rata share of the Net Settlement Fund.

23. The Stipulation of Settlement requires that all of the Net Settlement Fund must be paid out to Settlement Class members who submit valid claims. There is no reversion to Defendants.

24. The settlement also provides all Settlement Class members with the opportunity to request exclusion from the settlement or object to the settlement terms.

25. It also provides the Named Plaintiffs with reasonable enhancement awards for the risks, time and effort they expended in coming forward to provide invaluable information in support of the claims alleged in the complaint.

26. The claim form that Settlement Class members are required to submit is in plain English, concise and requires no documentary proof of the underlying transaction. In addition, Settlement Class members may submit claim forms by mail or electronically.

27. My firm and co-counsel conducted an extensive investigation of the factual allegations involved in this case. As part of the settlement negotiations, Defendants also provided additional informal discovery and we also engaged in meaningful discussions with Defendants' counsel. I am of the opinion that the settlement for each participating class member is fair, reasonable, and adequate, given the inherent risk of litigation, the risk relative to class.

28. Fairness of the settlement is further demonstrated by the uncertainty and risks to the Plaintiffs involved both in not prevailing on the merits and in non-certification. Defendants adamantly dispute Plaintiffs' ability to certify a class. In fact, following the establishment of an MDL proceeding for a nearly identical Glucosamine case in the U.S. District Court for the District of Maryland in Baltimore, Maryland, Judge Frederick Motz granted Defendant GNC's Motion to Dismiss Plaintiff's Consolidated Class Action Complaint; again denying Plaintiff's request for reconsideration. *See* Exhibit B (attached hereto). Plaintiffs undoubtedly faced complicated legal issues concerning the

putative claims. Further, were a class not certified, it is unlikely that any additional putative Class Members would maintain individual actions against Defendants given the relatively small individual recoveries at stake.

29. It is appropriate to recognize the contributions of the Named Plaintiffs in prosecuting this litigation. I am of the opinion that it is fair and reasonable that Plaintiffs Hazlin and Albence each receive a $3,500 enhancement payment. The Named Plaintiffs are the proposed Class Representatives for the settlement Class and have actively and aggressively represented the proposed class throughout this litigation. The Named Plaintiffs participated in the ENE conference with Judge Adler and were always available to provide their input on the litigation, gather evidence and other information that proved helpful to the prosecution. The enhancements are fair given the amount of the overall settlement and the time and effort the Named Plaintiffs spent on assisting in the prosecution of this case. The Named Plaintiffs will provide declarations outlining their efforts on behalf of the Class as part of the final approval process.

30. During the course of my career I have taken and defended over 100 depositions in personal injury, complex and class action cases. I have successfully participated in mediations resulting in more than $50,000,000 in settlements or awards in class action cases. I have drafted, filed, and argued multiple motions in complex consumer class actions, including all forms of discovery, dispositive and certification motions. My practice focuses exclusively on consumer class action and complex litigation, representing plaintiff classes in major insurance fraud, unfair business practices, false and deceptive advertising, product liability cases and anti-trust violations. I have represented plaintiffs in numerous class action proceedings in California and throughout the country, in both state and federal courts. I have represented thousands of purchasers of consumer products, food, food supplements and over the counter drugs in state and federal courts throughout the United States in cases arising out of various false advertising claims made by manufacturers and retailers, including: Proctor & Gamble, General Mills, Bayer, Clorox, WD-40, Dean Foods, Botanical Laboratories, Inc. and Pharmavite. I was also counsel of

record at my prior firm in the MDL proceeding, In re: Hydroxycut Marketing and Sales Practices Litigation, No. 09-02087 (S.D. Cal.), wherein my previous firm was designated as co-lead counsel for the class. I am also presently counsel of record in a "FACTA" case pending against Hugo Boss, U.S.A. Inc. in the Southern District of California; Travis Benware v. Hugo Boss, U.S.A., Inc., Case No. 3:12-cv-01527-L-MDD (pending preliminary approval) and another FACTA case against Southwest Airlines, Lumos v. Southwest Airlines, Co., Case No. C-13-1429-CRB, consolidated for discovery; now pending approval in the Northern District of California, San Francisco Division before Hon. Charles R. Breyer.

31. I have represented thousands of consumer credit card holders against several major retailers arising from violations of the Song-Beverly Credit Card Act section 1747.08. I have also represented thousands of consumer debit card holders against major commercial banks, including assuming a leadership role in In re: Checking Account Overdraft Litigation, Larsen v. Union Bank and Dee v. Bank of the West, MDL No. 2036 (S.D. Fl.). I have filed similar actions against several other banks and credit unions across the country, alleging that each institution manipulated the processing of customer debit card purchases to maximize overdraft fees, including actions against Northwest Savings Bank, (Toth v. Northwest Savings Bank, Case No. GD-12-8014, In the Court of Common Pleas of Allegheny County, Pittsburgh, Pennsylvania), Pinnacle National Bank (John Higgins v. Pinnacle Bank, Case No. 11-C4858, in the Circuit Court for the State of Tennessee, Twentieth Judicial District in Nashville) and the present matter, Mission Federal Credit Union (Taylor v. Mission Federal Credit Union, Case No. 37-2012-00092073-CU-BT-CTL, San Diego Superior Court, Department 75, San Diego, California).

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32. Attached as Exhibit C is the firm resume of my co-counsel, Jim Patterson and his law firm, the Patterson Law Group.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 15th Day of September, 2014 in San Diego, California.

/s/ Todd D. Carpenter
Todd D. Carpenter

CERTIFICATE OF SERVICE

The undersigned hereby certify that on September 15, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system per Civil Local Rule 5.4 which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail notice list, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice list. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Todd D. Carpenter

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICK PEARSON, FRANCISCO PADILLA, CECILIA LINARES, AUGUSTINA BLANCO, ABEL GONZALEZ, and RICHARD JENNINGS, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

NBTY, INC., a Delaware corporation; and REXALL SUNDOWN, INC., a Florida Corporation; and TARGET CORPORATION, a Minnesota Corporation,

Defendants.

No. 11 CV 7972
Judge James B. Zagel

MEMORANDUM OPINION AND ORDER

The resolution of a class action by settlement agreement with NBTY, Inc. ("NBTY"), Rexall Sundown, Inc. ("Rexall"), and Target Corporation ("Target") is now before us. Class Objectors challenge the settlement, contending that excessive attorneys' fees awarded to class counsel will result in a settlement that is not "fair, adequate and reasonable," in violation of Fed. R. Civ. P. 23(h).

