

Fill in this information to identify the case:

Debtor Orexigen Therapeutics, Inc.

United States Bankruptcy Court for the: _____ District of Delaware
(State)

Case number 18-10518

**Official Form 410
Proof of Claim**

04/16

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>Everyday Health Media, LLC</u> <small>Name of the current creditor (the person or entity to be paid for this claim)</small>	
	Other names the creditor used with the debtor <u>Everyday Health</u>	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? Everyday Health Media, LLC Attn: Legal Department 345 Hudson Street, 16th Floor New York, NY 10014 Contact phone <u>646-728-9700</u> Contact email <u>legal@ziffdavis.com</u>	Where should payments to the creditor be sent? (if different) Everyday Health Media, LLC PO Box 347351 Pittsburgh, PA 15251-4351 Contact phone <u>646-728-9700</u> Contact email <u>legal@ziffdavis.com</u>
	Federal Rule of Bankruptcy Procedure (FRBP) 2002(g) Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ <small>MM / DD / YYYY</small>	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor? No
 Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _

7. How much is the claim? \$ 3585108.25. Does this amount include interest or other charges?
 No
 Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim? Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
Limit disclosing information that is entitled to privacy, such as health care information.
breach of contract and serviced performed

9. Is all or part of the claim secured? No
 Yes. The claim is secured by a lien on property.
Nature or property:
 Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
 Motor vehicle
 Other. Describe: _____
Basis for perfection: _____
Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)
Value of property: \$ _____
Amount of the claim that is secured: \$ _____
Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.)
Amount necessary to cure any default as of the date of the petition: \$ _____
Annual Interest Rate (when case was filed) _____ %
 Fixed
 Variable

10. Is this claim based on a lease? No
 Yes. Amount necessary to cure any default as of the date of the petition. \$ _____

11. Is this claim subject to a right of setoff? No
 Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

No

Yes. Check all that apply:

	Amount entitled to priority
<input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	\$ _____
<input type="checkbox"/> Up to \$2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	\$ _____
<input type="checkbox"/> Wages, salaries, or commissions (up to \$12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	\$ _____
<input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	\$ _____
<input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	\$ _____
<input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.	\$ _____

* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?

No

Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

I am the creditor.

I am the creditor's attorney or authorized agent.

I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 06/12/2018
MM / DD / YYYY

/s/Robert Elliott
Signature

Print the name of the person who is completing and signing this claim:

Name Robert Elliott
First name Middle name Last name

Title Corporate Counsel

Company Everyday Health Media, LLC
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____

Contact phone _____ Email _____



KCC ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (888) 830-4646 | International (310) 751-2641

Debtor: 18-10518 - Orexigen Therapeutics, Inc.		
District: District of Delaware		
Creditor: Everyday Health Media, LLC Attn: Legal Department 345 Hudson Street, 16th Floor New York, NY, 10014 Phone: 646-728-9700 Phone 2: Fax: Email: legal@ziffdavis.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Disbursement/Notice Parties: Everyday Health Media, LLC PO Box 347351 Pittsburgh, PA, 15251-4351 Phone: 646-728-9700 Phone 2: Fax: E-mail: legal@ziffdavis.com DISBURSEMENT ADDRESS		
Other Names Used with Debtor: Everyday Health		Amends Claim: No Acquired Claim: No
Basis of Claim: breach of contract and serviced performed		Last 4 Digits: No Uniform Claim Identifier:
Total Amount of Claim: 3585108.25		Includes Interest or Charges: No
Has Priority Claim: No		Priority Under:
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No		Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:
Submitted By: Robert Elliott on 12-Jun-2018 3:36:15 p.m. Eastern Time Title: Corporate Counsel Company: Everyday Health Media, LLC		

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EVERYDAY HEALTH MEDIA, LLC,

Plaintiff,

-against-

OREXIGEN THERAPEUTICS, INC.,

Defendant.

Index No.

Index No. Purchased:

SUMMONS

Plaintiff designates New York
County as the place of trial based
upon CPLR 501 and CPLR 503(a)

TO THE ABOVE NAMED DEFENDANT: OREXIGEN THERAPEUTICS, INC.

