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IOVATE HEALTH SCIENCES U.S.A. INC.

17  
18 UNITED STATES DISTRICT COURT  
19 CENTRAL DISTRICT OF CALIFORNIA

20 JAMES EASHOO, individually and on  
21 behalf of all others similarly situated,

22 Plaintiff,

23 vs.

24 IOVATE HEALTH SCIENCES U.S.A.,  
25 INC.

26 Defendant.

Case No. 2:15-cv-1726-BRO-PJW

**CLASS ACTION**

**CLASS ACTION SETTLEMENT  
AGREEMENT**

1 This Class Action Settlement Agreement (the “Settlement”), dated September  
2 \_\_, 2015, is made and entered into by and between the Class Representative James  
3 Eashoo, on behalf of himself and the Settlement Class, and Defendant Iovate Health  
4 Sciences U.S.A. Inc. to settle and compromise this Action and settle, resolve, and  
5 discharge the Released Claims, as defined below, according to the terms and  
6 conditions herein.

7 **PREAMBLE**

8 1. WHEREAS, on March 10, 2015, Plaintiff James Eashoo (“Plaintiff”)  
9 filed the above-captioned class action lawsuit against Defendant Iovate Health  
10 Sciences U.S.A. Inc. (“Defendant”) entitled *Eashoo v. Iovate Health Sciences U.S.A.,*  
11 *Inc.*, Case No. 2:15-cv-1726-BRO-PJW.

12 2. WHEREAS, on April 10, 2015, Plaintiff filed a First Amended Class  
13 Action Complaint.

14 3. WHEREAS, Plaintiff alleges that Defendant has engaged in acts that  
15 violate state consumer protections laws (including California’s False Advertising  
16 Laws (“FAL”), Bus. & Prof. Code §17500 et seq., California's Unfair Competition  
17 Laws (“UCL”), and California's Consumer Legal Remedies Act (“CLRA”), Civil  
18 Code § 1750 et seq.), as well as the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301  
19 et seq., breach of express warranty, and negligent misrepresentation, and that as a  
20 direct result of such violations, Plaintiff and the putative class have suffered monetary  
21 damages and also seek equitable remedies.

22 4. WHEREAS, based upon the discovery taken to date, investigation, and  
23 evaluation of the facts and law relating to the matters alleged in the pleadings, plus the  
24 risks and uncertainties of continued litigation and all factors bearing on the merits of  
25 settlement, Plaintiff has agreed to settle the claims asserted in the Action pursuant to  
26 provisions of this Settlement.

27 NOW, THEREFORE, subject to the Final Approval of the Court as required  
28 herein and by applicable law and rules, the Settling Parties hereby agree, in

1 consideration of the mutual promises and covenants contained herein, that any  
2 Released Claims against any Released Parties shall be settled, compromised and  
3 forever released upon the following terms and conditions.

4 **TERMS AND CONDITIONS OF THE SETTLEMENT**

5 **1. DEFINITIONS**

6 As used in this Class Action Settlement Agreement and the related documents  
7 attached hereto as exhibits, the terms set forth below shall have the meanings set forth  
8 below.

9 1.1. "Action" means the civil action entitled *Eashoo v. Iovate Health Sciences*  
10 *U.S.A., Inc.*, Case No. 2:15-cv-1726-BRO-PJW, currently pending in the United  
11 States District Court for the Central District of California.

12 1.2 "CAFA Notice" means the notice of this Class Action Settlement  
13 Agreement to the appropriate federal and state officials in the United States, as  
14 provided by the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, and as further  
15 described in Paragraph 5.1.4.

16 1.3. "Claim" or "Settlement Claim" means a claim for payment submitted by  
17 a Settlement Class Member to the Claims Administrator as provided in this Class  
18 Action Settlement Agreement.

19 1.4. "Claim Form" or "Settlement Claim Form" means a claim form,  
20 substantially in the form of Exhibit A attached hereto, to be submitted by Claimants  
21 seeking payment pursuant to this Class Action Settlement Agreement to the Claims  
22 Administrator.

23 1.5. "Claimant" means a Settlement Class Member who submits a claim for  
24 payment.

25 1.6. "Claims Administrator" refers to the independent, third-party claims  
26 administrator jointly selected by the Parties to provide notice to the Settlement Class,  
27 CAFA Notice, and to administer the claims process.

1 1.7. "Class Action Settlement Agreement," "Settlement Agreement,"  
2 "Settlement," or "Agreement" means this Class Action Settlement Agreement,  
3 including the attached exhibits.

4 1.8. "Class Counsel" means the Class Representative's counsel of record in  
5 the Action, Daniel L. Warshaw and the law firm of Pearson, Simon & Warshaw, LLP.

6 1.9. "Class Period" means the time period between March 10, 2011 through  
7 the date the Preliminary Approval Order is entered.

8 1.10. "Class Representative" means James Eashoo.

9 1.11. "Court" means the United States District Court for the Central District of  
10 California.