FACTS AND PROCEEDINGS

A. Background

Defendants NBTY, Rexall, and Target are in the business of marketing, selling, and distributing, amongst many hundreds of products, a line of joint-health dietary supplements called "Up & Up Glucosamine." Within this line are two separate products. The first is Triple

Strength Glucosamine Chondroitin plus MSM ("Up & Up Triple Strength"). The second is Advanced Glucosamine Chondroitin Complex ("Up & Up Advanced"). The labeling on both products make similar representations as to the beneficial effect the product has on joint health. For example, both products' labeling states that the supplement helps to "maintain the structural integrity of joints." The Up & Up Advanced label also states that it will "help rebuild cartilage" and "lubricate joints." The Up & Up Triple Strength label states that the supplement "supports mobility and flexibility."

In or around June 2011, Plaintiff Nick Pearson ("Pearson") decided to purchase a bottle of Up & Up Triple Strength based on the representations made on the product's labeling. Plaintiff used the product as directed but did not experience any of the beneficial effects represented on its packaging. Subsequently, Pearson became aware of several clinical studies that suggested the active ingredients in the supplement, Glucosamine and Chondroitin, are ineffective in relieving symptoms of or actually curing joint-related ailments. Pearson alleges that, had he known that Defendant's representations about Glucosamine and Chondroitin were false, he would not have purchased Up & Up Triple Strength. Therefore, he claims he has suffered injury through loss of the money he spent on the product.

Similarly, starting as early as 1997 and continuing through the Class Period, Plaintiffs Francisco Padilla, Cecilia Linares, Augustina Blanco, Abel Gonzalez, and Richard Jennings were exposed to and saw Defendants' representations on the labels of Defendants' various products. After reading the representations on the label, Plaintiffs purchased and consumed Defendants' products as directed. Plaintiffs did not have the joint health benefits as represented.

B. Procedural Background

This case commenced as six separate federal court actions across the country involving various joint health dietary supplements manufactured or sold by Defendants. These actions were entitled: *Cardenas and Padilla v. NBTY, Inc and Rexall Sundown, Inc.*, No. 2:11-cv-01615-LKK-CKD (E.D. Cal.) (filed June 14, 2011); *Jennings v. Rexall Sundown, Inc.*, No. 1:11-cv-11488-WGY (D. Mass.) (filed August 22, 2011); *Padilla v. Costco Wholesale Corp.*, No. 1:11-cv-07686 (N.D. Ill.) (filed October 28, 2011); *Linares and Gonzales v. Costco Wholesale, Inc.*, No. 3:11-cv-02547-MMA-RBB (S.D. Cal.) (filed November 2, 2011); *Pearson v. Target Corp.*, No. 1:11-cv-07972 (N.D.Ill.) (filed November 9, 2011); and *Blanco v. CVS Pharmacy, Inc.*, No. 5:13-cv-00406-JGB-SP (C.D. Cal.) (filed March 4, 2013).

On April 15, 2013, Plaintiffs executed a global, nationwide settlement agreement settling and releasing for consideration, *inter alia*, all of the claims made in each case that was to be submitted to this Court for final approval. On April 22, 2013, Plaintiffs, together, filed a second amended complaint against Defendants in this Court. On May 16, 2013, we provisionally certified the Class, consisting of all consumers who purchased for personal use certain joint health dietary supplements sold or manufactured by Defendants.

A Preliminary Approval Order of the proposed class action settlement between Plaintiffs and Defendants was entered on May 30, 2013. [Doc. 89]. Objections to the class action settlement were filed subsequently.

Currently before us is Plaintiffs' Motion for Final Approval of the Class Action Settlement and Award of Attorneys' Fees, Expenses, and Incentive Awards.

C. Settlement Agreement

The Settlement Agreement, reached after protracted, arm's length negotiations over several months, secures for the Class a constructive common fund, injunctive relief, costs for notice and attorneys' fees, and a provision for incentive awards for Plaintiffs. The Settlement explains the claims process and guarantees $2 million towards a guaranteed fund, with unclaimed funds remitting to a *cy pres* fund. The injunctive relief is in the form of labeling changes on Defendants' products for a period of thirty months. Rexall identified and provided notice to approximately five million individual class members belonging to three categories: (1) members of NBTYs Ambassador Club; (2) members of Vitamin World's loyalty program or online purchasers of Vitamin Glucosamine products; and (c) Costco Wholesale club members who have purchased Costco's Kirkland-brand glucosamine products. In exchange, Class Members release Defendants from known and unknown claims.

DISCUSSION

Objectors contest both the fee award and approval order. Objectors argue that this Court should not approve as fair and reasonable a settlement agreement that, on its face, so disproportionately advances the interests of Class Counsel over those of the class itself through excessive attorneys' fees. Plaintiffs' attorneys contend that, due to the substantial benefit procured for Class Members, an award of the requested attorneys' fees would be reasonable and result in a fair settlement. We consider the reasonableness of the settlement to determine if it should be approved.

PART I: REASONABLENESS OF THE SETTLEMENT

A. General Principles of Law Under Rule 23

In class action settlements, a district court cannot rely solely on the adversarial process to protect the interests of the persons most affected by litigation—namely the class— and must rely on the fiduciary obligations of the class representatives and especially class counsel to protect those interests. The fiduciary obligation owed to clients is particularly significant when the class members are consumers, who ordinarily lack both the monetary stake and sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf. *See Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011). This is why settlements of class actions must be approved by the district court as fundamentally "fair, adequate and reasonable." Fed.R.Civ.P. 23(e)(1)(c).

The Seventh Circuit has held that, in evaluating the fairness of a settlement, the district court must consider the strength of the plaintiffs' case compared to the defendants' settlement offer; the risk, expense, complexity, and likely duration of further litigation; the extent of discovery completed; and the experience and views of counsel. *Synfuel Technologies v. DHL Express (USA)*, 463 F.3d 646, 653 (7th Cir. 2006) (quoting *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996)). The Seventh Circuit further held that "the fairness of the settlement must be evaluated primarily on how it compensates class members for past injuries," not on whether it provides relief to future customers. *Id.*, at 654. A district court's decision regarding the approval of a settlement will not be reversed unless there is a clear showing of abuse of discretion. *Id.*

Strength of Plaintiffs' Case on the Merits Compared to Defendants' Settlement Offer

While it is difficult to calculate the precise probability of success Plaintiffs may experience through continued litigation, the Court finds non-trivial potential obstacles to Plaintiffs' prevailing on the merits. As a threshold, Plaintiffs may be refused class certification.