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on the Plaintiff's attorneys within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: November 22, 2017
New York, New York

DAVIS & GILBERT LLP

By: /s/Neal H. Klausner
Neal H. Klausner
Jacklyn M. Siegel
1740 Broadway
New York, NY 10019
(212) 468-4800
*Attorneys for Plaintiff Everyday Health
Media, LLC*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EVERYDAY HEALTH MEDIA, LLC,

Plaintiff,

-against-

OREXIGEN THERAPEUTICS, INC.,

Defendant.

Index No.

COMPLAINT

Plaintiff Everyday Health Media, LLC (“Everyday Health” or “Plaintiff”), by and through its attorneys, Davis & Gilbert LLP, for its Complaint against Defendant Orexigen Therapeutics, Inc. (“Orexigen” or “Defendant”), alleges as follows:

NATURE OF THE ACTION

1. This action arises out of Orexigen’s improper and willful breach of its contractual obligations. Pursuant to a Master Services Agreement and two Statements of Work made part of the Master Services Agreement, Orexigen engaged Everyday Health to provide promotional services for its prescription drug, Contrave. As compensation, Orexigen agreed to pay Everyday Health certain Promotion Fees as expressly defined in each Statement of Work.

2. Everyday Health upheld its end of the bargain. Orexigen did not.

3. *First*, as set forth in the parties’ first Statement of Work, Orexigen agreed to compensate Everyday Health using a specific, defined methodology that would reward Everyday Health solely based on the success of its promotional efforts. In breach of the contract, however, Orexigen engaged in conduct that fundamentally distorted the agreed-upon mechanism for determining Everyday Health’s compensation—the very foundation of the parties’ agreement—

which, if not rectified, would deprive Everyday Health of millions of dollars in compensation for its valuable services.

4. *Second*, Orexigen has repudiated its obligation to pay Everyday Health additional amounts that will become due in the future. Orexigen has not only indicated its refusal to pay those amounts, but has also failed to honor its contractual responsibility to provide the data necessary for Everyday Health to calculate them.

5. *Third*, the parties specifically agreed in their sixth Statement of Work that if Orexigen exercised its contractual right to terminate the agreement early, then Everyday Health would have the right to accelerate delivery of valuable user engagements with Contrave-related content and to bill for whatever successful delivery of those engagements Everyday Health achieved, subject only to the overall cap on engagements set for the entire contract. After the parties exercised those respective rights, Everyday Health successfully delivered, on an accelerated basis, the full amount of engagements set by the contract, and Orexigen received the value of those significant engagements. Orexigen now disclaims its obligation to pay Everyday Health for the value it delivered, in breach of the parties' contract.

PARTIES

6. Plaintiff Everyday Health is a Delaware limited liability company with its principal place of business located at 345 Hudson Street, 16th Floor, New York, New York. Among other things, Everyday Health provides advertising, promotion, and marketing services to pharmaceutical companies seeking to market their products to medical professionals.

7. Upon information and belief, defendant Orexigen is a Delaware corporation with its principal place of business located at 3344 N. Torrey Pines Court, La Jolla, California. Upon

information and belief, Orexigen is engaged in the development, manufacturing, and selling of pharmaceutical products.

JURISDICTION AND VENUE

8. Jurisdiction is proper in this Court and this Court has personal jurisdiction over Defendant because the parties consented to jurisdiction in the federal and state courts located in Manhattan.

9. Venue is proper in New York County because Plaintiff is a resident of Manhattan and the parties agreed to venue in the federal and state courts located in Manhattan.

STATEMENT OF FACTS

The Master Services Agreement

10. On or about June 21, 2016, Everyday Health and Orexigen entered into a Master Services Agreement with an initial term of three years (the "MSA").

11. Under the MSA, Everyday Health agreed to provide Orexigen certain services as set forth in Statements of Work ("SOWs") to be executed by the parties, which would be incorporated into and governed by the MSA. Each SOW would "set forth, on terms mutually agreed upon by the parties, the specific Services to be performed by Everyday Health and the compensation to be paid by [Orexigen] for the provision of such Services." (MSA § 1.1.)

