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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VEDA WOODARD, TERESA RIZZO-MARINO, and DIANE MORRISON, on behalf of themselves, all others similarly situated, and the general public,

Plaintiffs,

vs.

LEE LABRADA; LABRADA BODYBUILDING NUTRITION, INC.; LABRADA NUTRITIONAL SYSTEMS, INC.; DR. MEHMET C. OZ, M.D.; ENTERTAINMENT MEDIA VENTURES, INC. d/b/a OZ MEDIA; ZOCO PRODUCTIONS, LLC; HARPO PRODUCTIONS, INC; SONY PICTURES TELEVISION, INC; NATUREX, INC.; and INTERHEALTH NUTRACEUTICALS, INC.,

Defendants.

CASE NO. 5:16-cv-00189-JGB-SP

CLASS ACTION

NOTICE OF MOTION AND JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH THE MEDIA DEFENDANTS

Date: July 16, 2018
Time: 9:00 a.m.
Ctrm: 1
Judge: Hon. Jesus G. Bernal

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on July 16, 2018 at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 1 of the United States District Court for the Central District of California, Eastern Division, 3470 Twelfth Street Riverside, California 92501, before the Honorable Jesus G. Bernal, presiding, Plaintiffs Veda Woodard, Teresa Rizzo-Marino, and Diane Morrison ("Plaintiffs") and Defendants Dr. Mehmet C. Oz, M.D., Zoco Productions, LLC, Harpo Productions, Inc., and Entertainment Media Ventures, Inc. (the "Media Defendants") will and hereby do move the Court for an Order for preliminary approval of a class action settlement.

This motion is based on this Notice of Motion, the concurrently-filed Memorandum of Points and Authorities, the concurrently-filed Declaration of Ronald A. Marron and Exhibits 1 through 3 attached thereto, the concurrently-filed Declaration of Timothy D. Cohelan and Exhibit A attached thereto, the concurrently-filed Declaration of Carla Peak, the concurrently-filed Proposed Order Granting Joint Motion for Preliminary Approval, all prior pleading and proceedings in this matter, and all other evidence and written and oral argument that will be submitted in support of the Motion.

DATED: June 15, 2018

/s/ Ronald A. Marron
RONALD A. MARRON

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Dated: June 15, 2018

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Plaintiffs Veda Woodard, Teresa Rizzo-Marino, and Diane Morrison ("Plaintiffs") and Defendants Dr. Mehmet C. Oz, M.D., Zoco Productions, LLC, Harpo Productions, Inc. and Entertainment Media Ventures, Inc. (the "Media Defendants") (collectively the "Settling Parties") respectfully submit this Memorandum of Points and Authorities in Support of their Joint Motion for Preliminary Approval of Class Action Settlement and state as follows:

I. INTRODUCTION

After hard-fought litigation with multiple rounds of written discovery, depositions, third-party discovery, extensive motion practice, and three full days of mediation, Plaintiffs and the Media Defendants reached this proposed Settlement. The Settlement Agreement establishes both monetary and non-monetary relief and requires the Media Defendants to pay $5,250,000 into a settlement fund.[1] If approved, the Settlement will bring an end to what has been, and likely would continue to be, highly contentious and costly litigation centered upon unsettled legal questions.

Therefore, this joint motion seeks the entry of an order providing for, among other things:

1. Preliminary Approval of the Settlement:
2. Preliminary certification of a Settlement Class and appointment of the Plaintiffs as Class Representatives and Plaintiffs' counsel as Class Counsel;
3. Approval of the Settlement Administrator, Notice Administrator, and Escrow Agent;
4. Approval of the Notice program describing:
    a. The Settlement and the Settlement Class members' rights with respect to the Settlement;

[1] A copy of the Settlement Agreement ("Agreement") is attached to the concurrently-filed Declaration of Ronald A. Marron in Support of the Settling Parties' Joint Motion for Preliminary Approval ("Marron Decl.") as Exhibit 1.

b. The proposed release of claims;

c. Class Counsel's request for attorneys' fees and expenses, as well as a Service Award for the Class Representatives; and

d. The procedure for opting-out of or objecting to the Settlement;

5. Approval of the Claims process; and

6. The scheduling of a Final Approval Hearing to consider Final Approval of the Settlement.

The Settling Parties' proposed Settlement is exceedingly fair, and well within the range of preliminary approval for several reasons. First, it provides relief for Settlement Class Members where their recovery, if any, would otherwise be uncertain, especially given the Media Defendants' ability and willingness to continue their vigorous defense of the case. Second, the Settlement was reached only after first engaging in substantial discovery, motion practice, and extensive arm's-length negotiations, including a three full days of mediation before a neutral mediator. Third, the Settlement was not conditioned on any amount of attorneys' fees for Class Counsel or Service Awards for Plaintiffs, which speaks to the fundamental fairness of the process. For all of these reasons, and as further described below, Plaintiffs and the Media Defendants respectfully request that the Court preliminarily approve the Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs and putative class members allegedly purchased Labrada Garcinia Cambogia DUAL ACTION FAT BUSTER and Labrada Green Coffee Bean Extract FAT LOSS OPTIMIZER (together, the "Products") on multiple occasions. (Dkt. No. 88 at 5-6). Plaintiffs claim to have purchased the products after watching episodes[2] of *The Dr. Oz Show* that referenced garcinia cambogia and

[2] Episode 3-143 aired on April 26, 2012 (Green Coffee Bean I); Episode 4-018 aired on September 10, 2012 (Green Coffee Bean II); and Episode 4-052 aired on October 29, 2012 (Garcinia Cambogia I).

green coffe bean extract ("Complained of Broadcasts") and/or reading a fact sheet posted on Doctoroz.com on April 26, 2012 regarding green coffee bean extract ("GCBE Post"). (Dkt. No. 88 at 16-18, 40-49).