On the other hand, after lengthy settlement negotiations, the Defendants' offered to create an unlimited constructive fund for the approximately 12 million Class Members. Of these Class Members, about 9.1 million received notice by publication and a smaller number of 4.7 million Class Members received direct, individual notice. Each Class Member is eligible to make a claim for at least $3 for one undocumented purchase, and up to $50 for documented purchases. Even if the value of the Settlement is limited to direct notice recipients, the Settlement has made available to the Class a monetary benefit of at least $14.2 million. Of this fund, only $2 million is guaranteed to be paid out by Defendants, either directly or to a *cy pres* fund. The Settlement secures an additional $6.5 million for the cost of notice and attorneys' fees and expenses, for a total of a $20.2 million made available to the Class.

In addition to the fund, the Settlement Agreement provides for injunctive relief in the form of labeling changes that eliminate key false marketing claims alleged in the lawsuit. However, the value of the injunctive relief, while potentially significant to both Class Members who may still be looking to improve joint health and those who are not Class Members, is difficult to ascertain and does not flow directly to the Class Members.

Risk, expense, complexity, and likely duration of further litigation

Even before this dispute was "consolidated" into the present case, the Plaintiffs expended significant time and resources in prosecuting individual Plaintiffs' cases in courts across the country. During this time, Plaintiffs survived multiple motions to dismiss and Defendant's motion for summary judgment. Leading up to this Settlement Agreement, parties engaged in the lengthy period of settlement negotiations.

This class action litigation continues to involve a number of complex legal, factual, and scientific questions. The disputed issues include scientific literature and medical studies

regarding the benefits of glucosamine and chondroitin, whether Class Members obtained some benefit (excluding a known placebo effect) from the use of the products, and whether the Class Members are entitled to damages. Parties also dispute the impact of and potentially liability arising from the disputed misrepresentations. There are also contested issues relating to class certification.

In the absence of a settlement, Plaintiffs would be required to undergo extensive litigation to secure a finding of liability, and then, if successful, continued litigation on causation, damages, limitations and other defenses. Even if able to prevail at all of these stages, Plaintiffs may face an appeal. Should Plaintiffs continue to litigate, any recovery or benefit would not likely be realized for years.

Extent of discovery completed

At the time the Settlement was agreed upon, each of the individual cases were at various stages of litigation, but had undergone sufficient discovery to enable the parties and counsel to evaluate their respective cases. Thousands of pages of documents had been produced, depositions had been taken of experts and employees, and expert reports had been submitted. Discovery completed in *Cardenas* and *Jennings*, including the depositions of experts and preparation of expert reports, provided Plaintiffs and counsel a thorough record upon which to evaluate the case and determine whether settlement was in the best interests of the Class.

Experience and views of counsel

Counsel for Plaintiffs and Defendants have both investigated the claims and underlying events and transactions alleged in the complaints; conducted legal research; engaged in motion practice; reviewed evidence obtained in discovery and class certification discovery,

consultations, reports, and depositions of experts; and considered arguments made by all Parties as to the merits of the case.

Counsel has also assessed the considerable expense, length of the time necessary to continue prosecution of the claims through trial, post-trial motions, and likely appeals, as well as the significant uncertainty in predicting the outcome of the litigation.

Based on the unavoidable expense, length, and risks inherent in litigation, counsel concluded that the Settlement Agreement is fair, reasonable, and adequate and in the best interests of the Class.

Presence of Collusion in Gaining a Settlement

Objectors oppose the Settlement due to three provisions they contend are signs of self-dealing and collusion: (1) the structure of the Settlement; (2) a "clear sailing" provision; and (3) a segregated fund provision.

Objectors' central opposition to the Settlement is that it allocates $4.5 million, or 70% of what it calculates is a $6.5 million constructive common fund (comprised of $4.5 million fees and $2 million guaranteed funds), to Class Counsel. Objectors contend that this disproportionate percentage award, almost two-thirds of the total fund, to counsel suggests self-dealing.

Second, Objectors, point to counsel's inclusion of a "clear sailing" provision that provides that Defendants will not oppose class counsel awards of $4.5 million as evidence of self-dealing. Objectors contend that the clear sailing provision "decouples class counsel's financial incentives from those of the class" and creates an incentive for counsel to settle lawsuits in a manner that is favorable to counsel, even at the detriment to the Class.

Objectors finally argue that the Settlement's segregated fund provision that ensures that fees, costs, and incentive awards are paid "separate and apart from" class relief is another

indication of self-dealing. Any reduction in fees would revert back to Defendants and a change in the fee structure would create no additional benefit to Class Members, reducing the incentive for Class Members to scrutinize and challenge potentially improper fees.

Class Counsel (and, for that matter, Defendants' counsel) denies any collusion and asserts that the Settlement was achieved through arm's-length discussions by conference calls, in-person meetings and written exchanges, during which offers and demands were exchanged. Counsel maintains that only after the relief to the Class was agreed upon did the Parties discuss the issue of attorneys' fees and incentive awards.

Actual Benefit to Class

Defendants' evaluation of the benefit made available to the Class dramatically exceeds the actual benefit realized by the Class. At the close of the claims deadline on December 3, 2013, only 30,245 claims had been filed, amounting to a distribution of $865,284.00 to Class members. The actual benefit to the Class, then, was a mere 4.2% of the $20.2 million Defendants claim it made available to the Class.

Defendants claim that the remaining $1,134,716.00 of the guaranteed fund of $2 million, to be provided as a *cy pres* award to the Orthopedic Research and Education Foundation upon the Court's approval, is a benefit to the Class. Defendants further maintain that the Class also realizes an actual benefit from valuable labeling changes as a result of the Settlement's securement of injunctive relief. Neither the *cy pres* fund nor the injunctive relief provides a direct benefit to the Class, but instead creates a benefit to the general public and future glucosamine consumers.

B. Conclusion

The settlement agreement, withholding approval of the requested attorneys' fees, is fair, adequate, and reasonable and the result of arms-length negotiations. Even though the actual benefit to the Class is only a fraction of the available fund, the settlement provides for adequate economic recovery by claimants in light of the costs, likelihood of only marginal additional relief to individual consumers, and uncertainty of continued litigation. While the *cy pres* fund and injunctive relief are substantial benefits secured under the settlement agreement, they benefit the public and future consumers of glucosamine—not Class members for past injuries—and cannot be a key consideration in determining the fairness of the settlement.

I will approve reasonable incentive awards in the amount of $5,000 for each of the six named Plaintiffs, for a total of $30,000.

Because Objectors' challenge to the fairness of the settlement agreement is based on a determination that the requested fee awards are substantively unreasonable, I will now turn to the reasonableness of the fee award.