12. Section 2.1 of the MSA required Orexigen to pay Everyday Health the fees specified in each SOW. In addition, the MSA provided that "all invoices are due net thirty (30) days from the date of Everyday Health's invoice. If any portion of an invoice is disputed, then [Orexigen] shall pay the undisputed amounts as set forth in the preceding sentence." (*Id.* § 2.3.)

The Parties Enter Statement of Work No. 1

13. On or about June 21, 2016, Everyday Health and Orexigen executed Statement of Work No. 1 to Master Services Agreement (“SOW No. 1”). Under SOW No. 1, Everyday Health agreed to promote Orexigen’s prescription drug, Contrave, to a defined set of medical professionals in the United States.

14. Everyday Health did not charge Orexigen any upfront fees for its promotion and marketing services under SOW No. 1. Instead, the parties agreed that Everyday Health would earn a share of the revenue generated by its promotional services. This “gain share” program allowed Orexigen to enjoy Everyday Health’s promotional services without any upfront risk; Orexigen would only have to pay if Everyday Health’s efforts were successful.

15. Everyday Health, on the other hand, incurred considerable expenses in providing promotional services to Orexigen in reliance on Orexigen’s agreement to pay Everyday Health based on this “gain share” compensation model.

16. In order for this program to work, the parties had to agree to a specific mechanism by which Everyday Health’s compensation would be accurately calculated. SOW No. 1 laid out just such a mechanism.

17. Pursuant to Section 5.1 and Exhibit 1 of SOW No. 1, the parties agreed that Everyday Health’s compensation would be determined by comparing, among other things, (a) the net revenue from Contrave prescriptions written by a specified “Target Group” of medical professionals to whom Everyday Health promoted Contrave, to (b) the net revenue from prescriptions written by a “Control Group” of medical professionals to whom Everyday Health did not promote Contrave.

18. Pursuant to Section 1.1 of SOW No. 1, both the Target Group and the Control Group would be taken from a defined group of medical professionals in the United States called

the “Everyday Health Segment.” Critically, Section 1.1(c) of SOW No. 1 provided that the Everyday Health Segment “excludes Medical Professionals in the Territory to whom [Orexigen] promotes the PRODUCT.”

19. In other words, the value of Everyday Health’s promotional services would be measured by calculating the difference between the number of Contrave prescriptions written by Target Group medical professionals who had received Everyday Health’s promotions and the number of Contrave prescriptions written by Control Group medical professionals who did not receive any of Everyday Health’s or Orexigen’s Contrave promotions. In that way, a “clean” Control Group was to be used as a baseline to measure the impact of Everyday Health’s promotional services to the Target Group.

20. Maintenance of a “clean” Control Group pursuant to Section 1.1(c) of the SOW was crucial to the parties’ agreed-upon measure of compensation. If Orexigen promoted Contrave to medical professionals in the Control Group, thereby causing Control Group medical professionals to write more Contrave prescriptions, it would impact the contractual measure of the value of Everyday Health’s promotions, decreasing the difference between the Target Group’s prescription activity and the Control Group’s prescription activity. By promoting to the Control Group, Orexigen would improperly impact that baseline by reducing the measure of Everyday Health’s success.

Orexigen Contaminates the Control Group and Refuses to Pay Everyday Health

21. In the spring of 2017, Everyday Health suspected that Orexigen had improperly contaminated the Control Group by promoting Contrave to medical professionals in that group. The volume of Contrave prescriptions written by Target Group medical professionals versus Control Group medical professionals had been steadily increasing over the prior two quarters,

but in the first quarter of 2017, the difference between the number of prescriptions written by Target Group and Control Group medical professionals reversed course and began to decline.

22. Because of this circumstance, Everyday Health requested a record of the Control Group and Target Group medical professionals whom Orexigen's sales representatives had contacted.

23. After numerous requests by Everyday Health, and Orexigen's initial refusal to provide the requested information, Orexigen provided files showing that Orexigen's sales representatives had contacted more than one thousand medical professionals in the Control Group during the first and second quarters of 2017 (the "Call-On Reports").