11 1.12. "Defendant" means Iovate Health Sciences U.S.A., Inc., as well as its  
12 past, present, and future officers, directors, shareholders, employees, predecessors,  
13 affiliates, parents, subsidiaries, partners, distributors, principals, insurers,  
14 administrators, agents, servants, successors, trustees, vendors, subcontractors, co-  
15 conspirators, buyers, independent contractors, attorneys, representatives, heirs,  
16 executors, experts, consultants, and assigns of all of the foregoing persons and entities.

17 1.13. "Defendant's Counsel" means Defendant's counsel of record in the  
18 Action, Scott J. Ferrell and the law firm known as Newport Trial Group, APC.

19 1.14. "Effective Date" means the first date by which all of the following events  
20 shall have occurred: the Court has entered the Final Approval Order and Judgment on  
21 the docket in the Action, and (a) the time to appeal from such order has expired and no  
22 appeal has been timely filed, (b) if such an appeal has been filed, it has finally been  
23 resolved and has resulted in an affirmation of the Final Approval Order and Judgment,  
24 or (c) the Court, following the resolution of the appeal, enters a further order or orders  
25 approving settlement on the terms set forth herein, and either no further appeal is  
26 taken from such order(s) or any such appeal results in affirmation of such order(s).  
27 Neither the pendency of the Fee and Cost Application, nor any appeal pertaining  
28

1 solely to a decision on the Fee and Cost Application, shall in any way delay or  
2 preclude the Final Approval Order and Judgment from becoming final.

3 1.15. “Fee and Cost Application” means the written motion or application by  
4 which the Class Representative and/or Class Counsel request that the Court award  
5 attorneys’ fees, costs, expenses and incentive awards.

6 1.16. “Final Approval Hearing” means the hearing scheduled to take place at  
7 least ninety days after the date of entry of the Preliminary Approval Order at which  
8 the Court shall: (a) determine whether to grant final approval to this Class Action  
9 Settlement Agreement and to certify the Settlement Class; (b) consider any timely  
10 objections to this Settlement and all responses thereto; and (c) rule on the Fee and  
11 Cost Application.

12 1.17. “Final Approval Order” means the order in which the Court grants final  
13 approval of this Class Action Settlement Agreement, certifies the Settlement Class,  
14 and authorizes the entry of a final judgment and dismissal of the Action with  
15 prejudice.

16 1.18. “Judgment” means the judgment to be entered by the Court pursuant to  
17 the Settlement.

18 1.19. “Net Settlement Fund” means the Non-Reversionary Common Fund, as  
19 defined herein, less claims administration expenses, notice expenses, any fee award,  
20 reimbursement of expenses, any incentive award, and tax expenses.

21 1.20. “Non-Reversionary Common Fund” means the non-reversionary sum of  
22 two million five hundred thousand dollars (\$2,500,000) Defendant will pay to settle  
23 all claims in the Action pursuant to this Settlement.

24 1.21. “Notice” shall mean a document substantially in the form of Exhibit B  
25 hereto, and “Summary Notice,” meaning a document substantially in the form of  
26 Exhibit C hereto, to be disseminated in accordance with the Preliminary Approval  
27 Order, informing Persons who fall within the Settlement Class definition of, among  
28

1 other things, the pendency of the Action, the material terms of the Proposed  
2 Settlement, and their options with respect thereto.

3 1.22 “Notice Date” means the date thirty (30) days after the Court provides  
4 Preliminary Approval to the Settlement Agreement, by which the Claims  
5 Administrator shall commence dissemination of Notice to the Settlement Class.

6 1.23. “Notice Plan” means the method of providing the Settlement Class with  
7 notice of the Class Action Settlement Agreement, as approved by the Court.

8 1.24. “Notice Response Deadline” means the deadline for all members of the  
9 Settlement Class to respond to the Notice, which shall be sixty (60) days after the  
10 Notice Date.

11 1.25. “Opt-Out Date” means the date that is the end of the period to request  
12 exclusion from the Settlement Class established by the Court and set forth in the  
13 Notice.

14 1.26. “Participating Claimant” means a Claimant who submits a Qualifying  
15 Settlement Claim Form in response to the Notice.

16 1.27. “Parties” means Class Representative James Eashoo and Defendant  
17 Iovate Health Sciences U.S.A. Inc. “Party” shall refer to each of them individually.

18 1.28. “Person” means any natural person, individual, corporation, partnership,  
19 limited partnership, association, joint stock company, estate, legal representative,  
20 trust, unincorporated association, government or any political subdivision or agency  
21 thereof, any business or legal entity, and such individual’s or entity’s spouse, heirs,  
22 predecessors, successors, representatives, and assignees.

23 1.29. “Plaintiff” means James Eashoo.

24 1.30. “Preliminary Approval Order” means the order in which the Court grants  
25 its preliminary approval to this Class Action Settlement Agreement and preliminarily  
26 certifies the Settlement Class, authorizes dissemination of Notice to the Settlement  
27 Class, and appoints the Claims Administrator.

28

1           1.31 “Proof of Purchase” means the packaging, label, SKU or other evidence  
2 from the Protein Products that the Claims Administrator deems sufficient to establish  
3 that a Claimant purchased the Protein Products.