PART II: ATTORNEYS' FEES AND COSTS

A. Attorneys' Fee Award Based on Constructive Fund

1. Standard of Review

Attorneys' fees are generally awarded based on the value of the settlement (i.e. the fund as a whole), not just the portion of the fund actually claimed by class members. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980), 100 S. Ct. 745, 62 L.Ed.2d 676 (attorney is entitled to a reasonable fee from the fund as a whole); *Mirfasihi v. Fleet Mortgage Co.*, 551 F.3d 682, 687 (7th Cir. 2008) ("a proper attorneys' fee award is based on success obtained *and* expense (including opportunity cost of time) incurred"); *In Re HP Inket Printer Litigation*, 716 F.3d 1173 (9th Cir. 2013) (attorneys' fees are attributable to the relief obtained for the class).

Courts have an independent obligation to ensure that the fee award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount. *Bluetooth*, 654 F.3d at 941; see also Committee Notes to Rule 23(h), 2003. A recent study, commissioned by the Institute for Legal Reform and conducted by Mayer Brown LLP, found that in the vast majority of class action lawsuits, the fees awarded to class counsel far exceeds the payout received by the class. "Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions," Mayer Brown, available at www.instituteforlegalreform.com. While the study suffers from non-trivial limitations, it raises an important issue regarding the frequently misaligned goals of class counsel and the class. Due to this issue, as well as others, it is particularly important that the Court rely on an adequate factual basis to determine whether a settlement and fee award is fair to the entire class. *In Re Baby Products Antitrust Litigation*, 708 F.3d 163, 175 (district court did not have necessary factual basis, including the amount of compensation distributed directly to the class, to determine whether settlement was fair); *Bluetooth*, at 943 (district court made: 1) no explicit fee calculation; 2) no comparison between fees award and benefit to class or degree of success in litigation; and 3) no comparison between fee calculation methods). To that end, courts may only include the value of injunctive relief to the total common fund in the unusual instance where the value to individual class members of the injunctive relief can be accurately ascertained. *Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003).

2. "Percentage-of-Recovery" vs. Lodestar Method

Depending on the type of relief obtained for the class—either constructive common fund and/or injunctive relief—attorneys' fees may be calculated under either the "lodestar" method or as a "percentage-of-the-recovery." The "lodestar method" is appropriate in class actions where the relief obtained is primarily injunctive in nature and thus not easily monetized. Class actions

brought under fee-shifting statutes (such as federal civil rights, securities, antitrust, copyright, and patent acts) frequently use the lodestar method. In these fee-shifting cases, the relief sought and obtained is largely only injunctive in nature and thus not easily monetized, but the legislature has authorized the award of fees to ensure compensation for counsel undertaking socially beneficial litigation. *Bluetooth*, 654 F.3d 935, 941 (9th Cir. 2011).

A lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer. *Id.*; *Staton v. Boeing*, 327 F.3d 938, 965 (9th Cir. 2003). Though the lodestar figure calculated in determining an attorney fee award is presumptively reasonable, the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of reasonableness factors, including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment. *Bluetooth*, 654 F.3d at 941-42.

On the other hand, where a settlement produces a constructive common fund for the benefit of the entire class, courts have discretion to employ either the lodestar method or the percentage-of-the-recovery method. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975 (7th Cir. 1991); *Bluetooth*, at 942. Under the latter method, attorneys' fees are derived from a percentage of the common fund. A constructive common fund is valued based on the direct monetary relief made available to members of the proposed class, not just the portion actually claimed by class members. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480 (1980), 100 S. Ct. 745, 62 L.Ed.2d 676; *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423,437 (2d Cir. 2007) ("the entire settlement fund, and not some portion thereof, was created through the efforts of counsel"). While the value of *cy pres* and injunctive relief will not be added to the amount of total funds

made available, they are relevant factors in determining what percentage of the fund is reasonable as fees. *Id.*; *Baby Products*, 708 F.3d at 179.

Courts typically calculate 25% of the fund as the "benchmark" for a reasonable fee award in cases involving recoveries of between $5 million and $15 million, and must provide adequate explanation in the record of any "special circumstances" justifying a departure. *Abrams v. Van Kampen Funds, Inc.*, 2006 WL 163023, at *19 (N.D. Ill. Jan. 18, 2006). Courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time, and may cross-check a percentage-of-recovery fee award with the lodestar method. *In re Synthroid Marketing Litigation*, 264 F.3d 712, 718 (7th Cir. 2001); *Baby Products*, 708 F.3d, at 176-77.

3. Calculating the Value of Constructive Common Fund

Counsel has primarily secured a constructive common fund to benefit the Class. An initial calculation of attorneys' fees based on a percentage-of-recovery method is appropriate. The value of the fund is based on the total funds made available to the Class—not only the funds actually claimed by the Class. Plaintiffs' counsel estimates that approximately 9.1 million members, comprising 76% of the estimated 12 million proposed Class members, were provided some type of notice. Of this, 4,718,651 Class members were provided direct notice of the class action proceeding via email or postcard.

At a recovery rate of $3 per bottle with no required documentation by the 4,718,651 members given direct notice, the value of the constructive fund is $14.2 million. Of the available common fund, the Class is guaranteed only two million dollars. Counsel also secured for the Class an additional $1.5 million for notice costs and requests $4.5 million in attorneys' fees and expenses, which Defendants have agreed to not contest. Not including the value of any

injunctive relief, the total direct monetary relief made available by the settlement through a constructive fund, notice costs, and attorneys' fees and expenses is $20.2 million. As such, attorneys' fees totaling $4.5 million constitutes approximately 22.3% of the total potential benefit and may be reasonable.

However, as Objectors foresaw, the data, compiled after the December 3 claims deadline, revealed that, like other consumer class actions with individual relief of a small value, the settlement resulted in a very low claims rate by the Class. *Spillman v. RPM Pizza, LLC*, No. 10-349-BAJ-SCR, 2013 U.S. Dist. LEXIS 72947, at *8 (M.D. La. May 23, 2013) (0.27% claims rate for $15 max claim); *Livingsocial*, 2013 U.S. Dist. LEXIS 40059, at *52 (D.D.C. Mar. 22, 2013) (.25% claims rate). A mere 30,245 claims were filed, representing 0.25% of the 12 million proposed Class Members, and 0.7% of even the 4,718,651 Class Members who received direct notice. Only a total of $865,284.00 of the available constructive common fund went to benefit the Class. This comprised a 4.2% of the available fund of $20.2 million. The remaining $1,134,716.00 of the guaranteed fund of $2 million is to be remitted in *cy pres* to the Orthopedic Research and Education Foundation.

