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Class Counsel

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

DEMARIE FERNANDEZ, ALFONSO MENDOZA, and FRED DURAN, on behalf of themselves and those similarly situated,

Plaintiffs,

v.

OBESITY RESEARCH INSTITUTE, LLC; CONTINUITY PRODUCTS, LLC; HENNY DEN UIJL; SANDRA DEN UIJL; WEST COAST LABORATORIES, INC.; and DOES 13 through 100, inclusive,

Defendants.

Case No. 37-2013-00048664-CU-BT-CTL

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Date: February 7, 2020
Time: 10:30 a.m.
Dept: SD-64
Judge: Hon. John S. Meyer

Complaint Filed: May 14, 2013
Remittitur Filed: September 16, 2016
FAC Filed: February 23, 2017

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

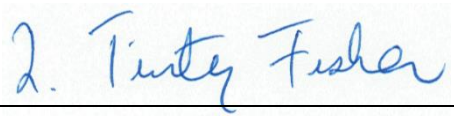
NOTICE IS HEREBY GIVEN that on February 7, 2020, at 10:30 a.m., or as soon thereafter as the matter can be heard, in Department SD-64, the Honorable John S. Meyer presiding, Plaintiffs Fred Duran, DeMarie Fernandez, and Alfonso Mendoza will move, and hereby do move, for final approval of the proposed class action settlement in this action.

This Motion is made on the grounds that the proposed settlement (the "Settlement"), the terms of which are embodied in the Class Action Settlement Agreement (the "Settlement Agreement") submitted herewith,[1] is fair, reasonable and falls within the range of possible approval.

The Motion is based on the Declaration of L. Timothy Fisher and its Exhibits; the Declaration of Craig M. Nicholas and its Exhibits; the [Proposed] Final Approval Order submitted herewith; the Declaration of Jeanne C. Finegan of Heffler Claims Group LLC; the Memorandum of Points and Authorities filed herewith; the pleadings and papers on file in this Action; and such other evidence and argument as may subsequently be presented to the Court.

Dated: January 10, 2020

BURSOR & FISHER, P.A.

By: 
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[1] The Settlement Agreement is Exhibit 1 to the accompanying Declaration of L. Timothy Fisher. All capitalized terms herein that are not otherwise defined have the definitions set forth in the Settlement Agreement.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On October 28, 2019, this Court granted preliminary approval of a proposed nationwide class action settlement (the "Settlement") between Plaintiffs Fred Duran, DeMarie Fernandez, and Alfonso Mendoza (collectively, "Plaintiffs" or the "Class Representatives") and Defendants Obesity Research Institute, LLC, Continuity Products, LLC, Henny den Uijl, and Sandra den Uijl (collectively, "Defendants"). Plaintiffs now respectfully request that the Court grant final approval of the Settlement and enter the [Proposed] Final Approval Order and Judgment submitted herewith.

The Settlement merits final approval. Under its terms, Defendants have agreed to the following monetary and injunctive relief on behalf of the Settlement Class:

(1) provide a total of up to $4.6 million for payment of Valid Claims;

(2) for Valid Claims submitted with a Proof of Purchase, provide a refund of the amount(s) shown on the Proof of Purchase, up to $15 per unit, with a cap of 4 units (for purchases made on the Lipozene.com website or through Defendants' toll-free number, a qualifying Proof of Purchase may consist of a credit card statement depicting such a purchase);

(3) for Valid Claims without a Proof of Purchase, provide $7 per unit of Lipozene, with a cap of 1 unit;

(4) provide injunctive relief by way of modification of marketing language for Lipozene so that the following statements no longer appear in the product's commercials or other marketing materials: "Lipozene is so powerful …" and "Lipozene is specifically designed to target fat;"

(5) promulgate notice to the Settlement Class designed to achieve no less than 70% reach, including direct notice to 680,033 Settlement Class Members (approximately 20% of the class), a social media campaign on Facebook and Instagram to target "purchasers of weight loss supplements" with 12 million impressions, print publication in *People* magazine once and the *San Diego Union Tribune* once a week for 4 weeks, a dedicated settlement website, and a 24-hour toll-free Interactive Voice Response ("IVR") telephone line; and

(6) pay Class Counsel's attorneys' fees in an amount up to $1.4 million, as awarded by the Court, and an incentive payment to Plaintiffs Fernandez, Mendoza, and Duran up to $7,500, as awarded by the Court.