The operative First Amended Complaint ("FAC") asserts that the Media Defendants made misrepresentations regarding the quality, effectiveness, and sponsorship of these weight-loss supplements. (Dkt. No. 88 at 12-15). Specifically, Plaintiffs allege that the Complained of Broadcasts and GCBE Post fraudulently promoted the weight loss benefits of the Products, misrepresented Dr. Oz's affiliation with products he endorses, and failed to disclose those affiliations to viewers of *The Dr. Oz Show*. (Dkt. No. 88 at 12-13). Plaintiffs further allege Dr. Oz was paid by co-defendants Labrada,[3] Interhealth,[4] and/or Naturex[5] in exchange for promoting green coffee bean extract and garcinia cambogia on *The Dr. Oz Show*. (Dkt. No. 88 at 12-13).

This action was originally filed by Plaintiff Veda Woodard on February 2, 2016. (Dkt. No. 1). On April 4, 2016, the Media Defendants filed a Motion to Dismiss Plaintiff Woodard's class action complaint (Dkt. No. 45) and on April 11, 2016 the Media Defendants filed a Special Motion to Strike Plaintiff Woodard's Class Action Complaint pursuant to California Civil Procedure Code section 425.16 (California's "anti-SLAPP law"). (Dkt. No. 49). On April 18, 2016, Plaintiff Woodard filed a Motion to Defer Ruling on the Media Defendants' Special Motion to Strike and for Leave to Conduct Discovery Pursuant to Federal Rule of Civil Procedure 56(d). (Dkt. No. 60). On May 12, 2016, the Court entered an Order Granting in Part and Denying in Part the Media Defendants' Motion to Dismiss with Leave to Amend and Granting Plaintiff Woodard's Motion to Defer

[3] "Labrada" collectively refers to Defendants Lee Labrada, Labrada Bodybuilding Nutrition, Inc., and Labrada Nutritional Systems, Inc.
[4] "Interhealth" refers to Defendant Interhealth Nutricueticals, Inc.
[5] "Naturex" refers to Defendant Naturex, Inc.

Ruling on the Media Defendants' Special Motion to Strike and for Leave to Conduct Discovery. (Dkt. No. 85).

On June 2, 2016, Plaintiffs Veda Woodard Teresa Rizzo-Marino, and Diane Morrison (collectively the "Plaintiffs") filed the operative FAC alleging violations of consumer protection laws. (Dkt. No. 88). On June 24, 2016, the Media Defendants filed a Motion to Dismiss Plaintiffs' First Amended Complaint. (Dkt. No. 94). On March 10, 2017, the Court issued an Order Granting in Part and Denying in Part the Media Defendants' Motion to Dismiss the FAC and dismissed Defendant Sony Pictures Television, Inc. from the action with prejudice. (Dkt. No. 154).

Plaintiffs and the Media Defendants have engaged in substantial discovery. The parties in this litigation have produced approximately 30,000 pages of documents. *See* Marron Decl., ¶ 3; Declaration of Timothy D. Cohelan in Support of Joint Motion for Preliminary Approval ("Cohelan Decl."), ¶ 11. Many of these documents were produced after the Court's rulings on Plaintiffs' Motion to Compel the Media Defendants' discovery responses. (Dkt. Nos. 147 & 177). The Parties have also taken several depositions in this action and all three of the named Plaintiffs have been deposed. Marron Decl., ¶¶ 5-10; Cohelan Decl., ¶ 12. Plaintiffs have also taken the Rule 30(b)(6) deposition of Defendant Zoco Productions, LLC as well as the depositions of the executive producers of *The Dr. Oz Show* and other witnesses as fully detailed below. Marron Decl., ¶¶ 5-8; Cohelan Decl., ¶ 12-13.

On September 26, 2017, all the Parties herein engaged in confidential, extensive, arm's-length negotiation and mediation with the Hon. Leo Papas (Ret.). Marron Decl., ¶ 12. Judge Papas is a retired Magistrate Judge of the United States District Court for the Southern District of California and an experienced and highly regarded mediator who served as a Magistrate Judge for the U.S. District Court, Southern District of California from 1991 to 2009, including a tenure as the

Presiding Judge from 2002 to 2007. Marron Decl., ¶ 12 & Ex. 2. The Parties were unable to reach a resolution at the mediation. Marron Decl., ¶ 12.