The low claims rate in combination with funds being remitted to *cy pres* in an amount greater than the actual benefit to the Class suggests that there is substantial reason to decrease the percentage of the attorneys' fee award from the "standard" 25% percentage of the settlement. *Baby Products*, 708 F.3d at 179.

Plaintiffs' attorneys claim, however, that they have secured very valuable injunctive relief—the removal of representations on the labeling of Defendant's products for thirty months. Although injunctive relief may be a factor supporting an increase in the percentage of recovery, the benefit secured here, like in *Synfuel*, would primarily benefit future customers and not Class

Members. *Synfuel*, at 653. Consequently, any injunctive relief secured here does not support an increase in the percentage recovery rate awarded to counsel.

4. Crosscheck with Lodestar Method

While the Seventh Circuit does not require calculation of attorneys' fees by the lodestar method, it does require courts to "do their best to award counsel the market price for legal services." *Synthroid Marketing*, 264 F. at 717–21. To this end, we crosscheck the amount of attorneys' fees awarded under the percentage-of-the-recovery against a lodestar calculation. Given that Plaintiffs' attorneys have submitted declarations in support of their requests for attorneys' fees and expenses for purposes of conducting a lodestar, assessing the lodestar will not be a difficult task.

The attorneys for Plaintiff are comprised of two legal teams. The first legal team is comprised of three firms: (1) Bonnett, Fairbourn, Friedman & Balint, P.C. ("BFFB"), (2) Stewart M. Weltman LLC ("WELTMAN LLC"), and (3) Levin Fishbein Sedran & Berman ("LFSB"). The second legal team is the law firm Denlea & Carton LLP ("D&C"). Both teams have submitted data that reflects reasonable hourly rates for attorneys of the same experience and skill.

Team One: BFFB, Weltman LLC, and LFSB

BFFB, consisting of six attorneys, one litigation support specialist, and four paralegals, submitted to the court the following breakdown of its time and proposed hourly rates:

Elaine A. Ryan: 390.1 hours at $575.00

Patricia N. Syverson: 399.3 hours at $525.00

Todd D. Carpenter: 40.2 hours at 525.00

T. Brent Jordan: 42.4 hours at $500.00

Lindsey M. Gomez-Gray: 365.2 hours at $250.00

Kevin R. Hanger: 35.2 hours at $250.00

Brian R. Elser: 3.0 hours at $225.00

Rose K. Creech: 16.7 hours at $175.00

Lydia L. Rueda: 199.3 hours at $165.00

David J. Streyle: 20.6 hours at $165.00

Meredith K. Kight: 5.7 hours at $165.00

These figures total 1,517.7 hours and amount to a base lodestar figure for BFFB of $617,166.50. BFFB also submitted a breakdown of expenses, primarily composed of expert fees, totaling $57,398.04.

Weltman LLC submitted that Stewart M. Weltman spent a total of 474.75 hours on this litigation at an hourly rate of $685, for a total lodestar of $325,203.75. Weltman LLC did not report any additional expenses.

LFSB's legal team, comprised of one partner, one associate, and paralegal, submitted the following breakdown of their fees:

Howard J. Sedran: 12.3 hours at $775.00

Charles Sweedler: 59.0 hours at $525.00

James Rapone: 45.0 hours at $265.00

These figures total 116.3 hours and amount to a base lodestar figure for LFSB of $52,432.50. LFSB submitted expenses of $29,091.06.

Based on these figures, the total base lodestar figure for BFFB, Weltman LLC, and LFSB, calculated as proposed by plaintiffs' counsel, is $994,802.75, with expenses totaling $86,489.10. BFFB, Weltman LLC, and LFSB requested a fee award of $2 million. Applying a

lodestar method crosscheck at counsel's regular billing rates, a total lodestar of $994,802.75, represents a request to use a lodestar multiplier of 2 (i.e. Class Counsel's fee request equaled twice what they would have received at their regular billing rates).

Team Two: D&C

D&C, consisting of six attorneys and staff, submitted in a declaration the following breakdown of its time and proposed hourly rates:

James R. Denlea: 41 hours at $675.00

D. Gregory Blankinship: 105.40 hours at $625.00

Jeffrey I. Carton: 190.50 hours at $675.00

Peter N. Freiberg: 1076.50 hours at $650.00

Todd S. Garber: 50.35 hours at $150.00

Based on these figures, calculated as proposed by Plaintiffs' attorneys, the value of the total 1,478.75 hours D&C devoted to this action amounts to a base lodestar figure for D&C of $938,790.00. D&C's requested fee is $2,500,000, including $93,187.13 in expenses. Applying a lodestar method crosscheck at counsel's regular billing rates, a total lodestar of $938,790.00, represents a request to use a lodestar multiplier of 2.56.

5. Conclusion

Based on a comparison of the percentage-of-the-recovery method and lodestar method, I am awarding attorneys' fees exclusively for securing a common fund, while taking into account factors, such as the actual benefit to the Class. Due to the low actual relief secured for the Class and lack of other meaningful benefit to compensate the Class for past injuries, a substantial decrease in the percentage of the recovery is warranted. Based on a crosscheck with the Lodestar methodology, fees in the amount of $994,802.75 and expenses in the amount of

$86,489.10 will be awarded to BFFB, Weltman LLC, and LFSB, and fees in the amount of $938,790.00 and expenses in the amount of $93,187.13 will be awarded to D&C, for a total of $1,933,592.75.

These fees reflect a lodestar with no multiplier. This award comprises 9.6% of the total fund of $20.2 million, including notice costs and fees, and 13.6% of the $14.2 of the available common fund. This award adequately (and, arguably, more than adequately) compensates counsel for the market price of their legal services.[1]

B. Potential Attorneys' Fee Award Based on Injunctive Relief

Parties ordinarily may not include an estimated value of undifferentiated injunctive relief in the amount of an actual or putative common fund for purposes of determining an award of attorneys' fees. *Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003). However, in limited cases, the legislature has authorized the award of fees to counsel undertaking socially beneficial litigation. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975) (only Congress can authorize an exception to the standard American rule that attorneys' fees are not recoverable by the winning party in federal litigation).