4           1.32. “Protein Products” means any of the protein supplements distributed by  
5 Defendant under any brand name including MuscleTech, Six Star, Epic, or fuel:one  
6 during the Class Period.

7           1.33. “Publication Notice” means the long-form and short-form notices,  
8 substantially in the form of Exhibits B and C attached hereto. The long-form  
9 Publication Notice and the short-form Publication Notice will be published as set forth  
10 in the Preliminary Approval Order.

11           1.34. A “Qualifying Settlement Claim Form” shall mean a Claim Form that is  
12 fully completed, properly executed and timely returned to the Claims Administrator  
13 on or before the Notice Response Deadline by a Settlement Class Member. A  
14 “Qualifying Settlement Claim Form” must be either returned with a postmark via U.S.  
15 mail or via online through the Class Settlement Website to be created and maintained  
16 by the Claims Administrator, at the Participating Claimant’s discretion.

17           1.35 “Receipt” shall mean documentary evidence establishing the purchase of  
18 one or more Protein Products, the date of purchase and the purchase price.

19           1.36. “Released Claims” means all of the claims alleged in the First Amended  
20 Class Action Complaint filed in the Action.

21           1.37. “Released Parties” and “Released Persons” means Defendant, its parent  
22 companies, subsidiary companies, affiliated companies, past, present, and future  
23 officers (as of the Effective Date), directors, shareholders, employees, predecessors,  
24 affiliates, parents, subsidiaries, joint partners, distributors, principals, insurers,  
25 administrators, agents, servants, successors, trustees, vendors, subcontractors, co-  
26 conspirators, buyers, independent contractors, attorneys, representatives, heirs,  
27 executors, experts, consultants, and assigns of all of the foregoing persons and entities.

28           1.38. “Releasing Parties” means all Settlement Class Members.

1           1.39. “Request for Exclusion” means a valid request for exclusion from a  
2 member of the Settlement Class. To be valid, a request for exclusion must (a) be  
3 submitted by the member of the Settlement Class; (b) be submitted to the Claims  
4 Administrator and postmarked by a date no later than the Notice Response Deadline;  
5 (c) contain the submitter’s name, address and telephone number; and (d) otherwise  
6 comply with the instructions set forth in the Notice.

7           1.40. “Settlement” means the settlement set forth in this Class Action  
8 Settlement Agreement.

9           1.41. “Settlement Class” means, collectively, all persons in the United States of  
10 America who purchased one or more of Defendant’s Protein Products at any time  
11 during the Class Period. Excluded from the Settlement Class are any officers,  
12 directors, or employees of Defendant, and the immediate family member of any such  
13 person. Also excluded is any judge who may preside over this case.

14           1.42. “Settling Parties” means, collectively, Defendant, the Class  
15 Representative, and all Settlement Class Members.

16           1.43. “Settlement Class Member” means any member of the Settlement Class  
17 who does not submit a timely and valid Request for Exclusion.

18           1.44. “Valid Claim” means a claim for reimbursement submitted by a  
19 Settlement Class Member that satisfies all the criteria for submission of a Qualifying  
20 Settlement Claim Form.

21           1.45. The singular of any defined term includes the plural, and the plural of any  
22 defined term includes the singular.

## 23   **2. DENIAL OF WRONGDOING AND LIABILITY**

24           2.1. Defendant denies the material factual allegations and legal claims  
25 asserted by the Class Representative in the Action, including any and all charges of  
26 wrongdoing or liability arising out of any of the conduct, statements, acts or omissions  
27 alleged, or that could have been alleged, in the Action.



1     **3.     THE BENEFITS OF SETTLEMENT**

2             3.1.    Class Counsel and the Class Representative recognize and acknowledge  
3     the expense and length of continued proceedings that would be necessary to prosecute  
4     the Action against Defendant through trial and appeals. Class Counsel also has taken  
5     into account the uncertain outcome and the risk of any litigation, especially in  
6     complex actions such as this Action, as well as the difficulties and delays inherent in  
7     such litigation. Class Counsel is mindful of the inherent problems of proof and  
8     possible defenses to the claims asserted in the Action. Class Counsel believes that the  
9     proposed settlement set forth in this Class Action Settlement Agreement confers  
10    substantial benefits upon the Settlement Class. Based on their evaluation of all of  
11    these factors, the Class Representative and Class Counsel have determined that the  
12    Class Action Settlement Agreement is in the best interests of the Class Representative  
13    and the Settlement Class.

14    **4.     SETTLEMENT CONSIDERATION**

15             4.1.    **Injunctive Relief**

16             4.1.1. Defendant will provide the Settlement Class injunctive relief by way of  
17    modification of the testing, label, packaging, and advertising for Protein Products to  
18    ensure that the nitrogen content attributed to amino acids, creatine, and other non-  
19    protein substances therein are not included in the protein calculation.

20             4.1.2. Defendant shall provide sufficient confirmation of the implementation of  
21    its updated testing procedures, labels, and advertisements for Protein Products prior to  
22    the Effective Date.