Plaintiffs and the Media Defendants engaged in two additional mediations with Judge Papas on December 13, 2017 and February 15, 2018. Marron Decl., ¶ 13. Between the second and third mediation sessions, Judge Papas held several private telephone caucuses with respective counsel. During the February 15 mediation, with Judge Papas' guidance, Plaintiffs and the Media Defendants reached a settlement which was reduced to a written memorandum of understanding ("MOU"). Marron Decl., ¶ 13. The MOU was superseded by a written Joint Stipulation of Settlement executed by Plaintiffs and the Media Defendants. Marron Decl., ¶ 13 & Ex. 1. The mediator's continued involvement over several months to work out significant details and vigorous disagreements between the parties demonstrate that this proposed resolution was the product of heavily disputed and arm's length negotiation. Marron Decl., ¶¶ 13-14.

III. SUMMARY OF THE PROPOSED SETTLEMENT

The following is a summary of the material terms of the proposed Settlement.

A. The Settlement Class

The proposed Settlement establishes a Settlement Class comprised of:

> All persons in the United States who purchased (A) any Green Coffee Bean Extract and/or Garcinia Cambogia product from any manufacturer, including but not limited to the Labrada Dual Action Fat Buster with Supercitrimax® Garcinia Cambogia and the Labrada Fat Loss Optimizer with Svetol® Green Coffee Bean Extract, from February 2, 2012 until the date notice is disseminated in this action, and saw any fake ad purported to be sourced from or approved by Dr. Oz or Media Defendants; or (B) any weight loss product, ingredient, and/or plant after viewing, at any time, any portion of Episode 3-143, Episode 4-018, or Episode 4-052 of The Dr. Oz Show, or viewing, at any time, any portion of DoctorOz.com on or after April 26, 2012 related to Green Coffee Bean Extract and/or Garcinia Cambogia, or after seeing any fake ad purported to be sourced from or approved by Dr. Oz or Media Defendants, even if it resulted in weight loss.

Agreement at ¶ 2.1(LL). The settlement class definition is tethered to the legal claims in this action because it includes persons who purchased a garcinia cambogia product or a green coffee bean extract product, including the Labrada Products, after seeing any fake ad purported to be sourced or approved by Dr. Oz or the Media Defendants, even if it resulted in weight loss or after viewing the disputed episodes of the Dr. Oz Show and/or the doctoroz.com website. Agreement at ¶ 2.1(LL). As further discussed below, the class definition is narrowly tailored because the release in the settlement will not preclude Class Members for seeking redress against the suppliers and manufacturers of garcinia cambogia and green coffee bean extract, including the Labrada Defendants, Interhealth, and Naturex. The class definition and the release focuses solely on the conduct of the Media Defendants.

B. Settlement Consideration

1. Monetary Relief

The Settlement Agreement provides that the Media Defendants will pay $5,250,000.00 into a settlement fund. Agreement at ¶ 6.2(3)(a). This fund will be used for, among other things, to pay authorized claims to the Settlement Class Members, to pay the costs of settlement administration and notice to the Class Members, to pay Class Counsel's fees and expenses, and to pay incentive awards to the named Plaintiffs. Agreement at ¶ 6.2(3)(b).

For class members who submit a claim with receipts that show a purchase of a Class Product, the class members will receive $30.00 cash for each product purchased. Agreement at ¶ 6.2(1)(a). For class members who submit a claim without a receipt showing a purchase of Class Product, The Media Defendants will provide $30.00 cash for each product purchased, to be paid from the Settlement Fund, with a limit of $90.00 per household. Agreement at ¶ 6.2(1)(b). If the total amount of eligible claims exceeds the Settlement Fund, then each claim will be reduced proportionally. Agreement at ¶ 6.2(1)(d). 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. Agreement at ¶ 6.2(1)(d). If after all valid claims (plus other authorized fees, costs and expenses) are paid and money remains in the settlement fund after pro rata distribution to Authorized Claimants, any remaining settlement funds thereafter will be awarded *cy pres* to the Consumers Union subject to Court approval. Agreement at ¶ 6.2(1)(d).

2. Non-Monetary Relief

Pursuant to the Settlement, the Media Defendants agree not to re-air Episode 3-143, Episode 4-018, or Episode 4-052 of *The Dr. Oz Show* ("Episodes"), and to remove all clips of these Episodes from doctoroz.com. Agreement at ¶ 6.2(2)(a).

C. The Notice Program and Settlement Administration

Pending this Court's approval, KCC, LLC will serve as the Notice and Settlement Administrator, and will be responsible for administrating the Notice Program and for paying valid claims to Settlement Class Members. The Notice Program consists of three different components: (1) Online Notice, (2) Print Publication Notice in *Glamour* magazine, *Star* Magazine, *In Touch* Magazine and the *Los Angeles Daily News* and (3) Long-Form and Short-Form Notices. *See* Declaration of Carla Peak in Support of Joint Motion for Preliminary Approval ("Peak Decl."), ¶¶ 12-25. The forms of the proposed Notices, agreed upon by Class Counsel and the Media Defendants, subject to this Court's approval and/or modification, are attached to the Settlement Agreement as Exhibits A & D. The Notice Administrator will also establish a settlement website that will be located at www.weightlossclassaction.com. *See* Peak Decl., ¶¶ 22.