[1] Calculating a lodestar, as we have done here, has its own difficulty. We accept both the hourly rates and the hours spent. Opposing counsel in a settled case rarely, if ever, challenge rates or hours spent in class action litigation. Hours and rate challenges are generally confined to non-class cases filed under fee-shifting statutes, where defendants allege that the plaintiffs' lawyer took 150 hours to complete a 95 hour job and charged rates higher than that lawyer's time was worth in his or her practice. On our own initiative, we considered the question of hours and fees. Based on the experience of our own dockets, the hourly rates were within the realm of reason and, in most, but not all cases the highest paid lawyers expended fewer hours than those with lower rates which is economically sound. The total number of hours is large in comparison to the class benefits. I approve the hours because the claims presented some difficulty. Several cases that were filed separately were constructed into an economically worthwhile case based on millions of consumers all of whom would receive very small damages, i.e., a maximum of $50.00 per class member, many in the range of $3.00 to $12.00. This case is not unique; I have cited similar cases. What is clear is that preparing this case required close analysis of the economic feasibility of proceeding and the method for doing so. In particular, the case was "soft" because there was no contention that the product physically harmed a large class of people. The harm done by purchasing a bottle of pills or capsules was inflicted on the small change in the buyer's pocket. It takes extra effort to try to prevail fully in such a case. For this reason, we conclude that hours spent were within the realm of reason.

These cases, addressing topics such as civil rights, employment, and antitrust, are identified by statutory fee-shifting provisions. *Bluetooth*, 654 F.3d at 941 (citing cases); *Gagne v. Maher*, 594 F.2d 336, 339-41 (2d Cir. 1979) (fees to recipient's attorneys was authorized under Civil Rights Attorney's Fees Awards Act of 1976 where class recovered almost all requested relief); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 822 (3d Cir. 1995) (calculation of attorneys' fee by the lodestar method was not legislatively justified because fee in hybrid relief consumer case was not made pursuant to statute). Courts typically use a lodestar calculation to arrive at an award of fees to counsel because there is often no way to gauge the net value of the settlement or any percentage thereof. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998) (rejecting straight percentage recovery fee calculation because of uncertainty of settlement valuation).

Class Counsel argues that the labeling changes included in the settlement are of significant value and that the attorneys' fees should account for the benefit of this injunctive relief. Class Counsel asserts that the removal of representations on the packaging of glucosamine products will provide consumers with valuable information and is likely to lead to decreased prices for Class Members and future consumers. Objectors, however, argue that counsel should be rewarded only for the benefit secured directly for the Class. The benefit of the injunctive relief is not to the Class, but to future consumers of glucosamine.

Even assuming *arguendo* that the Plaintiffs' attorneys were entitled to fees for securing injunctive relief, there is a major problem regarding valuation of the removal of representations from the labels of Defendants' products.

Class Counsel submitted an initial report ("Reutter Rep.") by Plaintiffs' economist Dr. Keith Reutter estimating that the value of the injunctive relief was approximately $21.7 million

to current class members and $46.2 million to all consumers. See Reutter Rep. Ex. S. In order to assess the potential benefit to the class of injunctive relief, this Court requested Plaintiffs' counsel to submit additional briefing regarding calculating the value of the injunctive relief by analyzing the impact of the labeling changes after they are implemented. On November 6, 2013, Class Counsel submitted the Supplemental Report of Plaintiffs' economist Dr. Keith Reutter ("Supp. Reutter Report") which concluded that it is infeasible to better measure the actual economic impact of the injunctive relief by waiting for the implementation of the labeling changes. Dr. Reutter concluded that any meaningful analysis would require the consideration of competitors' and retailers' proprietary sales and marketing information, which would be difficult to obtain, take several years to perform, and be quite expensive.

Plaintiffs' counsels' argument that the economic benefit cannot be measured after the labeling changes are actually implemented undermines any possibility that such changes could be accurately estimated prior to such implementation. Dr. Reutter opines that actual economic impact cannot be gleaned from an analysis of defendant Rexall's data alone. Dr. Reutter concludes that accurately estimating the economic impact of the proposed labeling changes will "require the purchase of retail sales data from a vendor such as ACNielsen, and will require knowledge of the advertising budgets of competing manufacturers and retail outlets."

Plaintiffs' counsel's own conflicting reports by Dr. Reutter strongly suggests that there is no accurate estimate to assess the value to the Class of the injunctive relief. The Seventh Circuit has conceded that a "high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes," but found that a judge that does not attempt to provide a monetization of the injunctive relief abuses his discretion. *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 285 (7th Cir. 2002).

Plaintiffs' counsel argues that it should be awarded fees without a reasonably accurate and defensible determination of the value of injunctive relief by calculating fees based on a lodestar method with a multiplier because it has engaged in socially beneficial litigation. However, we will not award attorneys' fees for injunctive relief secured without clear indication from Congress that consumer class actions fall into fee-shifting "socially beneficial litigation."

At this time, we are neither able nor willing to award the plaintiffs' attorneys fees based on inconsistent conjecture as to what may happen in the future regarding labeling changes—especially, when the court may wait and, possibly, base such an award on accurate data. *Bluetooth*, 654 F.3d at 945 (remanded to the district court for lack of an adequate explanation for fee award). Accordingly, whether Plaintiffs' counsel can prove the value of the labeling changes that it secured on behalf of the Class is an issue that it may be able to raise after the passage of time. As of now, the value is not proven even as to the members of the Class.

CONCLUSION

We approve judgment on the final settlement and award of attorneys' fees, accepting attorneys' fees for the benefits of injunction, and expenses as follows: $617,166.50 in fees and $57,398.04 in expenses to BFFB; $325,203.75 in fees to Weltman LLC; $52,432.50 in fees and $29,091.06 in expenses to LFSB; $938,790 in fees and $93,187.13 in expenses to D&C. I further approve reasonable incentive awards in the amount of $5,000 for each of the six named Plaintiffs, for a total of $30,000.

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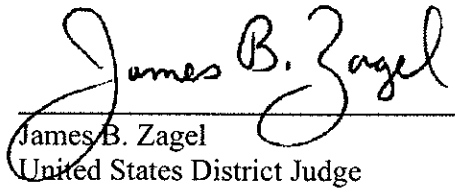

James B. Zagel
United States District Judge

DATE: January 3, 2014

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: GNC CORP. TRIFLEX PRODUCTS MARKETING AND SALES PRACTICES LITIGATION.	*	
This document relates to:	*	MDL No. 14-2491-JFM
No. 14-120 No. 14-122 No. 14-123 No. 14-2 No. 14-33 No. 14-465	*	

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MEMORANDUM

Plaintiffs filed a motion under Rule 60(b) asking the court to reconsider its judgment that granted defendants' motion to dismiss plaintiffs' Consolidated Amended Complaint ("CAC").[1] (ECF No. 43). For the reasons set forth below, the motion is denied.