24. Orexigen itself prepared the Call-On Reports.

25. Upon information and belief, the Call-On Reports, among other things, identified by name those medical professionals in the Control Group who had in-person meetings with or were otherwise contacted by Orexigen sales representatives who had responsibility for promoting Contrave.

26. The Call-On Reports showed that in some instances, Orexigen's sales representatives had met with individual Control Group medical professionals multiple times. In addition, Orexigen's sales representatives had contacted numerous medical professionals in the Target Group.

27. Orexigen's sales representatives conducted these meetings with Control Group medical professionals even though SOW No. 1 provided—and Orexigen agreed—that it could not promote Contrave to medical professionals in the Control Group. Orexigen understood that this prohibition was crucial to maintaining the integrity of the baseline from which Everyday Health's success would be measured.

28. If Orexigen wanted to promote Contrave to medical professionals in the Control Group, the parties' agreement required that Orexigen remove those medical professionals from the Control Group.

29. Accordingly, by promoting Contrave to medical professionals in the Control Group, despite the SOW's clear provision that the Everyday Health Segment must exclude medical professionals to whom Orexigen promoted the product, Orexigen effectively removed those medical professionals from the Control Group.

30. On July 31, 2017 and August 30, 2017, Everyday Health issued invoices for Promotion Fees owed by Orexigen under SOW No. 1 for the first and second quarters of 2017. Payment was due by August 30, 2017 and September 29, 2017, respectively.

31. To date, Orexigen has not paid either invoice.

32. Everyday Health calculated these invoices by subtracting from its calculations the Contrave prescriptions written by medical professionals in both the Control Group and Target Group whom Orexigen's sales representatives had contacted.

33. These invoices were inaccurate and inconsistent with the SOW. By removing prescriptions written by contaminated Target Group medical professionals from its calculation of Promotion Fees, Everyday Health was deprived of compensation for the value it delivered to Orexigen with respect to those medical professionals, despite Orexigen's promise to compensate Everyday Health for such value.

34. Accordingly, on October 10, 2017, Everyday Health issued adjusted and restated invoices for the first and second quarters of 2017. As Everyday Health explained to Orexigen, these corrected invoices were calculated by removing prescriptions written by contaminated

medical professionals in the Control Group, but not those written by contaminated medical professionals in the Target Group.

35. The restated first and second quarter 2017 invoices, for \$587,089.96 and \$1,052,135.96, respectively, were sent to Orexigen on October 12, 2017. Payment was due 30 days later, on November 11, 2017.

36. To date, Orexigen has failed and refused to pay any portion of the restated first and second quarter invoices, including any undisputed portion thereof, as required by Section 2.3 of the MSA.

Orexigen Refuses to Pay Future Promotion Fees Under SOW No. 1

37. Pursuant to Sections 5.1 and 6.1, and Exhibits 1 and 2, of SOW No. 1, Orexigen is obligated to provide Everyday Health certain data so that Everyday Health can calculate the Promotion Fees Orexigen must pay Everyday Health for its services. In particular, Orexigen must provide information concerning the number of Contrave prescriptions written by medical professionals in the Control Group and Target Group, as well as a net sales value per Contrave prescription figure.

38. On November 15, 2017, Everyday Health issued an invoice for the third quarter of 2017 in the amount of \$1,211,777.33, and sent that invoice to Orexigen.

39. To date, Orexigen has failed to provide the net sales value data necessary for Everyday Health to calculate the precise Promotion Fees due under SOW No. 1 for the third quarter of 2017.

40. For this reason, Everyday Health calculated its Promotion Fees due under SOW No. 1 for the third quarter of 2017 using the most recent net sales value Orexigen had provided to Everyday Health, from the second quarter of 2017.

41. Everyday Health has explained to Orexigen that it will continue to calculate Promotion Fees due under SOW No. 1 by removing prescriptions written by Control Group medical professionals who were contacted by Orexigen's sales representatives.

42. Orexigen has indicated to Everyday Health that it will not accept any invoice for Promotion Fees calculated in that manner.

Orexigen Anticipatorily Breaches SOW No. 1's Tail Payment Provision

43. SOW No. 1 also provided that if the SOW was terminated or expired, then Orexigen would be obligated to pay Everyday Health a "Tail Payment" for a period of 12 months after the termination or expiration (the "Tail Period").