23             4.1.3. To the extent that any state and/or federal statute, regulation, policies,  
24    and/or code may at any time impose other, further, different and/or conflicting  
25    obligations or duties on Defendant at any time with respect to the Protein Products,  
26    this Class Action Settlement Agreement and any Judgment which may be entered  
27    pursuant thereto, as well as the Court’s continuing jurisdiction with respect to  
28    implementation and enforcement of the terms of this Class Action Settlement

1 Agreement, shall cease as to the Settlement Class's and Defendant's conduct covered  
2 by that statute, regulation and/or code as of the effective date of such statute,  
3 regulation, and/or code.

4 4.2. **Non-Reversionary Common Fund**

5 4.2.1. The amount of the Non-Reversionary Common Fund is two million five  
6 hundred thousand dollars (\$2,500,000). None of the money paid into the Non-  
7 Reversionary Common Fund will revert to Defendant under any circumstances.

8 4.2.2. No later than three (3) business days after entry of the Preliminary  
9 Approval Order, Defendant shall make a deposit of two million five hundred thousand  
10 dollars (\$2,500,000) into an escrow account to be established and managed by the  
11 Claims Administrator.

12 4.2.3. Refunds to Settlement Class Members provided under Paragraph 4.3 will  
13 be paid from the Net Settlement Fund.

14 4.2.4. Any taxes and tax expenses related to the fund shall be taken from the  
15 Net Settlement Fund.

16 4.2.5. The amounts deposited by Defendant into the Non-Reversionary  
17 Common Fund are to be released from escrow for funding the Class Action Settlement  
18 Agreement only upon the Effective Date.

19 4.2.6. If for some reason the Court does not approve the Class Action  
20 Settlement Agreement, the entirety of the Non-Reversionary Common Fund shall be  
21 returned to Defendant within fifteen (15) business days of the Court's order denying  
22 Final Approval.

23 4.3. **Refunds to Class Members**

24 4.3.1. The Non-Reversionary Common Fund shall provide for a full refund for  
25 any of the Protein Products purchased by any member of the Settlement Class from  
26 any retailer who makes a claim within the timeframe to make a Valid Claim, subject  
27 to the household cap set forth in Paragraph 4.3.2.2 and 4.3.2.3. Adequate and  
28 customary procedures and standards will be used by the Claims Administrator to

1 prevent the payment of fraudulent claims and to pay only legitimate claims including  
2 requiring all Claimants to provide certifications as to their purchases.

3 4.3.2. The amount of the refund for any claim shall be determined as follows:

4 4.3.2.1. For any Participating Claimant who provides a Receipt, the  
5 Participating Claimant shall be entitled to a refund of the amount(s) shown on the  
6 receipt, subject to a cap of \$300.00 per household.

7 4.3.2.2 For any Participating Claimant who provides Proof of Purchase;  
8 the Participating Claimant shall be entitled to the suggested retail price of the Protein  
9 Product as determined by information on the packaging, such as a bar or SKU code,  
10 subject to a cap of \$300.00 per household. 4.3.2.3 For any Participating Claimant  
11 who does not provide Proof of Purchase or Receipts, but who swears or affirms under  
12 penalty of perjury that he or she purchased a Protein Product during the Class Period,  
13 the actual amount paid to each Participating Claimant will be \$10.00 per Protein  
14 Product, with a cap of \$50.00 per household.

15 4.3.3. Participating Claimants can make a claim for a combination of Receipts  
16 or Proof of Purchase. Participating Claimants cannot combine claims with Receipts or  
17 Proof of Purchase with claims without Receipts or Proof of Purchase. A cap of \$300  
18 per household shall apply to any combination of claims including claims with  
19 Receipts, claims with Proof of Purchase, and claims without any Receipts or Proof of  
20 Purchase.

21 4.3.4. Payment will be made directly to the Participating Claimant by first class  
22 mail after entitlement to payment has been verified, and in no event more than six  
23 months after the close of the timeframe to make a Valid Claim, unless Class Counsel  
24 permits an extension of time.

25 4.3.5. Payments to Participating Claimants may be subject to *pro rata* reduction  
26 if the aggregate number of claims exceeds the Net Settlement Fund.

27 4.3.6. If all eligible Valid Claims have been paid and funds remain in the Net  
28 Settlement Fund 270 days following the close of the Effective Date, Class Counsel

1 shall direct the Claims Administrator to distribute one hundred (100) percent of any  
2 remaining funds to Participating Claimants as a supplemental distribution. The  
3 remaining funds shall first be distributed to Participating Claimants who have  
4 provided valid claims with Receipts or Proof of Purchase in excess of \$300, up to the  
5 full amount of their qualifying purchases of the Protein Products. Funds remaining  
6 thereafter shall be distributed on a *pro rata basis* to Participant Claimants. In the  
7 event that there are remaining funds subsequent to the aforementioned distributions to  
8 Participating Claimants that are insufficient to justify a further distribution, the  
9 remaining monies in the Net Settlement Fund shall be provided to Public Health Law  
10 & Policy (dba ChangeLab Solutions), a cy pres recipient. Under no circumstances  
11 shall the remaining funds revert to Defendant or Class Counsel.