See Fisher Decl., Ex. 1, ¶¶ 4.1.1, 4.2.1, 4.2.2(a)-(b), 5.4.3, 6.1, 9.1, and 9.2; Finegan Decl. ¶¶ 6, 8-20.

This is an excellent recovery for the Settlement Class. The Settlement emerged only after *6.5 years* of vigorous litigation, including an appellate proceeding. The Settlement also involved extensive arm's-length negotiations, including a mediation session with Jill R. Sperber of Judicate West and 2 months of subsequent post-mediation negotiations. Instead of risking the Class' recovery with further litigation, the Settlement provides certainty, finality, and a significant monetary recovery and injunctive relief that comfortably equals or exceeds $4.6 million. At the time the Settlement was reached, Plaintiffs had overcome Defendants' demurrer, completed fact discovery, and filed a motion (and later a renewed motion) for class certification. Continued litigation posed significant risks to class recovery.

In its Preliminary Approval Order, this Court found that the Settlement fell within the range of possible approval, and preliminarily concluded that it was fair, reasonable, and adequate, so as to warrant submission to members of the Settlement Class for their consideration. The Court certified a Settlement Class and set a deadline of January 24, 2020 for the submission of objections and requests for exclusion and established a hearing date of February 7, 2020 for final approval of the Settlement.

In conformity with the Preliminary Approval Order, Heffler Claims Group LLC ("Heffler") emailed 580,908 notices to Settlement Class Members, and sent another 286,368 notices by U.S. Mail (approximately 20% of the class). Finegan Decl. ¶ 7. Heffler also published a social media campaign on Facebook and Instagram to target "purchasers of weight loss supplements" with 12 million impressions, and a print publication in *People* magazine once and the *San Diego Union Tribune* once a week for 4 weeks. *Id.* ¶¶ 6, 8-20. Heffler also created a dedicated settlement website, and a 24-hour toll-free Interactive Voice Response ("IVR") telephone line. *Id.* Heffler estimates that these forms of noticed "reached 72 percent of the target audience, i.e., the Class, as defined in the Settlement Agreement, with an average frequency of over three times." *Id.* ¶ 3. Notice of the Settlement also appeared on TopClassActions.com, the largest source of class action news online,

with an audience of over 5 million monthly page views and over 685,000 newsletter subscribers. *Id.* ¶ 18.[2] As of this writing, and, out of the millions of class members, not a single class member has submitted an objection to the Claims Administrator, and only 1 class member has requested to be excluded from the Class. Finegan Decl. ¶¶ 21-23.[3]

The Settlement is plainly a tremendous victory for consumers that enjoys strong support from the members of the Settlement Class. The Court should grant final approval and enter the Final Approval Order and Judgment that has been lodged with the Court herewith.

II. FACTUAL AND PROCEDURAL BACKGROUND

On May 14, 2013, Plaintiff Fred Duran, represented by Nicholas & Tomasevic, LLP, filed the instant matter in San Diego Superior Court, Central Division against Obesity Research Institute, LLC and Wal-Mart Stores, Inc. Fisher Decl. ¶ 2. Just a few days later, Plaintiffs DeMarie Fernandez and Alfonso Mendoza filed a Complaint in the Eastern District of California, making similar allegations regarding the Lipozene product. *Id.* That matter was subsequently stayed in light of the first-filed *Duran* complaint. *Id.*

Initial written discovery, along with depositions of Duran and one ORI representative, took place in mid to late 2013. *Id.* ¶ 3. Thereafter, in January 2014, the initial parties entered into a Stipulation and Agreement of Settlement. *See Duran v. Obesity Research Institute, LLC* (2016) 1

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[2] Notice on TopClassActions.com was not part of the originally proposed Notice Plan that was approved by this court. *Id.* The appearance on TopClassAction.com is *in addition* to the Notice Plan and was *not* factored into Heffler's determination that the notice "reached 72 percent of the target audience … with an average frequency of over three times." *Id.* ¶¶ 3, 18. As such, Heffler's estimate of 72% reach is conservative.