The Notice program is designed to provide the Settlement Class with important information regarding the Settlement and their rights thereunder, including a description of the material terms of the Settlement; a date by which Settlement Class members may exclude themselves from or "opt-out" of the Settlement Class; a date by which Settlement Class Members may object to the Settlement, Class Counsel's fee application and/or the request for a Service Award; the date of the Final Approval Hearing; information regarding the Settlement Website where Settlement Class members may access the Agreement, and other important documents.

D. Claims Process

The Claims process here is intentionally straightforward, easy to understand for Settlement Class members, and designed so that they can make a claim to their portion of the Settlement Fund without complication. Settlement Class members will make a claim by submitting a valid and timely Claim Form to the Settlement Administrator. A copy of the Claim Form is attached to the Settlement Agreement as Exhibit C. Claim Forms may be sent in by hard copy or submitted electronically on the Settlement Website. The Claim Form requires basic information from Settlement Class members, including: (1) name; (2) current address; (3) identification of the Class Products purchased; (4) location of where the Class Products were purchased from; and (5) a current contact telephone number. Once a Settlement Class member submits a Claim Form and it is reviewed and approved by the Settlement Administrator, the Settlement Class Member will automatically receive a cash payment as discussed above.

E. Opt-Out and Objection Procedures

Settlement Class members who do not wish to participate in the Settlement may opt-out of the Settlement by sending a written request to the Settlement Administrator at the address designated in the Notice. Settlement Class members who timely opt-out of the Settlement will preserve their rights to individually

pursue any claims they may have against the Media Defendants, subject to any defenses that the Media Defendants may have against those claims. The Settlement Agreement details the requirements to properly opt-out of the Settlement Class. Agreement, at ¶ 4.4. A Settlement Class member must opt-out of the Settlement Class by the Objection/Exclusion Deadline. Agreement, at ¶ 4.4.

Settlement Class Members who wish to file an objection to the Settlement likewise must do so no later than 30 days prior to the Final Approval Hearing. Agreement ¶ at 4.3. For an objection to be considered by the Court, it must include the following: (i) a reference at the beginning to the title of the Action, i.e., , *Veda Woodard et al. v. Lee Labrada, et al.*; (ii) the objector's full name, address, and telephone number (and the objector's lawyer's name, address and telephone number if objecting through counsel); (iii) a statement of the objector's membership in the Settlement Class, including a verification under oath as to the date and location of their purchase of Class Products and/or a Proof of Purchase reflecting such purchase and any other information required by the Claim Form; (iv) a written statement of all grounds for the Objection, accompanied by any legal support for such objection; (v) copies of any papers, briefs, or other documents upon which the Objection is based; (vi) a list of all persons who will be called to testify in support of the Objection; (vii) a statement of whether the objector intends to appear at the Settlement Hearing (Note, if the objector intends to appear at the Settlement Hearing through counsel, the objection must also state the identity of all attorneys representing the objector who will appear at the Settlement Hearing); (viii) a list of the exhibits the objector may offer during the fairness hearing, along with copies of such exhibits; and (ix) the objector's signature. Agreement at ¶ 4.5(b).

In addition, the Objector must include the following with his or her objection: (i) the identity of all counsel who represent the Objector, if any, including former or current counsel who may be entitled to compensation for any

reason related to the objection; (ii) a detailed list of any other objections submitted by the Objector, or Objector's counsel on his or her behalf, to any class actions submitted in any court, whether state or federal, in the United States within the previous five (5) years. Agreement at ¶ 4.5(b).

F. Release of Claims

In exchange for the Settlement consideration, Plaintiffs and each Settlement Class Member, and each of their heirs, guardians, executors, parents, administrators, representatives, agents, attorneys, insurers, partners, successors, predecessors-in-interest, and assigns, shall be deemed to have, and by operation of the Final Approval Order shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against the Released Persons. Agreement, at ¶ 7.1. The Released Claims are defined in paragraph 2.1(HH) of the Agreement and the Released Persons are defined in paragraph 2.1(II) of the Agreement. The release is narrowly tailored to include only the Media Defendants and their related entities, as further described in the agreement. Agreement at ¶ 2.1(II). The release specifically excludes the Non-Settling Defendants and will not preclude the Class's ability to pursue claims against other manufacturers and suppliers of garcinia cambogia and green coffee bean extract. Agreement at ¶ 2.1(II)

G. Class Counsel's Fees and Expenses and Plaintiffs' Service Awards

The Media Defendants have agreed not to oppose Class Counsel's request for an award of attorneys' fees and reasonable, actual out-of-pocket expenses of up to 30% of the Settlement Fund, subject to this Court's approval. Agreement ¶ 8.1. In the event that the Court manifests a specific concern as to requested Attorneys' Fees as serving as a primary basis to deny approval of the proposed Settlement, the Media Defendants may submit comment and/or potential objection to the fee request, but only after good faith meet and confer with Class Counsel as to the Media Defendants' specific basis for comment or objection to the fee request.

Agreement ¶ 8.1. The Media Defendants have also agreed not to oppose an application for a Service Award for Plaintiffs Woodard and Morrison up to $5,000.00 and an application for a Service Award for Plaintiff Rizzo-Marino up to $7,500.00. Agreement, at ¶ 8.3. Subject to this Court's approval, Class Counsel will file a Motion for Attorneys' Fees, Expenses, and Service Awards at least 60 days prior to the Final Approval Hearing date.