## 12 **5. ADMINISTRATION AND NOTICE**

13 5.1.1. All costs and expenses of administering the Class Action Settlement  
14 Agreement and providing Notice in accordance with the Preliminary Approval Order  
15 (the “Administrative Costs”) shall be distributed from the Non-Reversionary Common  
16 Fund.

### 17 5.1.2. **Appointment and Retention of Claims Administrator**

18 5.1.2.1. The parties retained a Claims Administrator to implement the  
19 terms of the Class Action Settlement Agreement.

20 5.1.2.2. The Claims Administrator will facilitate the notice process by  
21 assisting the Parties in the implementation of the Notice Plan, as well as CAFA  
22 Notice, although Defendant shall retain ultimate responsibility for effecting CAFA  
23 Notice within the required time.

24 5.1.2.3. The costs of the Claims Administrator will be paid from the Non-  
25 Reversionary Common Fund.

### 26 5.1.3. **Class Settlement Website**

27 5.1.3.1. The Claims Administrator will create and maintain the Class  
28 Settlement Website, to be activated within fifteen (15) days of the entry of the

1 Preliminary Approval Order by the Court. The Claims Administrator's  
2 responsibilities will also include securing an appropriate URL. The Class Settlement  
3 Website will post the settlement documents and case-related documents such as the  
4 Class Action Settlement Agreement, the Long-Form Notice, the Claim Form (in  
5 English and Spanish versions), and the Preliminary Approval Order. In addition, the  
6 Class Settlement Website will include procedural information regarding the status of  
7 the Court-approval process, such as an announcement of the Final Approval Hearing  
8 Date, when the Final Approval Order and Judgment have been entered, and when the  
9 Effective Date has been reached. Claimants will be able to submit their claims  
10 electronically via the Class Settlement Website.

11 5.1.3.2. Defendant shall prominently place a link to the Class Settlement  
12 Website on Defendant's corporate website.

13 5.1.3.3. The Class Settlement Website will terminate (be removed from the  
14 internet) and no longer be maintained by the Claims Administrator thirty (30) days  
15 after either (a) the Effective Date or (b) the date on which the Class Action Settlement  
16 Agreement is terminated or otherwise not approved by a court, whichever is later.  
17 The Claims Administrator will then transfer ownership of the URL to Defendant.

18 5.1.3.4. All costs and expenses related to the Class Settlement Website  
19 shall be distributed from the Non-Reversionary Common Fund.

20 5.1.4. **CAFA Notice**

21 5.1.4.1. The Parties agree that the Claims Administrator shall serve notice  
22 of the settlement that meets the requirements of CAFA, 28 U.S.C. § 1715, on the  
23 appropriate federal and state officials no later than ten (10) days after the filing of this  
24 Class Action Settlement Agreement with the Court.

25 5.1.4.2. Notwithstanding the foregoing, Defendant shall have ultimate  
26 responsibility to ensure that CAFA Notice is, in fact, effectuated consistent with the  
27 statutory requirements.  
28

1           5.1.4.3.     All costs and expenses related to the CAFA Notice shall be  
2 distributed from the Non-Reversionary Common Fund.

3           5.1.4.4.     Defendant will file a certification with the Court stating the date(s)  
4 on which the CAFA Notices were sent. Defendant will provide Class Counsel with  
5 any substantive responses received in response to any CAFA Notice.

6           5.1.5. **Notice Plan**

7           5.1.5.1.     The class notice shall conform to all applicable requirements of the  
8 Federal Rules of Civil Procedure, the United States Constitution (including the Due  
9 Process Clauses), and any other applicable law, and shall otherwise be in the manner  
10 and form agreed upon by the Parties and approved by the Court. The class notice  
11 shall constitute the best notice that is practicable under the circumstances.

12          5.1.5.2.     Within thirty (30) days after preliminary approval by the Court of  
13 this Class Action Settlement Agreement, the Claims Administrator shall provide  
14 notice to the Settlement Class according to the Notice Plan.

15          5.1.5.3.     The Notice Plan will include direct notice to any Settlement Class  
16 Member who can be individually identified.

17          5.1.5.4.     Defendant shall prominently place a link to the Class Settlement  
18 Website on Defendant's corporate website.

19          5.1.5.5.     The Parties agree to the content of these notices substantially in the  
20 forms attached to this Agreement as Exhibits B and C.

21          5.1.6. **Taxes**

22          5.1.6.1.     Settlement Class Members, the Class Representative, and Class  
23 Counsel shall be responsible for paying any and all federal, state, and local taxes due  
24 on any payments made to them pursuant to the Class Action Settlement Agreement.

25          5.1.6.2.     Taxes due in connection with the Non-Reversionary Common  
26 Fund and Net Settlement Fund prior to distribution to the Settlement Class shall be  
27 paid by the Claims Administrator from the Net Settlement Fund.  
28

1     **6.     RELEASES**

2             6.1. Upon the Effective Date, the Class Representative and each of the  
3 Settlement Class Members will be deemed to have, and by operation of the Judgment  
4 will have fully, finally, and forever released, relinquished, and discharged the  
5 Released Parties from all Released Claims during the Class Period.