[3] In choosing these avenues of notice, Heffler was "guided by well-established principles of communication and utilize[d] best-in-class nationally syndicated media research data provided by GfK Mediamark Research and Intelligence, LLC, ('MRI') and online measurement currency comScore, among others, to provide media consumption habits and audience delivery verification of the potentially affected population." *Id.* ¶ 6 (footnotes omitted). These same data and resources "are used by advertising agencies nationwide as the basis to select the most appropriate media to reach specific target audience," and were used here by Heffler to "identif[y] which media channels are favored by the target audience (*i.e.*, the Class Members)," including "browsing behaviors on the Internet, social media channels that are used, and which magazines Class Members are reading." *Id.* For example, Heffler determined that "72% percent of the primary purchasers of these products are female," "67% are between the ages of 25-54 years old," "90 percent have gone online in the last 30 days, with nearly 86 percent using their smartphone to access the Internet," and "84% use social media with nearly 71% reporting that they have visited Facebook in the last 30 days." *Id.*

Cal. App. 5th 635, 637. Plaintiffs Fernandez and Mendoza objected to the initial settlement, but this Court denied their objection and entered final approval in February 2014. Fisher Decl. ¶ 3.

On April 21, 2014, Plaintiffs Fernandez and Mendoza then filed a notice of appeal with respect to the final approval order and judgment. *Id.* ¶ 4. The appellate court reversed the approval and remanded the case to the Superior Court in a June 23, 2016 decision, largely due to inaccuracies in the online claim form and problems with the notice. *See Duran*, 1 Cal. App. 5th at 645 ("[T]he downloadable claim form states class members would also receive a 'full monetary payment for each Hydroxycut product you purchased and for which you have an original proof of purchase, up to no limit.' This is also inconsistent with the court-approved settlement agreement. … Duran's lawsuit does not involve the distinct product, Hydroxycut."); *id.* ("[T]he downloadable claim form contains a waiver of rights under Civil Code section 1542. This apparently is a remnant from an early (November 2013) draft of the settlement agreement, which at that time included such a waiver. However, at the December 2013 hearing on the first motion for preliminary approval, the court stated it would not approve a Civil Code section 1542 waiver."); *id.* at 650 ("Objectors submitted a declaration from a media expert, Mary Tyrrell, asserting the *USA Today* notice reached only approximately 1.06 percent of class members. … The parties offered no evidence disputing Tyrell's opinion or its foundation. There was also no evidence Lipozene products are even advertised in *USA Today*. Nor was there evidence the parties made any effort to demographically target print notice to an audience interested in diet, weight loss supplements, or anything else. … According to Tyrell's undisputed and unopposed declaration, *USA Today* is ill-suited, demographically, to reach the class members here.").

On February 23, 2017, Plaintiffs Fernandez, Mendoza, and Duran filed their consolidated First Amended Class Action Complaint. Fisher Decl. ¶ 5. Following a round of demurrers, Plaintiffs filed their operative Second Amended Class Action Complaint on July 24, 2017. *Id.* After Defendants' second demurrer, the remaining claims are for: violation of the Magnuson Moss Warranty Act, breach of express warranty, breach of the implied warranty of merchantability, unjust enrichment, negligent misrepresentation, fraudulent concealment/nondisclosure, intentional

misrepresentation, fraud, violation of the California Consumers Legal Remedies Act ("CLRA"), violation of the California Unfair Competition Law ("UCL"), and violation of the California False Advertising Law ("FAL"). *Id.*

With regard to Defendants Henny den Uijl and Sandra den Uijl, the Court held that Plaintiffs may proceed on an alter ego / veil piercing theory. 6/30/17 Opinion at 5 ("There are sufficient facts alleged to support the elements of a unity of interest and ownership between the corporation and its equitable owners that the separate personalities of the corporation and the shareholder do not in reality exist, and an inequitable result will occur if the acts in question are treated as those of the corporation alone.").