IV. LEGAL STANDARD FOR PRELIMINARY APPROVAL

Approval of class action settlements involves a two-step process. First, the Court must make a preliminary determination whether the proposed settlement appears to be fair and is "within the range of possible approval." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). If so, notice can be sent to class members and the Court can schedule a final approval hearing. *See Manual for Complex Litigation*, § 21.312 at 293-96 (4th ed. 2004) (hereinafter "*Manual*").

The purpose of a preliminary approval hearing is to ascertain whether to send out notice to putative class members and proceed with a fairness hearing. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079. Notice should be disseminated where "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." *Id*. Preliminary approval does not require an answer to the ultimate question of whether the proposed settlement is fair and adequate, for that determination occurs only after notice of the settlement has been given to the members of the settlement class. *Id.* (finding that "[t]he question currently before the court is whether this settlement should be preliminarily approved" for the purposes of notifying the putative class members of the proposed settlement and proceeding with a fairness hearing, which requires

the court to consider whether the settlement appears to be fair and "falls within the range of possible approval").

While the district court has discretion regarding the approval of a proposed settlement, it should give "proper deference to the private consensual decision of the parties." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Here, the negotiations were conducted at arm's length, were non-collusive and were well-informed, with an assessment of the strengths and weaknesses of the claims on both sides, were conducted between counsel with decades of class action experience, and utilized at the appropriate time the assistance of a well-respected mediator. Under such circumstances, the Court is entitled to rely upon the opinions and assessments of counsel that the settlement is fair and reasonable. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622-23 (N.D. Cal. 1979).

Beyond the public policy favoring settlements, the principal consideration in evaluating the fairness and adequacy of a proposed settlement is the likelihood of recovery balanced against the benefits of settlement. "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." *Protective Committee for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). That said, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

V. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

Rule 23(e)(2) provides that "the court may approve [a proposed class action settlement] only after a hearing and on finding that it is fair, reasonable, and

adequate." When making this determination, the Ninth Circuit has instructed district courts to balance several factors: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; and (6) the experience and views of counsel. *Hanlon*, 150 F.3d at 1026;[6] *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Here, the balance of these factors readily establishes that the Settlement should be preliminarily approved.

A. Strength of Plaintiffs' Case

In determining the likelihood of a plaintiff's success on the merits of a class action, "the district court's determination is nothing more than an amalgam of delicate balancing, gross approximations and rough justice." *Officers for Justice*, 688 F.2d at 625 (internal quotations omitted). The court may "presume that through negotiation, the Parties, counsel, and mediator arrived at a reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm. Mut. Auto. Ins. Co.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010) (citing *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)). Here, the settlement negotiations were hard-fought, requiring multiple mediation sessions over several months, with both Parties and their counsel thoroughly familiar with the applicable facts, legal theories, and defenses on both sides. *See* Marron Decl., ¶¶ 12-16; Cohelan Decl., ¶¶ 16-18. Plaintiffs believe that the Settlement is an outstanding result considering the issues addressed below.

[6] In *Hanlon*, the Ninth Circuit also instructed district courts to consider "the reaction of the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026. This consideration is more germane to final approval, and will be addressed at the appropriate time.

Although Plaintiffs believe that proving the Media Defendants' liability would be possible here, there is no guarantee that a jury would agree. Even if Plaintiffs were able to prove that The Media Defendants received compensation for mentioning the garcinia cambogia and green coffee bean products on *The Dr. Oz Show*, Plaintiffs would still have to prove that the products are ineffective for weight loss and that Dr. Oz made misleading statements about the products. This inquiry would like devolve into an uncertain "battle of experts." Moreover, Plaintiffs would face a strong hurdle at class certification and summary judgment to establish damages against the Media Defendants. The Media Defendants vigorously deny Plaintiffs' allegations and assert that neither Plaintiffs nor the Class suffered any harm or damages. In addition, Defendants would no doubt present a vigorous defense at trial, and there is no assurance that the Class would prevail – or even if they did, that they would be able to obtain an award of damages significantly higher than achieved here absent such risks. Marron Decl., ¶ 16; Cohelan Decl., ¶ 18. Thus, in the eyes of Class Counsel, the proposed Settlement provides the Class with an outstanding opportunity to obtain significant relief at this stage in the litigation. The Settlement also abrogates the risks that might prevent them from obtaining *any* relief. Marron Decl., ¶¶ 16, 19; Cohelan Decl., ¶ 18.