6     **7.     CLASS CERTIFICATION**

7             7.1.1. The Parties agree that, for settlement purposes only, this Action shall be  
8 certified as a class action pursuant to Federal Rule of Civil Procedure 23 with Class  
9 Representative serving as class representative and Class Counsel as counsel for the  
10 Settlement Class.

11            7.1.2. In the event the Class Action Settlement Agreement is terminated or for  
12 any reason the Class Action Settlement Agreement is not effectuated, the certification  
13 of the Settlement Class shall be vacated and the Action shall proceed as if the  
14 Settlement Class had not been certified.

15     **8.     SETTLEMENT HEARING**

16            8.1. Promptly after execution of this Class Action Settlement Agreement, the  
17 Parties will submit the Class Action Settlement Agreement together with its Exhibits  
18 to the Court and will request that the Court grant preliminary approval of the Class  
19 Action Settlement Agreement as of the date of which the settlement shall be deemed  
20 as “filed” within the meaning of 28 U.S.C. § 1715, issue the Preliminary Approval  
21 Order, and schedule a hearing on whether the Class Action Settlement Agreement  
22 should be granted final approval and whether the Fee Application should be granted  
23 (“Settlement Hearing”).

24            8.2.     **Procedures for Objecting to the Class Action Settlement Agreement**

25            8.2.1. Settlement Class Members shall have the right to appear and show cause,  
26 if they have any reason why the terms of this Class Action Settlement Agreement  
27 should not be given Final Approval, subject to each of the subprovisions in Paragraph  
28 8.2. Any objection to this Class Action Settlement Agreement, including any of its

1 terms or provisions, must be in writing, filed with the Court, with a copy served on  
2 Class Counsel, Counsel for Defendant, and the Claims Administrator at the addresses  
3 set forth in the Class Notice, and postmarked no later than the Notice Response  
4 Deadline. Settlement Class Members may object either on their own or through an  
5 attorney hired at their own expense.

6 8.2.2. If a Settlement Class Member hires an attorney to represent him or her at  
7 the Final Approval Hearing, he or she must do so at his or her own expense. No  
8 Settlement Class Member represented by an attorney shall be deemed to have objected  
9 to the Class Action Settlement Agreement unless an objection signed by the  
10 Settlement Class Member is also filed with the Court and served upon Class Counsel,  
11 Counsel for Defendant, and the Claims Administrator at the addresses set forth in the  
12 Class Notice no later than the Notice Response Deadline.

13 8.2.3. Any objection regarding or related to the Class Action Settlement  
14 Agreement shall contain a caption or title that identifies it as “Objection to Class  
15 Settlement in *Eashoo v. Iovate Health Sciences U.S.A. Inc.*, No. 2:15-cv-01726-BRO-  
16 PJW” and also shall contain the following information: (i) the objector’s name,  
17 address, and telephone number, (ii) the name, address, and telephone number of any  
18 attorney for the objector with respect to the objection; (iii) the factual basis and legal  
19 grounds for the objection, including any documents sufficient to establish the basis for  
20 their standing as a Settlement Class Member, e.g., Receipt, Proof of Purchase, or  
21 verification under oath as to the approximate date(s) and location(s) of their  
22 purchase(s) of the Protein Products; and (iv) identification of the case name, case  
23 number, and court for any prior class action lawsuit in which the objector and the  
24 objector’s attorney (if applicable) has objected to a proposed class action settlement,  
25 the general nature of such prior objection(s), and the outcome of said prior  
26 objection(s). If an objecting party chooses to appear at the hearing, no later than the  
27 Notice Response Deadline, a notice of intention to appear, either in person or through  
28



1 an attorney, must be filed with the Court and list the name, address, telephone number,  
2 facsimile number, and email address of the attorney, if any, who will appear.

3 8.2.4. If a Settlement Class Member wishes to present witnesses or evidence at  
4 the Final Approval Hearing in support of a timely and validly submitted objection, all  
5 witnesses must be identified in the objection, and true and correct copies of all  
6 supporting evidence must be appended to, or filed and served with, the objection.  
7 Failure to identify witnesses or provide copies of supporting evidence in this manner  
8 waives any right to introduce such testimony or evidence at the Final Approval  
9 Hearing. While the declaration described above is prima facie evidence that the  
10 objector is a member of the Settlement Class, Plaintiff or Defendant or both may take  
11 discovery regarding the matter, subject to Court approval.

12 8.2.5. Any Settlement Class Member who fails to comply with the applicable  
13 provisions of the preceding paragraphs concerning their objection shall waive and  
14 forfeit any and all rights he or she may have to object, appear, present witness  
15 testimony, and/or submit evidence, shall be barred from appearing, speaking, and  
16 introducing any testimony or evidence at the Final Approval Hearing, and shall be  
17 bound by all the terms of this Class Action Settlement Agreement and by all  
18 proceedings, orders and judgments in the Action.

19 8.2.6. Any Settlement Class Member who does not object to the Class Action  
20 Settlement Agreement is deemed to be a Settlement Class Member and bound by the  
21 Class Action Settlement Agreement or any further orders of the Court in this Action.