The parties then engaged in additional fact discovery, which included the service of 33 document requests and 50 interrogatories on each of the three Class Representatives. Fisher Decl. ¶ 6. All three Plaintiffs also sat for a deposition. *Id.*[4] Likewise, Plaintiffs served 41 document requests, 107 interrogatories, and 22 requests for admission on Defendants. *Id.* Plaintiffs' counsel also reviewed 11,777 pages of documents produced by Defendants. *Id.* Plaintiffs also took the deposition of Henny den Uijl on April 18 and 19, 2018, as the "person most knowledgeable" on behalf of Defendants Obesity Research Institute, LLC and Continuity Products, LLC. *Id.*

Following fact discovery, on May 4, 2018, Plaintiffs moved for class certification. Fisher Decl. ¶ 7. On June 22, 2018, the Court denied Plaintiffs' motion, finding that, while Plaintiffs met their burden as to numerosity, commonality and adequate representation by Class Counsel, "Plaintiffs have not met their burden on the elements of ascertainability, adequate representation [by Plaintiffs], or superiority of a nationwide class." 6/22/18 Opinion. On February 13, 2019, Plaintiffs filed their renewed motion for class certification.[5] Fisher Decl. ¶ 7.

Before the renewed motion was heard, on June 10, 2019, the parties attended a day-long mediation with Jill R. Sperber of Judicate West. *Id.* ¶ 7. The matter did not settle at that time.

[4] Additionally, Plaintiffs Fernandez and Mendoza were deposed concerning their purchase and use of Lipozene in a related matter, *Obesity Research Institute, LLC v. DOES 1 through* 100, Case No. 37-2013-00055350-CU-BT-CTL. As such, Plaintiffs Fernandez and Mendoza were deposed twice about their purchase of use of Lipozene.

[5] Defendants disputed that the renewed motion was proper.

However, through the mediator, the parties continued to negotiate and, on July 23, 2019, they entered a Confidential Class Action Settlement Term Sheet. *Id.* Ultimately, the parties entered into the Settlement Agreement on September 9, 2019. *Id.* The Court granted preliminary approval on October 28, 2019, and dissemination of notice commenced on November 15, 2019.

III. THE TERMS OF THE SETTLEMENT

The Settlement affords both monetary and injunctive relief:

1. $4.6 Million in Monetary Relief. For any Participating Claimant who provides a Proof of Purchase, the Participating Claimant shall be entitled to a refund of the amount(s) shown on the Proof of Purchase, up to $15 per unit, with a cap of 4 units per such Participating Claimant (unit is only product paid for and defined as a buy-one, get one free, or a single bottle individual purchase, not promotional offers). *See* Fisher Decl., Ex. 1, ¶ 4.2.2(a). "Proof of Purchase" shall mean documentary evidence (*e.g.*, a Receipt) establishing the purchase of Lipozene, the date of purchase, and the purchase price. *Id.* ¶ 1.33. For purchases made on the Lipozene.com website or through Defendants' toll-free number, a qualifying "Receipt" may consist of a credit card statement depicting such a purchase unless the purchase price was already previously refunded to the claimant by Defendants as a return transaction or if the transaction resulted in a charge back. *Id.* For any Participating Claimant who does not provide a Proof of Purchase, but who submits a Claim Form, either online or via mail, attesting, swearing or affirming under penalty of perjury that he or she purchased Lipozene during the Class Period, the actual amount paid to each Participating Claimant will be $7 per unit of Lipozene, with a cap of 1 unit per such claimant. *Id.* ¶ 4.2.2(b). There are no coupons – only cash.

2. An Injunction Modifying the Marketing and Advertising for Lipozene. Defendants have agreed to provide injunctive relief by way of modifying the marketing language for Lipozene so that the following statements no longer appear in the product's commercials or other marketing materials: "Lipozene is so powerful …" and "Lipozene is specifically designed to target fat." *Id.* ¶ 4.1.1.

The injunctive relief is more than a promise to comply with the law, as it provides specific modifications to Defendants' marketing and advertising of the Lipozene product. Nor is this a mere retooling of pre-existing marketing language – Defendants are *prohibited* from using the above-

referenced language when marketing Lipozene, with no expiration. In the event there is a violation of the terms of this injunction, the Court will determine the appropriate remedy based upon the nature and extent of the violation.