44. The SOW provides that "Tail Payments during the Tail Period are to be determined using the same methodology as used during each Contract Quarter during the SOW Term." (SOW No. 1 § 7.2(b).)

45. The Tail Payment provision reflected the parties' understanding that the benefits Orexigen would receive from Everyday Health's promotion services would not occur immediately, but instead would be realized over time. Accordingly, in recognition of the value Orexigen would continue to receive during the Tail Period from Everyday Health's efforts before the Tail Period, Orexigen agreed to pay Everyday Health the Tail Payments, so that Everyday Health would be fairly compensated for the full value of the services it provided to Orexigen during the term of the SOW.

46. By letter dated August 1, 2017, Everyday Health notified Orexigen that it had materially breached SOW No. 1 by promoting Contrave to medical professionals in the Everyday Health Segment.

47. By letter dated October 11, 2017, through counsel, Everyday Health informed Orexigen that because Orexigen had not cured its material breach within 60 days of notice, Everyday Health was exercising its right to terminate SOW No. 1 pursuant to Section 3.3 of the MSA, effectively immediately.

48. In addition, Everyday Health reminded Orexigen of its contractual obligation, under Sections 5.1 and 6.1, and Exhibits 1 and 2, of SOW No. 1, to provide Everyday Health the prescription and net sales value data required for Everyday Health to calculate the Tail Payments due under the SOW through the end of the Tail Period.

49. The Tail Period runs from October 11, 2017, to October 11, 2018.

50. By letter dated October 26, 2017, through counsel, Orexigen informed Everyday Health that it would not recognize Everyday Health's termination of SOW No. 1 under Section 3.3 of the MSA.

51. Instead, Orexigen stated that it was exercising its right to terminate SOW No. 1 for cause, arguing that Everyday Health, and not Orexigen, was in material breach of the contract.

52. Orexigen stated further that because it was terminating SOW No. 1 for cause, "no tail payment is applicable."

53. To date, Orexigen has failed to provide the net sales value data necessary for Everyday Health to calculate the Tail Payments due under SOW No. 1 for the beginning of the Tail Period.

The Parties Enter Statement of Work No. 6

54. On or about January 1, 2017, Orexigen and Everyday Health executed Statement of Work No. 6 to Master Services Agreement ("SOW No. 6").

55. Under SOW No. 6, Everyday Health agreed to promote Contrave by featuring certain Contrave-branded assets on its Everyday Health Professional Portfolio web pages and in emails.

56. In exchange for these services, Orexigen agreed to “pay Everyday Health the Promotion Fees set forth on Exhibit 1” to SOW No. 6. (SOW No. 6 § 4.1.)

57. Exhibit 1 provided a schedule for the delivery of and billing for user “Engagements” with the Contrave-branded assets via Everyday Health’s web pages and emails.

58. In general, the parties agreed in SOW No. 6 that an “Engagement” would occur when a user—typically a medical professional—viewed a piece of Contrave-related content on one of the web pages or in one of the emails for at least five seconds.

59. By defining Engagements in this manner, the parties agreed that user interactions with Contrave-related content that lasted for at least five seconds delivered real value to Orexigen, reflecting meaningful exposure to the product for the medical professionals who might later write prescriptions for Contrave.

60. To compensate Everyday Health for the value it delivered to Orexigen, the parties agreed that Everyday Health would be compensated for each Engagement delivered, subject to certain limitations.

61. According to the schedule, Everyday Health would be compensated for the delivery of up to 1,500 Engagements per quarter.

62. As provided in the SOW and Exhibit 1, fees for those Engagements would be billed on a “Cost-Per-Engagement basis” at a rate of \$205 per Engagement, for a total payment up to \$307,500 per quarter, and \$1,230,000 for the calendar year 2017. (*Id.* § 4.2, Ex. 1.)

63. The parties agreed that “[b]illing will be based on actual Engagements recognized by month.” (*Id.* § 4.2(c).) Everyday Health agreed to “invoice [Orexigen] monthly.” (*Id.* § 4.2.)