B. The Amount Offered in the Settlement

As discussed above, it would be difficult for Plaintiffs to establish classwide damages against the Media Defendants. Here, Plaintiffs' counsel has determined that the total damages in this action are approximately $31,000,000. Marron Decl., ¶ 17. The Media Defendants have agreed to settle this matter for $5,250,000, which constitutes approximately 17% of the total potential recovery. Marron Decl., ¶ 17. This amount is well within the range of reason. *See, e.g., Stovall-Gusman v. W.W. Granger, Inc.*, No. 13-cv-02540-HSG, 2015 WL 3776765, at *4 (N.D. Cal. June 17, 2015) (granting final approval of a net settlement amount representing 7.3 % of

the plaintiffs' potential recovery at trial); *Balderas v. Massage Envy Franchising, LLC*, No. 12-cv-06327NC, 2014 WL 3610945, at *5 (N.D. Cal. July 21, 2014) (granting preliminary approval of a net settlement amount representing 5 % of the projected maximum recovery at trial); *Ma v. Covidien Holding, Inc.*, No. SACV 12-02161-DOC (RNBx), 2014 WL 360196, at *5 (C.D. Cal. Jan. 31, 2014) (finding a settlement worth 9.1 % of the total value of the action "within the range of reasonableness"); *Downey Surgical Clinic, Inc. v. Optuminsight, Inc.*, No. CV09-5457PSG (JCx), 2016 WL 5938722 at *5 (C.D. Cal. May 16, 2016) (granting final approval where recovery was as low as 3.21 % of potential recovery at trial).

The settlement amount is also reasonable because this is a non-reversionary settlement. *See McGrath v. Wyndham Resort Dev. Corp.*, No. 15CV1631 JM (KSC), 2018 WL 637858, at *6 (S.D. Cal. Jan. 30, 2018) (finding a non-reversionary settlement fund to be "fair, reasonable, and adequate."). If the Settlement Fund is not exhausted, then the amount each claimant will receive will increase *pro rata*. Moreover, the release in the Settlement Agreement is narrowly tailored. Class Members will not be precluded from pursuing claims against the Labrada Defendants, the Supplier Defendants, or against any other manufacturer of garcinia cambogia and/or green coffee bean extract. Therefore, preliminary approval is warranted.

C. Risk of Continuing Litigation and Maintaining Class Action Status

As referenced above, proceeding in this litigation in the absence of settlement poses various risks such as failing to certify a class, having summary judgment granted against Plaintiffs, or losing at trial. Such considerations have been found to weigh heavily in favor of settlement. *See Rodriguez*, 563 F.3d at 966; *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, No. C 06-3903 TEH, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt,

certain, and substantial recovery for the Plaintiff class."). Even if Plaintiffs are able to certify a class, there is also a risk that the Court could later decertify the class action. *See In re Netflix Privacy Litig.*, No. 5:11-cv-00379 EJD, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement.") (internal citations omitted). The Settlement eliminates these risks by ensuring Class Members a recovery that is "certain and immediate, eliminating the risk that class members would be left without any recovery … at all." *Fulford v. Logitech, Inc.*, No. 08-cv-02041 MNC, 2010 U.S. Dist. LEXIS 29042, at *8 (N.D. Cal. Mar. 5, 2010). Therefore, preliminary approval should be granted.

D. The Extent of Discovery and Status of Proceedings

Under this factor, courts evaluate whether class counsel had sufficient information to make an informed decision about the merits of the case. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Here, the parties to this litigation have produced approximately 30,000 pages of documents. Marron Decl., ¶ 3. Many of these documents were produced after the Court's rulings on Plaintiffs' Motion to Compel the Media Defendants' discovery responses. (Dkt. Nos. 147 & 177). Between the Parties, approximately 20 sets of formal written discovery were propounded and responded to and the Parties met and conferred extensively regarding discovery responses and document productions. Marron Decl., ¶ 3. Plaintiffs also served approximately twelve Non-Party subpoenas to produce documents to gather further information about the Products, sales and potential monetary gain by the Media Defendants. Marron Decl., ¶ 4.

The Parties have also taken several depositions in this action. Defendants have taken the depositions of each of the three named Plaintiffs. Marron Decl., ¶ 10. On August 10, 2017, Plaintiffs took the Rule 30(b)(6) deposition of Defendant Zoco Productions, LLC. Marron Decl., ¶ 5. On August 11, 2017, Plaintiffs took the deposition of Amy Chiaro, an executive producer of *The Dr. Oz Show*. Marron

Decl., ¶ 6. On September 15, 2017, Plaintiffs took the deposition of Mindy Borman, a former executive producer of *The Dr. Oz Show*. Marron Decl., ¶ 7. On February 2, 2018, Plaintiffs took the deposition of Faith Rosello, the rights and clearances supervisor of *The Dr. Oz Show*. Marron Decl., ¶ 8. In addition to these depositions, Plaintiffs have also took the Rule 30(b)(6) depositions of Defendants Naturex and Interhealth. Marron Decl., ¶ 9. Plaintiffs have also deposed Defendant Lee Labrada. Marron Decl., ¶ 9. These depositions have allowed the Parties to sufficiently evaluate the strengths and weaknesses of their respective cases. Marron Decl., ¶ 9. The Settlement is thus the result of fully-informed negotiations.

E. Experience and Views of Counsel

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). Deference to Class Counsel's evaluation of the Settlement is appropriate because "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967. Here, the Settlement was negotiated by counsel with extensive experience in consumer class action litigation. *See* Marron Decl., ¶¶ 20-38 & Ex. 3 (firm resume of Law Offices of Ronald A. Marron); Cohelan Decl., ¶ 3 & Ex. A (firm resume of Cohelan, Khoury, & Singer). Based on their experience, Class Counsel concluded that the Settlement provides exceptional results for the class while sparing the class from the uncertainties of continued and protracted litigation.

For all the foregoing reasons, the Settlement is fair, adequate, and reasonable, and should be preliminarily approved.

