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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE HYDROXYCUT
MARKETING AND SALES
PRACTICES LITIGATION

CASE NO. 09md2087 BTM (KSC)

CASE NO. 09cv1088 BTM(KSC)

ANDREW DREMAK, on Behalf of
Himself, All Others Similarly
Situating and the General Public,

Plaintiff,

**ORDER DENYING FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

v.

IOVATE HEALTH SCIENCES
GROUP, INC., et al.,

Defendants.

Co-Lead Class Counsel (and Proposed Class Counsel for the Settlement Class) have filed a Motion for Final Approval of Class Action Settlement. The Court held a hearing on the motion on October 22, 2013. For the reasons set forth below, the Court **DENIES** the motion for final approval of the settlement.

1 **I. SETTLEMENT TERMS**

2 The terms of the Settlement Agreement are set forth in the Amended
3 Stipulation of Settlement (“Am. Stip.”). (09cv1088 - Doc. 238.)

4 The “Settlement Class” is defined as including those persons who
5 purchased in the United States any of the Hydroxycut Products (specific products
6 set forth in § II.A.23 of the Am. Stip.) between May 9, 2006 and May 1, 2009,
7 inclusive. (Am. Stip. § II.A.46.) Excluded from the Settlement Class are (1)
8 persons who purchased Hydroxycut Products for the purpose of resale; (2) Iovate
9 and its officers, directors, and employees; (3) any person who filed a valid and
10 timely Request for Exclusion; and (4) the Judges to whom this action is assigned
11 and any members of their immediate families.¹

12 The settlement relief consists of a \$10 million Cash Component and a \$10
13 million Product Component. Settlement Class Members who opt to receive cash
14 will receive \$25 for each Hydroxycut Product they purchased. (Am. Stip. §
15 IV.A.2.) No proof of purchase is required to receive \$25. Requests for payment
16 for more than one unit of Hydroxycut Product require proof of purchase. In lieu
17 of cash, Settlement Class Members can elect to receive a Product Bundle for
18 each purchase of a Hydroxycut Product. (Am. Stip. § IV.A.3.) Each Product
19 Bundle shall have an aggregate retail price of not less than \$50. Authorized
20 claimants requesting one Product Bundle will be provided with the Product
21 Bundle without proof of purchase. A request for more than one Product Bundle
22 requires proof of purchase.

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26 ¹ In the original Stipulation of Settlement, the Settlement Class excluded persons with
27 claims for personal injuries arising from the ingestion of one or more Hydroxycut Products.
28 However, the definition of the Settlement Class was amended after the Court raised concerns
that the *cy pres* distribution of residual settlement fund amounts would be used to compensate
consumers who suffered personal injuries from taking Hydroxycut Products, even though these
personal injury plaintiffs were specifically excluded from the class definition.

1 Any amount remaining in the Cash Component after payment of Notice and
2 Claim Administration Expenses, necessary taxes and tax expenses, and Eligible
3 Cash Claims constitutes the “Residual Settlement Amount.” (Am. Stip. §
4 IV.C.1.a.) Any amount remaining in the Product Component after payment of
5 Eligible Product Claims, Product Bundle Shipping Expenses, and any amounts
6 needed to pay Eligible Cash Claims,² shall, at lovate’s option, either (1) be
7 provided by lovate to the general public pursuant to the *cy pres* doctrine in the
8 form of Additional Product; or (2) be added to the Residual Settlement Amount.
9 (Am. Stip. § IV.C.2.a.)

10 The Residual Settlement Amount shall be held in trust by an Escrow Agent.
11 (Am. Stip. § IV.C.1.b.) A Personal Injury Claimant – defined as persons who
12 have lawsuits pending in federal or state courts, or who have executed tolling
13 agreements as of September 1, 2012, and allege personal injury resulting from
14 the ingestion of one or more Hydroxycut Products (Am. Stip. § II.A.33) – may
15 submit a Residual Settlement Claim Form to the Escrow Agent if the claimant is
16 a party to a settlement or final judgment. Upon receipt of the Residual Settlement
17 Amount Claim Form, the Escrow Agent shall be authorized to pay the amount of
18 such judgments or settlements, on a first-come, first-served basis, without any
19 pro rata or per capita adjustment, until the Residual Settlement Amount is
20 exhausted. (Am. Stip. § IV.C.1.b.)