64. SOW No. 6 provided for a one-year term, through December 31, 2017.

65. At Orexigen’s request, the parties agreed that Orexigen could terminate the SOW “at any time and for any reason by giving ninety (90) days’ written notice to Everyday Health.” (*Id.* § 2.2.)

66. In exchange for including this early termination right, Everyday Health insisted upon—and Orexigen agreed to include—a right of acceleration in connection with Everyday Health’s delivery of and billing for Engagements.

67. Specifically, the parties agreed that:

Everyday Health will adhere to the quarterly breakdowns of billable Engagements as set forth in Exhibit 1. Notwithstanding the foregoing, in the event that [Orexigen] terminates this SOW in accordance with Section 2.2 herein, that parties acknowledge that *Everyday Health may accelerate and bill for quarterly delivery in excess of such quarterly caps.*

(*Id.* § 3.1 (emphasis added).)

68. In other words, the parties agreed that if Orexigen exercised its early termination right, then Everyday Health need not adhere to the quarterly delivery and billing schedule set forth in Exhibit 1, and instead could speed up its delivery of Engagements and bill Orexigen for them accordingly.

69. Among other reasons, Everyday Health insisted on this acceleration right because it had agreed to cover all the expenses for its promotional services and, therefore, needed the opportunity to recoup its investment by seeking to deliver, and get paid for, additional Engagements.

70. Everyday Health’s right to accelerate did not alter the contract’s requirement that Everyday Health only bill Orexigen for Engagements it successfully delivered. As such,

Everyday Health's compensation under SOW No. 6, following Orexigen's notice of termination of that SOW, would continue to be based on the value Everyday Health actually delivered to Orexigen through user Engagements.

Orexigen Breaches Its Obligations Under SOW No. 6

71. On or about January 27, 2017, Orexigen notified Everyday Health of its intent to exercise its early termination right under Section 2.2 of SOW No. 6, which would terminate 90 days later.

72. In light of Orexigen's election to terminate the SOW, Everyday Health, in turn, exercised its right to accelerate delivery of Engagements and to bill for them under Section 3.1 of SOW No. 6.

73. Everyday Health succeeded in delivering valuable Engagements to Orexigen during the 90-day period before the termination became effective.

74. Everyday Health issued invoices to Orexigen pursuant to SOW No. 6 for Engagements delivered in January, February, and March 2017. These invoices, for \$97,580, \$209,920, and \$188,395, respectively, collectively exceeded the \$307,500 cap that would have applied to the first quarter of 2017 had Orexigen not terminated the SOW, triggering Everyday Health's right to accelerate.

75. Orexigen paid the January, February, and March invoices without objection.

76. By the end of April, Everyday Health had delivered to Orexigen more than the maximum number of Engagements contemplated by Exhibit 1 to SOW No. 6.

77. On April 30, 2017, Everyday Health issued an invoice for \$734,105, for compensation for Engagements delivered to Orexigen in April (the "April Invoice").

78. The actual value of Engagements delivered in April, as defined by the contract, was significantly higher than \$734,105. Everyday Health reduced the amount due in the April Invoice so that the total value of the Engagements billed to Orexigen under SOW No. 6 did not exceed the \$1,230,000 maximum total cost of Engagements set forth in Exhibit I to SOW No. 6. The April Invoice included a notation that showed the total number of Engagements actually delivered and the contractual cost-per-Engagement, which exceeded this maximum.

79. Payment pursuant to the April Invoice was due on May 31, 2017.

80. On May 31, 2017, Orexigen responded, purporting to dispute the April Invoice in its entirety. Orexigen did not provide any basis for its refusal to pay.

81. Everyday Health has repeatedly demanded that Orexigen promptly pay the April Invoice, as required by SOW No. 6.

82. To date, Orexigen has failed and refused to pay any portion of the April Invoice.

**AS AND FOR THE FIRST CAUSE OF ACTION
(Breach of Contract—SOW No. 1)**

83. Everyday Health repeats and realleges the allegations stated in paragraphs 1 through 82 of the Complaint as if set forth fully herein.

84. The MSA, into which SOW No. 1 was incorporated, is a valid and enforceable contract between Everyday Health and Orexigen.