### 22 8.3. **Right to Respond to Objections**

23 8.3.1. Class Counsel and Defendant shall have the right, but not the obligation,  
24 to respond to any objection no later than seven (7) days prior to the Final Approval  
25 Hearing. The Settling Party so responding shall file a copy of the response with the  
26 Court, and shall serve a copy, by regular mail, hand or overnight delivery, to the  
27 objector (or counsel for the objector) and to counsel for Plaintiff and Defendant.

### 28 8.4. **Opt Outs**

1           8.4.1. Any Settlement Class Member who does not wish to participate in this  
2 Class Action Settlement Agreement must write to the Claims Administrator stating an  
3 intention to be “excluded” from this Class Action Settlement Agreement by the Opt-  
4 Out Date. This written Request for Exclusion must be sent via first class United  
5 States mail to the Claims Administrator at the address set forth in the Class Notice and  
6 postmarked no later than the Notice Response Deadline. The Request for Exclusion  
7 must be personally signed by the Class Member. So-called “mass” or “class” opt-outs  
8 shall not be allowed.

9           8.4.2. Any Settlement Class Member who does not request exclusion from the  
10 Settlement has the right to object to the Settlement as set forth in paragraphs 8.2.1 to  
11 8.2.7 above. If a Class Member submits a written Request for Exclusion, he or she  
12 shall be deemed to have complied with the terms of the opt-out procedure and shall  
13 not be bound by the Class Action Settlement Agreement if approved by the Court.  
14 However, any objector who has not timely requested exclusion from the Settlement  
15 will be bound by the terms of the Class Action Settlement Agreement and by all  
16 proceedings, orders and judgments in the Action.

17 **9. ATTORNEYS’ FEES, COSTS, AND EXPENSES AND INCENTIVE**  
18 **AWARDS**

19           9.1. Class Counsel may apply to the Court for an award of attorneys’ fees in  
20 an amount not to exceed twenty five percent (25%) of the \$2.5 million Non-  
21 Reversionary Common Fund (i.e. up to \$625,000) and expenses and verified costs in  
22 an amount not to exceed \$15,000.00.

23           9.2. Plaintiff may apply to the Court for an enhancement award of \$5,000 for  
24 his service as a Class Representative.

25           9.3 A payment of attorneys’ fees, costs, expenses and the enhancement  
26 award shall be paid from the Non-Reversionary Common Fund. Defendant agrees not  
27 to oppose or submit any evidence or argument challenging or undermining such  
28 application for attorneys’ fees, costs, or enhancement award that does not exceed the

1 amounts set forth in this Settlement Agreement. Defendant will bear its own  
2 attorneys' fees, costs and expenses.

3 9.4. Attorneys' fees and costs that are approved by the Court shall be paid  
4 from the Non-Reversionary Common Fund no later than fifteen (15) days after  
5 Effective Date, and only in the event that the Effective Date occurs.

6 9.5 Any incentive payments awarded by the Court will be taken from the  
7 Non-Reversionary Common Fund.

8 **10. CONDITIONS FOR EFFECTIVE DATE; EFFECT OF**  
9 **TERMINATION**

10 10.1. The Effective Date of this Class Action Settlement Agreement shall be  
11 the date as defined in Paragraph 1.14.

12 10.2. If this Class Action Settlement Agreement is not approved by the Court  
13 or the Settlement is terminated or fails to become effective in accordance with the  
14 terms of this Class Action Settlement Agreement, the Settling Parties will be restored  
15 to their respective positions in the Action as of the date the Motion for Preliminary  
16 Approval is filed. In such event, the terms and provisions of this Class Action  
17 Settlement Agreement will have no further force and effect with respect to the Settling  
18 Parties and will not be used in this Action or in any other proceeding for any purpose,  
19 and any Judgment or order entered by the Court in accordance with the terms of this  
20 Class Action Settlement Agreement will be treated as vacated.

21 10.3. No order of the Court or modification or reversal on appeal of any order  
22 of the Court concerning any award of attorneys' fees, expenses, or costs to  
23 Class Counsel will constitute grounds for cancellation or termination of this Class  
24 Action Settlement Agreement.

25 **11. CONFIRMATORY DISCOVERY**

26 11.1. This Class Action Settlement Agreement is conditioned upon Defendant  
27 providing sufficient confirmatory discovery to establish that its wholesale sales  
28 revenue during the Class Period totaled approximately \$56 million.

1     **12.   DISPUTE RESOLUTION**

2           12.1. If any dispute arises out of the Settlement, the Settling Parties agree that  
3 they will attempt to resolve such disputes by way of mediation with the Honorable  
4 Dickran M. Tevrizian (Ret.) before seeking the Court’s intervention. If for any reason  
5 Judge Tevrizian is unavailable or has a conflict of interest, the Settling Parties will  
6 agree on a substitute neutral so that this portion of the Class Action Settlement  
7 Agreement can be enforced without seeking Court intervention.

8     **13.   MISCELLANEOUS PROVISIONS**

9           13.1. The Parties acknowledge that it is their intent to consummate this Class  
10 Action Settlement Agreement, and they agree to cooperate to the extent reasonably  
11 necessary to effectuate and implement all terms and conditions of this Class Action  
12 Settlement Agreement and to exercise their best efforts to accomplish the foregoing  
13 terms and conditions of this Class Action Settlement Agreement.