BACKGROUND

Briefly stated, after plaintiffs' individual, putative class actions were transferred to this court under 28 U.S.C. § 1407, they filed a CAC against the defendants that allege violations of various consumer protection, deceptive practices, and express warranty statutes in several states.[2] The CAC's allegations target several of defendants' products that contain glucosamine

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[1] Named plaintiffs are Michael Lerma, Jeremy Gaatz, Robert Toback, Robert Calvert, Sean Howard, Thomas Flowers, John Gross, and Justin George. (ECF No. 38 at p. 1). Defendants are General Nutrition Corporation and GNC Holdings, Inc. ("GNC") and Rite Aid Corporation ("Rite Aid"). *Id.*

[2] A more comprehensive background is contained in the court's memorandum accompanying its order granting defendants' motion to dismiss. (ECF No. 38).

hydrochloride and chondroitin sulfate. Plaintiffs argue that the "vast weight" of the evidence demonstrates that ingesting defendants' products orally has a negligible effect, if any, on improving joint discomfort and treating the symptoms of deteriorating cartilage.

Defendants filed a motion to dismiss which the court granted on June 20, 2014. (ECF No. 39). The court cited a study that supports defendants' statements in their advertising and product labels, and concluded that plaintiffs would need to show that "the clinical trial relied upon by defendants was itself false and/or deceptive." (ECF No. 38 at p. 7).[3] Finding no such allegations in the CAC, the court dismissed the CAC with leave to amend if plaintiffs could allege (within the strictures of Rule 11) that *no* reasonable expert could conclude that glucosamine and chondroitin do not improve joint health in non-arthritic consumers.

Plaintiffs claim that the court adopted "an erroneous legal standard," and asks the court to alter its previous judgment by denying defendants' motion to dismiss and reinstating the CAC.

STANDARD

A Rule 60(b) remedy is considered "extraordinary and is only to be invoked on a showing of exceptional circumstances." *Johnson v. Momminy*, 289 F. Supp. 2d 705 (D. Md. 2003) (quoting *Compton v. Alton Steamship Company, Inc.*, 608 F.2d 96, 102 (4th Cir. 1979)); *see also Almy v. Sebelius*, 749 F. Supp. 2d 315, 338 (D. Md. 2010) (characterizing relief under Rule 60(b) as a "high bar"). Moreover, a 60(b) ruling is within the discretion of the trial court. *CNF Constructors, Inc. v. Donohoe Const. Co.*, 57 F.3d 395, 401 (4th Cir. 1995).

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[3] The court also stated "the fact that one set of experts may disagree with the opinions expressed by other qualified experts does not *ipso facto* establish any violation of the applicable consumer protection laws." (ECF No. 38 at p. 7).

ANALYSIS

Defendants argue that plaintiffs' Rule 60(b) motion is both procedurally and substantively defective. Each objection is addressed in turn.

I. Correction of Legal Errors under Rule 60(b).

Plaintiffs seek relief under Rule 60(b) by arguing that the court adopted an erroneous legal standard. In response, defendants characterize plaintiffs' motion as simply asking the court to "change its mind." (ECF No. 49 at p. 2).

Whether Rule 60(b) permits reconsideration of a legal issue is somewhat academic, as a district court's decision on a Rule 60(b) motion is reviewed on appeal under the abuse of discretion standard. *E.g., CNF Constructors, Inc.*, 57 F.3d at 401. It is true, however, that the Fourth Circuit has stated a motion for reconsideration of a legal issue "is not authorized by Rule 60(b)." *Id.* (quoting *United States v. Williams*, 674 F.2d 310, 313 (4th Cir. 1982)). Rather than asking a court to "change its mind," parties are free to appeal legal issues they consider erroneous. *E.g., Johnson*, 289 F. Supp. 2d at 705.

Plaintiffs argue that other circuits have relaxed their formerly strict view of Rule 60(b) and now permit district courts to reconsider legal issues. (ECF No. 50 at pp. 2–3) (citing several cases). Although denying plaintiffs' motion on this ground alone is likely within my discretion, I will nonetheless briefly describe the substantive rationale for my decision to deny the pending motion and affirm my previous order.

II. Plaintiffs' CAC Contains Claims upon which Relief cannot be Granted.

Plaintiffs argue that the standard adopted by the court to justify dismissing the CAC "is not the law under *any* of the states' consumer fraud statutes pursuant to which Plaintiffs' claims

are being prosecuted." (ECF No. 44 at p. 6). Defendants counter that the court's ruling was doctrinally correct.

Although I am denying plaintiffs' Rule 60(b) motion, I would like to clarify my previous order and accompanying memorandum to eliminate any confusion. In order to recover, plaintiffs must show that defendants' products are ineffective as to non-arthritic users. The only studies they cite in the CAC, however, involve osteoarthritis patients. Plaintiffs argue that these osteoarthritic studies can serve as "an effective proxy" for measuring the products' effect in non-arthritic users, and that "experts in the field" will testify as such. Whether such studies are a valid proxy is indeed a factual matter perhaps best left to the fact-finder, but plaintiffs' burden at the 12(b)(6) stage is to state a plausible claim upon which relief can be granted.

Plaintiffs have not alleged that defendants relied upon false and/or deceptive studies, data or science to support their advertisement and marketing. Nor have plaintiffs alleged that their experts (who would testify that osteoarthritis studies are valid proxies for measuring clinical effects in non-arthritic patients) would testify that *no* expert could look at the available data and conclude, as defendants did, that their products have an effect on non-arthritic users. Absent such a pleading, plaintiffs are not entitled to relief on their claims.[4]

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[4] In the final analysis the issue turns on whether in this context juries should resolve conflicting disagreements among experts. At first blush, arguably they should. After all, juries serve as a proper check upon allegedly expert elitism. However, in this case the question is not whether the views of jurors should prevail over the views of asserted experts and judges. Rather the question is whether the views of jurors should prevail over the views of those who choose to purchase glucosamine/chondroitin pills. What is "democratic" in one instance may be tyrannical in another. After all, damage awards and even the cost of defending against high stakes litigation has the effect of increasing the cost of glucosamine/chondroitin pills or, potentially, driving the pills from the market. Should those who choose to purchase the pills have to pay more for them (or be deprived of the opportunity to purchase them at all) when the science is uncertain merely because juries disagree with their own judgment about the pills' efficacy?

I specifically stated that plaintiffs could amend the CAC to allege the facts above, if true. Moreover, if plaintiffs can specify discovery requests that would aid them in alleging the above facts, they should file a motion setting forth the discovery that they request. Presumably, however, if plaintiffs' experts are of the view that no reasonable expert would reach the conclusion reached by the expert upon whom defendant relies, they are already, by virtue of their asserted expertise, in possession of the relevant factual information.