21 If any funds remain after six years from the Effective Date (date of entry
22 of final judgment or the date after an appeal has been concluded and is no longer
23 subject to review), the remaining funds shall be paid to ChangeLab Solutions or
24 some other similar organization pursuant to the *cy pres* doctrine. (Am. Stip. §
25 IV.C.1.d.)

26
27 ² Section IV. B. provides that up to \$ 4 million from the Product Component can be used
28 to pay Eligible Cash Claims if the aggregate Eligible Cash Claims, Notice and Claim
Administration Expenses, and necessary taxes and tax expenses exceed the \$10 million Cash
Component.

1 lovate agrees not to oppose an application for an award of attorney’s fees
2 not to exceed \$5,000,000, and for an award of out-of-pocket expenses not to
3 exceed \$300,000. (Am. Stip. § X.A.) Class Counsel seeks fees in the amount
4 of \$5,000,000 and expenses in the amount of \$ 193,656.64. According to Class
5 Counsel, the combined fee and expense award amounts to 21% of the settlement
6 value created by plaintiffs’ counsel’s efforts (\$20 million Settlement Fund, plus \$5
7 million in attorneys’ fees, and up to \$300,000 in expenses).

8 9 **II. STANDARD**

10 A district court can approve a class action settlement if the court finds that
11 the settlement is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e). When
12 the settlement is reached before formal class certification, settlement requires a
13 “higher standard of fairness” and “a more probing inquiry than may normally be
14 required under Rule 23(e).” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th
15 Cir. 1998). The reason for the higher level of scrutiny is that there is “greater
16 potential for a breach of fiduciary duty owed the class during settlement.” In re
17 Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011).
18 “Collusion may not always be evident on the face of a settlement, and courts
19 therefore must be particularly vigilant not only for explicit collusion, but also for
20 more subtle signs that class counsel have allowed pursuit of their own self-
21 interests and that of certain class members to infect the negotiations.” Id. at 947.

22 23 **III. DISCUSSION**

24 At the final approval hearing, the Court questioned Class Counsel and
25 lovate’s attorney about the *cy pres* distribution provisions of the settlement.
26 Based on the information obtained at the hearing, the Court finds that the *cy pres*
27 remedy does not satisfy the standards for *cy pres* relief set forth by the Ninth
28

1 Circuit. Therefore, the Court cannot find that the settlement is fair, adequate, and
2 reasonable, and the motion for final approval of the settlement must be **DENIED**.

3 The *cy pres* doctrine allows a court to distribute unclaimed or non-
4 distributable portions of a class action settlement fund to indirectly benefit the
5 entire class. Six Mexican Workers v. Ariz.Citrus Growers, 904 F.2d 1301, 1305
6 (9th Cir. 1990). When employing the *cy pres* doctrine, unclaimed funds should be
7 put to their next best use, e.g., for “the aggregate, indirect, prospective benefit of
8 the class.” Nachshin v. AOL, LLC, 663 F.3d 1034, 1038 (9th Cir. 2011) (quoting
9 Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007)).
10 The Ninth Circuit has held that *cy pres* distribution must be “guided by (1) the
11 objectives of the underlying statute(s); and (2) the interests of the silent class
12 members.” Six Mexican Workers, 904 F.2d at 1307. A *cy pres* distribution is an
13 abuse of discretion if there is “no reasonable certainty” that any class member
14 would benefit from it. Dennis v. Kellogg Co., 697 F.3d 858, 865 (9th Cir. 2012)
15 (quoting Six Mexican Workers, 904 F.2d at 1308)). A court should not find that
16 a settlement is fair, adequate, and reasonable unless the *cy pres* remedy
17 “account[s] for the nature of the plaintiffs’ lawsuit, the objectives of the underlying
18 statutes, and the interests of the silent class members” Lane v. Facebook,
19 696 F.3d 811, 819-20 (9th Cir. 2012) (quoting Nachshin, 663 F.3d at 1036).