14           13.2. The Parties intend the Settlement to be a final and complete resolution of  
15 all disputes between them with respect to the Action. The Settlement compromises  
16 claims that are contested and will not be deemed an admission by any Settling Party as  
17 to the merits of any claim or defense. The Parties agree that the consideration  
18 provided to the Settlement Class and the other terms of the Settlement were negotiated  
19 in good faith by the Parties, and reflect a settlement that was reached voluntarily after  
20 consultation with competent legal counsel.

21           13.3. Neither this Class Action Settlement Agreement nor the Settlement, nor  
22 any act performed or document executed pursuant to or in furtherance of this Class  
23 Action Agreement or the Settlement is or may be deemed to be or may be used as an  
24 admission of, or evidence of, the validity of any Released Claims, or of any  
25 wrongdoing or liability of Defendant; or is or may be deemed to be or may be used as  
26 an admission of, or evidence of, any fault or omission of Defendant in any civil,  
27 criminal, or administrative proceeding in any court, administrative agency or other  
28 tribunal. Any party to this Action may file this Class Action Settlement Agreement

1 and/or the Judgment in any action that may be brought against it in order to support  
2 any defense or counterclaim, including without limitation those based on principles of  
3 res judicata, collateral estoppel, release, good faith settlement, judgment bar or  
4 reduction, or any other theory of claim preclusion or issue preclusion or similar  
5 defense or counterclaim.

6 13.4. All agreements made and orders entered during the course of the  
7 Action relating to the confidentiality of information will survive this Class Action  
8 Settlement Agreement.

9 13.5. Any and all Exhibits to this Class Action Settlement Agreement are  
10 material and integral parts hereof and are fully incorporated herein by this reference.

11 13.6. This Class Action Settlement Agreement may be amended or modified  
12 only by a written instrument signed by or on behalf of all Parties or their respective  
13 successors-in-interest.

14 13.7. This Class Action Settlement Agreement and any Exhibits attached  
15 hereto constitute the entire agreement among the Parties, and no representations,  
16 warranties, or inducements have been made to any Party concerning this Class Action  
17 Settlement Agreement or its Exhibits other than the representations, warranties, and  
18 covenants covered and memorialized in such documents. Except as otherwise  
19 provided herein, the Parties will bear their own respective costs.

20 13.8. Class Counsel, on behalf of the Settlement Class, are expressly  
21 authorized by the Class Representative to take all appropriate action required or  
22 permitted to be taken by the Settlement Class pursuant to this Class Action Settlement  
23 Agreement to effectuate its terms, and are expressly authorized to enter into any  
24 modifications or amendments to this Class Action Settlement Agreement on behalf of  
25 the Settlement Class that Class Counsel deem appropriate.

26 13.9. Each counsel or other Person executing this Class Action Settlement  
27 Agreement or any of its Exhibits on behalf of any Party hereby warrants that such  
28 Person has the full authority to do so.

1           13.10. This Class Action Settlement Agreement may be executed in one or  
2 more counterparts. All executed counterparts and each of them will be deemed to be  
3 one and the same instrument. A complete set of original counterparts will be filed with  
4 the Court.

5           13.11. This Class Action Settlement Agreement will be binding upon, and  
6 inure to the benefit of, the successors and assigns of the Settling Parties.

7           13.12. Except as provided herein, the Court will retain jurisdiction with respect  
8 to implementation and enforcement of the terms of this Class Action Settlement  
9 Agreement, and all parties hereto submit to the jurisdiction of the Court for purposes  
10 of implementing and enforcing the Settlement.

11           13.13. None of the Settling Parties, or their respective counsel, will be deemed  
12 the drafter of this Class Action Settlement Agreement or its Exhibits for purposes of  
13 construing the provisions thereof. The language in all parts of this Class Action  
14 Settlement Agreement and its Exhibits will be interpreted according to its fair  
15 meaning, and will not be interpreted for or against any of the Settling Parties as the  
16 drafter thereof.

17           13.14. This Class Action Settlement Agreement shall be deemed the “proposed  
18 agreement” filed with the Court within the meaning of 15 U.S.C. § 1715 as of the date  
19 on which Preliminary Approval is granted by the Court.

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13.15. This Class Action Settlement Agreement and any Exhibits hereto will be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of California without giving effect to that State’s choice-of-law principles.

Dated: September \_\_\_\_, 2015

\_\_\_\_\_  
James Eashoo

Dated: September \_\_\_\_, 2015

\_\_\_\_\_  
Roch Vaillancourt, General Counsel  
On behalf of Iovate Health Sciences U.S.A. Inc.

**APPROVED AS TO FORM:**

Dated: September \_\_\_\_, 2015

\_\_\_\_\_  
Daniel L. Warshaw  
Attorney for Plaintiff James Eashoo and the Class

Dated: September \_\_\_\_, 2015

\_\_\_\_\_  
Scott J. Ferrell  
Attorney for Defendant Iovate Health Sciences U.S.A. Inc.