Plaintiffs motion to reconsider is denied. A separate order effecting the same will be entered herewith.

09/09/2014
Date

/s/
J. Frederick Motz
United States District Judge

EXHIBIT C

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PATTERSON LAW GROUP

Patterson Law Group is a San Diego, California based commercial litigation firm that focuses on complex class action litigation, including consumer protection, privacy, and employee rights actions. Our firm has been recognized as a leader on both the state and national levels, and attorneys at our firm have been appointed lead counsel, or co-lead counsel in more than 40 state and federal actions.

CONSUMER PROTECTION CLASS ACTIONS

Our consumer advocacy practice is focused on protecting the privacy rights of consumers. Representative cases which have been certified as class actions and prosecuted to judgment include: (1) *Shabaz, Korn v. Polo Ralph Lauren Corp.,* Case No. SA CV 07-1349 AG (US Dist. Ct.) (class receiving benefits of more than $10 million); (2) *Anderson v. United Retail Group*, Case No. 37-2008-00089685-CU-BT-CTL (San Diego Sup. Ct.) (class receiving benefits of approximately $4.2 million); (3) *McCarthy v. Euromarket*, Case No. 37-2008-00085041-CU-BT-CTL (San Diego Sup. Ct.) (class receiving benefits of approximately $6 million); (4) *Johnson v. New York & Company*, Case No. 37-2008-00080567-CU-BT-CTL, (San Diego Sup. Ct.) (class receiving benefits of approximately $5 million).

EMPLOYEE RIGHTS ACTIONS

Our employee protection practice includes prosecution and trial of both individual and class cases. Representative cases include: (1) *LaMasa, et al. v. INDYMAC Resources, Inc.*, Case No. 626836 (Stanislaus County Sup. Ct.) (more than $3,000,000 recovered after bank failure and seizure by FDIC); (2) *DeLapp v. Union Bank,* Case No. CGC-10-500638 (San Francisco Sup. Ct.) (over $1,800,000 recovered for lost vacation pay); (3) *Fletcher v. The Toro Company*, Case No. 37-2008-00095573 (San Diego Sup. Ct.) (approximately $1,000,000 in compensation recovered for the class of only 119 people); (4) *Von Retteg v. La Costa Limousine,* Case No. 37-2008-00086676 (San Diego Sup. Ct.) (approximately $300,000 recovered for the class).

TRIAL EXPERIENCE

While we take pride in our ability to appropriately evaluate and favorably resolve complex cases, we are ready willing and able to vigorously litigate any case through trial. The attorneys at Patterson Law Group have significant trial experience, including notable results in *Ichor Medical Systems v. Walters* (14 million jury verdict, S.D. Cal.) and *Oris Medical Systems v. Allion Healthcare* ($4 million settlement reached mid-trial; San Diego Sup. Ct.). Patterson Law Group's attorneys have tried more than 20 jury trials.

OUR ATTORNEYS

JAMES R. PATTERSON is the founder of Patterson Law Group. Prior to founding the firm, Jim spent 6 years with the prestigious national law firm of Cooley LLP, and 6 years with Harrison Patterson & O'Connor LLP. He has been constantly recognized as a leader in both consumer and employee class actions by the media, legislators, and courts throughout the country. Jim has been appointed lead or co-lead counsel in more than 35 state and federal class actions, and has obtained hundreds of millions of dollars in benefits for his clients and class members. He is known as an innovator that will fight the tough fights. Jim is co-lead counsel in the seminal Pineda v. Williams-Sonoma case that changed the prevailing law, and the entire retail industry in California by prohibiting retailers from collecting unnecessary personal identification information from credit card customers. As a result of his in-court success, Jim has been asked to speak at numerous consumer and privacy related conferences, and to opine as to legislation concerning consumer privacy rights in California.

Jim's training and experience at Cooley, provides him with a unique perspective on the inner-workings and decision making process of large corporations. His experience on the plaintiffs' side has rounded him into a multi-dimensional and dynamic class action attorney. Jim is a graduate of the University of California at Davis, and the University of San Diego Law School, where he finished magna cum laude and was a member of law review and Order of the Coif. He grew up in the Bay Area and currently resides with his wife and two children in San Diego, California.

ALLISON H. GODDARD joined Patterson Law Group, APC at its inception. After graduating from law school in 2000, Ali joined the law firm of Cooley LLP in San Diego, California, where she focused her practice on class actions and complex litigation. She left Cooley in 2004 to found the litigation boutique firm Jaczko Goddard. There, Ali concentrated on intellectual property and general business litigation. In 2011, she joined Patterson Law Group to continue working on intellectual property matters and complex class actions. Ali is very active in the legal community and has served as President of the San Diego Chapter of the Federal Bar Association, Vice Chair of the Host Committee for the 2012 Federal Bar Association National Meetings and Convention. She is currently a Lawyer Representative from the Southern District of California to the Ninth Circuit Judicial Conference.

ALISA A. MARTIN joined Patterson Law Group, APC at its inception. Prior to joining the firm, Alisa spent 8 years with the prestigious national law firm of Cooley LLP, and 2 years with Harrison Patterson & O'Connor LLP. She is a recognized advocate for consumers and employees and has been prosecuted and defended numerous state and federal class actions.

Alisa also is a trained clinical therapist, which honed her communications skills and ability to understand her clients' needs.

Alisa graduated from the University of San Diego Law School and was a member of law review. Before law school, she obtained a Masters of Arts with honors in clinical psychology from Pepperdine University, and a Bachelor of Arts from University of California at San Diego. Alisa is native of San Diego, California, and continues to reside there with her husband and three children.

MATTHEW J. O'CONNOR spent 6 years with as a government prosecutor with the Contra Costa County District Attorney's Office, and 6 years with Harrison Patterson & O'Connor LLP prior to joining Patterson Law Group. He has litigated more than 20 consumer and employee class actions, and has tried over forty cases to verdict.

Matt's training and experience as a government attorney prosecuting individuals who profit from data breaches and identity theft, many through jury trial, gives him a unique perspective on how to combat consumer fraud on a large scale. And his courtroom experience is an invaluable asset which he draws upon to reach successful resolution of complex class action cases, both in the consumer protection and employment areas of law. Matt is a graduate of the

University of California at Davis, and then Santa Clara University School of Law, where he finished Cum Laude and with a High Technology Certificate. He grew up in the Bay Area and currently resides with his wife and three children in San Diego, California.