20 The biggest problem with the proposed *cy pres* distribution in this
21 settlement is that it simply does not benefit the class. At the hearing, counsel for
22 Lovate explained that under the master settlement agreement governing the
23 personal injury cases in this multi-district litigation, personal injury claimants are
24 to be paid out of a \$14 million settlement fund. Amounts paid to personal injury
25 claimants from the Residual Settlement Amount in this action will be credited
26 towards the \$14 million personal injury fund. A personal injury claimant who is
27 paid out of the Residual Settlement Amount cannot also recover against the
28 personal injury settlement fund – i.e. the personal injury claimant’s recovery is

1 limited to what he or she is entitled to under the applicable final judgment or
2 settlement. Thus, *cy pres* distributions to personal injury claimants in this action
3 reduce the amount that lovate must pay into the personal injury fund while
4 providing no additional benefit to the personal injury claimants and no benefit at
5 all to the class members who suffered no personal injury.

6 Class Counsel argues that the *cy pres* remedy provides a benefit to the
7 class members because the master settlement in the personal injury cases was
8 reached based on the assumptions underlying the settlement of this class action.
9 In other words, class members who suffered personal injury benefit from the *cy*
10 *pres* remedy, because without the *cy pres* provisions in this settlement, the
11 settlement of the personal injury cases might not have occurred. lovate's
12 attorney adds that without the *cy pres* remedy, the class action settlement may
13 fall apart and, therefore, the non-personal injury class members also receive a
14 benefit from the inclusion of the *cy pres* provisions. The Court is not convinced
15 by these arguments. The Court doubts that *causing* a benefit in the form of
16 facilitating settlement in this action or the separate personal injury actions is the
17 type of "indirect benefit" that *cy pres* remedies are meant to provide. The focus
18 should be on whether the funds themselves are being used for the benefit of the
19 class.

20 Furthermore, whatever the circumstances surrounding the creation of the
21 master settlement in the personal injury cases, the settlement is now in place.
22 lovate is obligated to fund the settlement, and participating claimants are entitled
23 to their awards, whether paid from the Residual Settlement Amount in this case
24 or not. Accordingly, the Court disagrees that the *cy pres* distribution benefits the
25 personal injury claimants.

26 The *cy pres* remedy is also problematic because it allows for a grossly
27 disproportionate distribution of settlement funds to personal injury claimants. In
28 doing so, the *cy pres* remedy fails to take into account the interests of the silent

1 class members, most of whom did not suffer any personal injury, and the nature
2 of this action, which concerns unfair competition, consumer protection, and
3 product warranty claims, not personal injury liability. The personal injury
4 claimants make up only a tiny fraction of the overall class. There are 550
5 personal injury plaintiffs, whereas approximately 48,000 settlement claims³ have
6 been made. According to lovate’s counsel, the amount of cash claims that have
7 been made totals approximately \$1 million, while the amount of product claims
8 that have been made totals approximately \$400,000. Therefore, the remaining
9 \$18.6 million, minus Notice and Claim Administration Expenses and taxes and
10 tax expenses, may be used for *cy pres* distribution to the personal injury
11 claimants.