VI. THIS COURT SHOULD PROVISIONALLY CERTIFY THE CLASS AND ENTER THE PRELIMINARY APPROVAL ORDER

A. The Proposed Settlement Class Should be Certified

The Ninth Circuit has recognized that certifying a settlement class to resolve

consumer lawsuits is a common occurrence. *Hanlon*, 150 F.3d at 1019. When presented with a proposed settlement, a court must first determine whether the proposed settlement class satisfies the requirements for class certification under Rule 23. In assessing those class 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."). For the reasons below, the Class meets the requirements of Rule 23(a) and (b).

1. The Class Satisfies Rule 23(a)

a. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." *See* Rule 23(a)(1). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members, but not satisfied when membership dips below 21." *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000). Here, the proposed Class is comprised of thousands of consumers who purchased the Class Products – a number that obviously satisfies the numerosity requirement. Accordingly, the proposed Class is so numerous that joinder of their claims is impracticable.

b. Commonality

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." *See* Rule 23(a)(2). Commonality is established if plaintiffs and class members' claims "depend on a common contention," "capable of class-wide resolution … [meaning] that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Because the commonality requirement may be satisfied by a single common issue, it is easily met. 1H. Newberg & Conte, Newberg on Class Actions § 3.10, at 3-50 (1992).

There are ample issues of both law and fact here that are common to the members of the Class. All of the Class Members' claims arise from a common nucleus of facts and are based on the same legal theories. Plaintiffs allege that the Defendants misrepresented the weight-loss benefits of garcinia cambogia and green coffee bean extract on episodes of *The Dr. Oz Show*. These alleged misrepresentations were made in a uniform manner to each of the class members. Accordingly, commonality is satisfied by the existence of these common factual issues. *See Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994) (commonality requirement met by "the alleged existence of common discriminatory practices").

Second, Plaintiffs' claims are brought under legal theories common to the Class as a whole. Alleging a common legal theory alone is enough to establish commonality. *See Hanlon*, 150 F.3d at 1019 ("All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."). Here, all of the legal theories asserted by Plaintiffs are common to all Class Members. Given that there are virtually no issues of law which affect only individual members of the Class, common issues of law clearly predominate over individual ones. Thus, commonality is satisfied.

c. Typicality

Rule 23(a)(3) requires that the claims of the representative plaintiffs be "typical of the claims … of the class." *See* Rule 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *See Hanlon*, 150 F.3d at 1020. In short, to meet the typicality requirement, the representative plaintiffs simply must demonstrate that the

members of the settlement class have the same or similar grievances. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

The claims of the named Plaintiffs are typical of those of the Class. Like those of the Class, their claims arise out of the purchase of garcinia cambogia and green coffee bean extract products after relying on alleged representations of the Media Defendants. The named Plaintiffs have precisely the same claims as the Class, and must satisfy the same elements of each of their claims, as must other Class Members. Supported by the same legal theories, the named Plaintiffs and all Class Members share claims based on the same alleged course of conduct. The named Plaintiffs and all Class Members have been injured in the same manner by this conduct. Therefore, Plaintiffs satisfy the typicality requirement.

d. Adequacy

The final requirement of Rule 23(a) is set forth in subsection (a)(4) which requires that the representative parties "fairly and adequately protect the interests of the class." *See* Rule 23(a)(4). A plaintiff will adequately represent the class where: (1) plaintiffs and their counsel do not have conflicts of interests with other class members; and (2) where plaintiffs and their counsel prosecute the action vigorously on behalf of the class. *See Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Moreover, adequacy is presumed where a fair settlement was negotiated at arm's length. Newberg on Class Actions, *supra*, §11.28, at 11-59.

Class Counsel have vigorously and competently pursued the Class Members' claims. The arm's-length settlement negotiations that took place and the investigation they undertook demonstrate that Class Counsel adequately represent the Class. Moreover, the named Plaintiffs and Class Counsel have no conflicts of interests with the Class. Rather, the named Plaintiffs, like each absent Class Member, have a strong interest in proving the Media Defendants' common course of conduct, and obtaining redress. In pursing this litigation, Class Counsel, as well as the named Plaintiffs, have advanced and will continue to advance and fully

protect the common interests of all members of the Class. Class Counsel have extensive experience and expertise in prosecuting complex class actions. Class Counsel are active practitioners who are highly experienced in class action and consumer fraud litigation. *See* Marron Decl., ¶¶ 20-38; Cohelan Decl., ¶¶ 2-9. Accordingly, Rule 23(a)(4) is satisfied.

2. **The Class Satisfies Rule 23(b)(3)**

In addition to meeting the prerequisites of Rule 23(a), Plaintiffs must also meet one of the three requirements of Rule 23(b) to certify the proposed class. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Under Rule 23(b)(3), a class action may be maintained if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Rule 23(b)(3). Certification under Rule 23(b)(3) is appropriate and encouraged "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.

a. Common Questions of Law and Fact Predominate

The proposed Class is well-suited for certification under Rule 23(b)(3) because questions common to the Class Members predominate over questions affecting only individual Class Members. Predominance exists "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Id.* As the U.S. Supreme Court has explained, when addressing the propriety of certification of a settlement class, courts take into account the fact that a trial will be unnecessary and that manageability, therefore, is not an issue. *Amchem*, 521 U.S. at 619-620.