3. Payment of Attorneys' Fees. Defendants have also agreed to pay Class Counsel's attorneys' fees of up to $1.4 million, subject to this Court's approval. Fisher Decl., Ex. 1, ¶ 9.1. This amount is to be paid separately from $4.6 million made available to the Settlement Class, and it will not derogate in any way from the Settlement Class' recovery. *Compare id.* ¶ 4.2.1 (specifying that the $4.6 million in monetary relief shall be "for payment of Valid Claims") *with id.* ¶ 9.1 (stating that Class Counsel may separately "apply to the Court for an award of attorneys' fees and costs in a total amount not to exceed" $1.4 million).

4. Payment of Incentive Awards. Defendants have agreed to pay incentive awards to Plaintiffs Fernandez, Mendoza, and Duran of up to $7,500, subject to this Court's approval. *Id.* ¶ 9.2. As with the payment of attorneys' fees, the payment of incentive awards is separate from $4.6 million made available to the Settlement Class. *See id.* ¶ 9.2 (establishing procedures for the Class Representatives to "apply to the Court for a[n] … incentive payment of not more than $7,500 apiece").

Since the Court issued its order granting preliminary approval, the Settlement Administrator has disseminated notice in accordance with the Court's order. *See* 10/28/19 Order at ¶¶ 6-8; *see also* Finegan Decl. ¶¶ 6, 8-20. The January 24, 2020 deadline for objections and requests for exclusions has not yet arrived. As of the filing of this motion, however, not a single one of the over 3 million class members has submitted an objection to the Claims Administrator. *Id.* at ¶ 23.

IV. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT

A. The Applicable Legal Standards

A class action settlement requires court approval after notice to the class members. *Malibu Outrigger Bd. of Governors v. Sup. Court* (1980) 103 Cal. App. 3d 573, 578; Fed. R. Civ. P. 23(e).[6]

[6] In resolving issues relating to class actions, California courts frequently look to Rule 23 of the Federal Rules of Civil Procedure, and to federal cases decided thereunder, for guidance. *Green v. Obledo* (1981) 29 Cal. 3d 126; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 821.

California has a well-established and strong policy in favor of the settlement of litigation. *Stambaugh v. Superior Court* (1976) 62 Cal. App. 3d 231, 236; *Hamilton v. Oakland Sch. Dist.* (1933) 219 Cal. 322, 329; *Cent. & W. Basin Water Replenishment Dist. v. S. Cal. Water Co.* (2003) 109 Cal. App. 4th 891, 912.[7] Settlement is particularly favored in class actions, given the costs and uncertainties inherent in complex litigation. *See 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal. App. 4th 1135, 1152 ("the risks of maintaining class action status and pursuing judgment through trial would have been large"); *Bell v. Am. Title Ins. Co.* (1991) 226 Cal. App. 3d 1589, 1607 (noting California's "strong public policy in favor of settlement of class actions"); *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 1276, *cert. denied*, 506 U.S. 953 (1992) ("strong judicial policy … favors settlements, particularly where complex class action litigation is concerned"); Rubenstein, 4 Newberg on Class Actions (5th ed. 2013) § 13.44 ("The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding lengthy trials and appeals.").

Whether a class action settlement should receive final approval is committed to the broad discretion of the trial court. *Mallick v. Superior Court* (1979) 89 Cal. App. 3d 434, 438 ("the trial court has broad powers to determine whether a proposed settlement in a class action is fair"). The purpose of the final approval hearing is not, however, to rework a settlement that is the result of complex and hard-fought negotiations. *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 246 ("the proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial").

When the settlement results from arm's-length bargaining by experienced counsel who performed sufficient discovery, and the percentage of objectors is small, there is a "presumption of fairness." *Dunk v. Ford Motor Company* (1996) 48 Cal. App. 4th 1794, 1801. That presumption was summarized as follows by the First District Court of Appeal in *In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 723:

[7] Unless noted, internal citations, quotations, and footnotes are omitted, and emphasis added.

> At the same time, the trial court should give "[d]ue regard … to what is otherwise a private consensual agreement between the parties." Such regard limits its inquiry "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." The trial court operates under a presumption of fairness when the settlement is the result of arm's-length negotiation, investigation and discovery that are sufficient to permit counsel and the court to act intelligently, counsel are experienced in similar litigation, and the percentage of objectors is small.

On final approval, a number of factors may be relevant to a determination that a settlement is "fair, adequate, and reasonable," including:

> [T]he strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, … the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, … and the reaction of the class members to the proposed settlement.