12 The Court is concerned that so little of the sizeable settlement fund directly
13 benefits the class. Under the terms of the settlement, most of the fund will be
14 channeled into *cy pres* distribution, without any consideration of whether further
15 distributions can be made directly to claimants on a pro rata basis. The American
16 Law Institute’s Principles of the Law of Aggregate Litigation (“ALI Principles”)
17 provide that where a settlement involves individual distributions to class members
18 and there are funds remaining after the distributions, “the settlement should
19 presumptively provide for further distributions to participating class members
20 unless the amounts involved are too small to make individual distributions
21 economically viable or other specific reasons exist that would make such further
22 distributions impossible or unfair.” ALI Principles § 3.07(b) (2010). Similarly, the
23 Fifth Circuit has held:

24 Where it is still logistically feasible and economically viable to make
25 additional pro rata distributions to class members, the district court
26 should do so, except where an additional distribution would provide

27 ³ lovate’s counsel represented that there were about 40,000 cash claims, most of the
28 claims being for a single unit of Hydroxycut Product. The Court approximates that there were
8,000 product claims based on the total of the product claims (\$400,000) divided by the value
of a single product bundle (\$50).

1 a windfall to class members with liquidated-damages claims that were
2 100 percent satisfied by the initial distribution. A *cy pres* distribution
3 puts settlement funds to their next-best use by providing an indirect
4 benefit to the class. That option arises only if it is not possible to put
5 those funds to their very best use: benefitting the class members
6 directly.

7 Klier v. Elf Atochem North America, Inc., 658 F.3d 468, 475 (5th Cir. 2011).

8 The Third Circuit agrees that *cy pres* distributions are “most appropriate
9 where further individual distributions are economically infeasible,” but has
10 declined to hold that *cy pres* distributions are only appropriate under those
11 circumstances. In re Baby Products Antitrust Lit., 708 F.3d 163, 173 (3d Cir.
12 2013). Instead, the Third Circuit has held that in analyzing whether a class
13 settlement is fair, reasonable, and adequate, the Court should consider, among
14 other things, the degree of direct benefit provided to the class:

15 In making this determination, a district court may consider, among
16 other things, the number of individual awards compared to both the
17 number of claims and the estimated number of class members, the
18 size of the individual awards compared to claimants' estimated
19 damages, and the claims process used to determine individual
20 awards. *Barring sufficient justification, cy pres awards should
21 generally represent a small percentage of total settlement funds.*

22 Id. at 174. (Emphasis added.)

23 Whether the Ninth Circuit agrees with the Fifth Circuit’s or Third Circuit’s
24 approach, the *cy pres* distribution in this case falls short of the mark. The Court
25 is not convinced that the claimants have been fully compensated for their
26 damages because proof of purchase is needed to make more than one cash
27 claim or product bundle claim. The vast majority of the claims have been for one
28 unit of product even though it seems likely that many claimants purchased more
than one Hydroxycut Product. Accordingly, the claimants would not necessarily
receive a windfall if additional funds were distributed. Iovate has not claimed that
it would be infeasible to make additional distributions. Therefore, the degree of
direct benefit provided to the class by the settlement (\$1.4 million out of \$20
million) is insufficient. This is especially so in light of the fact that class counsel

1 seeks \$5 million in attorney's fees based in part on a percentage of the total \$20
2 million settlement fund.

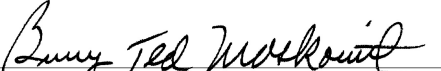
3 In sum, the Court finds that the *cy pres* distribution is not "guided by (1) the
4 objectives of the underlying statute(s); and (2) the interests of the silent class
5 members." Six Mexican Workers, 904 F.2d at 1307. It appears that the *cy pres*
6 relief is being used as a vehicle to settle the personal injury cases, not to provide
7 an indirect prospective benefit to the entire class. Because the *cy pres*
8 distribution violates the Ninth Circuit's standards governing *cy pres* awards, the
9 Court cannot find that the settlement is fair, reasonable, and adequate. Dennis,
10 697 F.3d at 868; Lane, 696 F.3d at 819-20.

11
12 **IV. CONCLUSION**

13 For the reasons discussed above, the motion for final approval of class
14 action settlement [09md2087- Doc. 1637; 09cv1088 - Doc. 201] is **DENIED**.

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16 **IT IS SO ORDERED.**

17 DATED: November 19, 2013

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19 **BARRY TED MOSKOWITZ**, Chief Judge
20 United States District Court
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