In this case, common questions of law and fact exist and predominate over any individual questions, including in addition to whether this settlement is reasonable (*see Hanlon*, 150 F.3d at 1026-27), *inter alia*: (1) whether the Media

Defendants' representations regarding garcinia cambogia and green coffee bean extract were false and misleading or reasonably likely to deceive consumers; (2) whether the Media Defendants violated the CLRA, UCL, FAL and NY GBL §§ 349-350; (3.) whether the Media Defendants had defrauded Plaintiff and the Class Members; and (4.) whether the Class has been injured by the wrongs complained of, and if so, whether Plaintiffs and the Class are entitled to damages, injunctive and/or other equitable relief, including restitution or disgorgement, and if so, the nature and amount of such relief. Thus, predominance is satisfied.

b. A Class Action Is the Superior Mechanism for Adjudicating this Dispute

The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of the Class Members. Each individual Class Member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

Moreover, since this action will now settle, the Court need not consider issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("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, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial."). Accordingly, common questions predominate and a class action is the superior method of adjudicating this controversy.

VII. THE PROPOSED NOTICE PROGRAM CONSTITUTES ADEQUATE NOTICE AND SHOULD BE APPROVED

Once preliminary approval of a class action settlement is granted, notice must be directed to class members. For class actions certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Rule 23(c)(2)(B). In addition, Rule 23(e)(1) applies to any class settlement and requires the Court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." Rule 23(e)(1).

When a court is presented with class notice pursuant to a settlement, both the class certification notice and notice of settlement may be combined in the same notice. *Manual*, § 21.633 at 321-22 ("For economy, the notice under Rule 23(c)(2) and the Rule 23(e) notice are sometimes combined."). This notice allows Class Members to decide whether to opt out of or participate in the class and/or to object to the Settlement and argue against final approval by the Court. *Id*.

The Notices accurately inform Class Members of the salient terms of the Settlement, the Class to be certified, the final approval hearing and the rights of all parties, including the rights to file objections and to opt out of the class. The Parties in this case have created and agreed to perform the following forms of notice, which will satisfy both the substantive and manner of distribution requirements of Rule 23 and due process. *See* Exhibits A, B, & D to Settlement Agreement.

> **SETTLEMENT WEBSITE**: The parties will post a copy of the Long Form Notice (Ex. A) on a website to be maintained by the Administrator, which will additionally contain the settlement documents, an online claim form, a list of important dates, and any other information to which the parties may agree. The website shall also contain a Settlement Email Address and Settlement Telephone Number, where Class Members can submit questions and receive further information and assistance. Peak Decl., ¶ 22.

INTERNET AD CAMPAIGN: The Administrator will implement an Internet ad campaign via desktop and mobile devices through Google Display Network (GDN) and the social site Facebook and Yahoo! Ad network. This internet ad campaign is designed to generate 204.5 impressions targeting potential class members. Peak Decl., ¶¶ 16-19.

PUBLICATION NOTICE: The Administrator will also publish notice in *Glamour* Magazine, *Star* Magazine, *In Touch* Magazine and the *Los Angeles Daily News* (four consecutive times to satisfy CLRA notice requirements). Peak Decl., ¶¶ 12-15, 20.

This proposed notice program provides a fair opportunity for Class Members to obtain full disclosure of the conditions of the Settlement and to make an informed decision regarding the Settlement. This notice program is designed to reach at least 70 percent of the Class Members. *See* Peak Decl., ¶ 26. Thus, the notices and notice procedures amply satisfy the requirements of due process.

VIII. PROPOSED SCHEDULE OF EVENTS

In connection with Preliminary Approval of the Settlement, the Court should also set a date and time for the Final Approval Hearing. Other deadlines in the Settlement approval process, including the deadlines for requesting exclusion from the Settlement Class or objecting to the Settlement, will be determined based on the date of the Final Approval Hearing or the date on which the Preliminary Approval Order is entered. The Parties respectfully propose the following schedule:

EVENT	DEADLINE
Deadline for publishing Notice	10 days after the Court's Order Granting Preliminary Approval.
Filing of papers in support of Final Approval and Class Counsel's Application for Attorneys' Fees and Expenses	60 days before the date of the Final Approval Hearing.

For filing an objection with the Court, or submitting a Request for Exclusion to the Settlement Administrator	30 days before the date of the Final Approval Hearing
Filing of response to objections	10 days before the date of the Final Approval Hearing.
Final Approval Hearing	150 days after date of Order Granting Preliminary Approval.
Deadline for submitting claims forms	10 days after the date of the Final Approval Hearing

IX. CONCLUSION

For the foregoing reasons, Plaintiffs and the Media Defendants respectfully request that the Court grant preliminary approval, provisionally certify the Class, approve the proposed notice plan, and enter the Proposed Preliminary Approval Order.

DATED: June 15, 2018

Respectfully submitted,

/s/ Ronald A. Marron

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ELECTRONIC SIGNATURE CERTIFICATION

I, Ronald A. Marron, hereby attest that that all other signatories listed, and on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

/s/ *Ronald A. Marron*
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