Dunk, 48 Cal. App. 4th at 1801.

As explained below, the Settlement Agreement before the Court amply satisfies these standards.

B. The Proposed Settlement Is Fair, Adequate, And Reasonable

1. <u>The Settlement Is Entitled To A Presumption Of Fairness</u>

As noted in *Microsoft I-V*, proposed class action settlements are presumed fair where the settlement is the result of arm's-length negotiation, discovery has been sufficient, counsel are experienced in similar litigation, and the percentage of objectors is small. 135 Cal. App. 4th at 723; *see also Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1389. Each of those criteria is met here. Therefore, when the Court reviews the settlement, it should begin with a presumption that the settlement is fair, adequate, and reasonable.

a. *<u>The Settlement Was The Result Of Arm's-Length Negotiations</u>*

Here, the Settlement was the result of arm's-length negotiations under the aegis of a distinguished and experienced mediator, Jill R. Sperber of Judicate West. Fisher Decl. ¶¶ 8-11. The adversarial nature of the settlement negotiations is underscored by the fact that the matter did not

settle during the parties' mediation on June 10, 2019, but rather the parties continued to aggressively negotiate for the next six weeks, through the mediator, before executing the Confidential Class Action Settlement Term Sheet on July 23, 2019. *Id.* Additionally, that the settlement was arm's-length is demonstrated by the protracted, vigorous litigation itself, which has been pending since 2013. *Id.* Only after more than six years of hard-fought litigation, with Ms. Sperber's able assistance, were the parties finally able to reach a Settlement. *Id.*

b. *The Settlement Was Negotiated After Litigation And Sufficient Discovery*

The Settlement was negotiated after the parties had completed significant discovery that included the service by Plaintiffs of 41 document requests, 107 interrogatories, and 22 requests for admission. Fisher Decl. ¶ 6. Plaintiffs' counsel also reviewed 11,777 pages of documents produced by Defendants, and took the deposition of Henny den Uijl on April 18 and 19, 2018 as the "person most knowledgeable" of ORI and Continuity Products. *Id.* Additionally, Defendants served 33 document requests and 50 interrogatories on the Class Representatives, and each sat for a lengthy deposition. *Id.* In addition, Plaintiffs filed a motion for class certification – and a renewed motion – and even handled an appeal to the California Court of Appeal. *Id.* ¶¶ 2-7. Thus, the parties negotiated the Settlement with full knowledge of the factual and legal issues, as well as the strengths and weaknesses of their own case and that of their adversaries.

c. *Counsel Are Experienced In Similar Litigation*

As demonstrated by their firm resumes submitted herewith, Class Counsel have extensive experience representing plaintiff classes in consumer litigation. *See* Fisher Decl. Ex. 2 (firm resume of Bursor & Fisher, P.A.).

d. *No Objections Have Yet Been Filed*

The Class Notice stated that any Class Members wishing to object to the Settlement must file their objections with the Settlement Administrator. Yet, while the objection deadline is still two weeks away, not a single objection has been received by the Claims Administrator at this point. Finegan Decl. ¶ 23.

2. Review Of The Relevant Factors Demonstrates That The Proposed Settlement Is Fair, Adequate, And Reasonable

The non-exclusive list of factors that the Court may consider when reviewing a proposed class action settlement includes (1) the consideration obtained in the settlement, (2) the risk, expense, complexity, and duration of further litigation as a class action, (3) the extent of discovery completed and the stage of the proceedings, (4) the experience and views of counsel, and (5) the reaction of class members to the proposed settlement. *Microsoft I-V*, 135 Cal. App. 4th at 723. Reviewing those factors in light of the presumption of validity discussed above, the Settlement clearly merits final approval.

a. The Consideration Provided By The Settlement And The Risk, Expense, Complexity, And Duration Of Further Litigation Faced By Plaintiffs

The Settlement represents an excellent recovery for the Settlement Class, consisting of $4.6 million in monetary relief made available to Class Members, plus injunctive relief in the form of modifications to Lipozene's marketing and advertising. The monetary relief includes a full cash refund, up to $15 per unit, for 4 units of Lipozene if a Proof of Purchase is provided. Claimants without a Proof of Purchase are eligible to receive $7 for their purchase of Lipozene. Thus, many Settlement Class Members will receive a full refund for the entirety of their purchases.

The conclusion is based on the Class' likely recovery in the case as well as the significant risks the Class faced if the case proceeded to trial. Fisher Decl. ¶¶ 16-18. Indeed, further litigation of this Action would present substantial risks to any potential Class recovery. *Id.* Although Plaintiffs had confidence in their claims, it was clear that Defendants would present a vigorous defense, and that there could be no assurance that the Class would be certified or prevail at trial. *Id.* Indeed, Plaintiffs' original motion for class certification had already been denied. It was also likely that Defendants would file a motion for summary judgment that would present significant risks to the Class. *Id.* A favorable outcome was not assured. *Id.* By settling, Plaintiffs and the Class avoid these risks, as well as the delays and risks of a lengthy trial and appellate process. *Id.* The Settlement will provide Settlement Class Members with monetary benefits that are immediate, certain, and

substantial, and avoid the obstacles that might have prevented them from obtaining relief. *Id.*

Even if Plaintiffs had obtained a larger recovery at trial, it would have happened at a much later time and the Class would have incurred additional costs and attorneys' fees that would have further reduced their relief. Moreover, even if Plaintiffs prevailed at trial, Defendants would likely appeal the verdict, which would delay the final resolution of this case by years and could result in the verdict being overturned. By settling now, Plaintiffs avoid those risks and obtain significant monetary and injunctive relief now. They also avoid any delay and the risk associated with post-trial motions and the appellate process. The nature and scope of the relief obtained in the Settlement plainly supports final approval.

b. *Stage Of The Proceedings*

This Settlement was negotiated after more than six years of hard-fought litigation that included an appeal, several demurrers, fact discovery, and significant motion practice. The parties were also in the middle of briefing on Plaintiffs' renewed motion for class certification when the Settlement was reached.

c. *Experienced Class Counsel Recommend Approval Of The Settlement*

The Settlement is also fully supported and recommended by experienced Class Counsel, who have vigorously prosecuted the case here. Class Counsel have carefully gauged the risks involved with this case and are in the best position to evaluate those risks at this stage of the litigation. *See 7-Eleven,* 85 Cal. App. 4th at 1152; *Lyons v. Marrud, Inc.* (S.D.N.Y. June 6, 1972) 1972 WL 327, at *2 ("Experienced and competent counsel have assessed these problems and probability of success on the merits … and [t]he parties' decisions regarding the respective merits of their positions has an important bearing on this case."). "Counsels' opinions warrant great weight both because of their considerable familiarity with this litigation and because of their extensive experience in similar actions." *In re Washington Public Power Supply System Securities Litigation* (D. Ariz. 1989) 720 F. Supp. 1379, 1392 *aff'd*, 955 F.2d 1268; *Boyd v. Bechtel Corp.* (N.D. Cal. 1979) 485 F. Supp. 610, 622 ("Attorneys, having an intimate familiarity with a lawsuit after spending years in litigation, are

in the best position to evaluate the action, and the Court should not without good cause substitute its judgment for theirs.").

d. *The Settlement Enjoys The Support Of The Class Members*

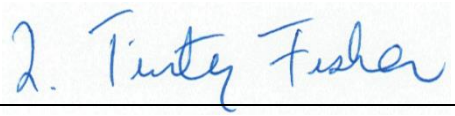
Notice to the class was disseminated beginning on November 15, 2019. As part of this process, Heffler emailed 580,908 notices to Settlement Class Members, and sent another 286,368 notices by U.S. Mail (approximately 20% of the class). Finegan Decl. ¶ 7. Thus far, no objections have been submitted to the Claims Administrator. *Id.* ¶ 23. If no objections, or only a small number of them, end up being filed, that will be a strong indication that the Class overwhelmingly supports the settlement and favors approval of it as fair. *See 7-Eleven*, 85 Cal. App. 4th at 1153. The Court should grant final approval to the Settlement.

V. CONCLUSION

The Settlement in this matter is fair, adequate, and reasonable. Plaintiffs therefore request that this Court grant final approval and enter judgment on the forms submitted herewith.

Dated: January 10, 2020

BURSOR & FISHER, P.A.

By: 
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