85. Everyday Health has duly performed its material obligations under the MSA and SOW No. 1, and Orexigen has accepted and benefited from Everyday Health's performance.

86. Despite demand, Orexigen has failed and refused to pay Everyday Health all amounts due under the MSA pursuant to SOW No. 1, including the Promotion Fees due for services rendered in the first and second quarters of 2017.

87. Despite demand, Orexigen has failed to provide the net sales value data necessary for Everyday Health to calculate the precise Promotion Fees due under SOW No. 1 for the third quarter of 2017 and the Tail Payments due under SOW No. 1 for the beginning of the Tail Period.

88. As a result of Orexigen's breaches of the MSA and SOW No. 1, Everyday Health has been damaged in an amount to be determined at trial, but in no event less than \$1,639,225.92, plus interest, costs, and disbursements.

**AS AND FOR THE SECOND CAUSE OF ACTION
(Breach of Contract—SOW No. 6)**

89. Everyday Health repeats and realleges the allegations stated in paragraphs 1 through 88 of the Complaint as if set forth fully herein.

90. The MSA, into which SOW No. 6 was incorporated, is a valid and enforceable contract between Everyday Health and Orexigen.

91. Everyday Health has duly performed its material obligations under the MSA and SOW No. 6, and Orexigen has accepted and benefited from Everyday Health's performance.

92. Despite demand, Orexigen has failed and refused to pay Everyday Health all amounts due under the MSA pursuant to SOW No. 6, including the Promotion Fees due for services rendered in April 2017.

93. As a result of Orexigen's breach of the MSA, Everyday Health has been damaged in an amount to be determined at trial, but in no event less than \$734,105, plus interest, costs, and disbursements.

**AS AND FOR THE THIRD CAUSE OF ACTION
(Anticipatory Breach of Contract—SOW No. 1)**

94. Everyday Health repeats and realleges the allegations stated in paragraphs 1 through 93 of the Complaint as if set forth fully herein.

95. The MSA, into which SOW No. 1 was incorporated, is a valid and enforceable contract between Everyday Health and Orexigen.

96. Everyday Health has duly performed its material obligations under the MSA and SOW No. 1, and Orexigen has accepted and benefited from Everyday Health's performance.

97. Orexigen has anticipatorily repudiated its obligation to pay Everyday Health the contractually-required Promotion Fees owed for services rendered under SOW No. 1 in the third quarter of 2017.

98. Everyday Health validly terminated SOW No. 1 pursuant to Section 3.3 of the MSA as of October 11, 2017.

99. Orexigen has anticipatorily repudiated its obligation to pay Everyday Health the contractually-required Tail Payments it is owed during the 12-month Tail Period following termination of SOW No. 1.

100. Orexigen has anticipatorily repudiated its obligation to provide the prescription and net sales value data necessary for Everyday Health to calculate the Tail Payments it is owed under SOW No. 1 during the Tail Period.

101. As a result of Orexigen's anticipatory breach of the MSA, Everyday Health has been damaged in an amount to be determined at trial, but in no event less than the estimated amount of \$1,211,777.33 for the third quarter of 2017 and the amount of additional required Tail Payments that continue to accrue, plus interest, costs, and disbursements.

**AS AND FOR THE FOURTH CAUSE OF ACTION
(Breach of the Covenant of Good Faith and Fair Dealing—SOW No. 1)
(In the Alternative to First and Third Causes of Action)**

102. Everyday Health repeats and realleges the allegations stated in paragraphs 1 through 101 of the Complaint as if set forth fully herein.

103. The MSA, into which SOW No. 1 was incorporated, is a valid and enforceable contract between Everyday Health and Orexigen.

104. Pursuant to the MSA, into which SOW No. 1 was incorporated, Orexigen owes Everyday Health an implied covenant of good faith and fair dealing.

105. By allowing its sales representatives to contact medical professionals in the Control Group, Orexigen prevented Everyday Health from receiving the benefit of its bargain with respect to its compensation for services provided to Orexigen under SOW No. 1.

106. As a result, Orexigen breached the implied covenant of good faith and fair dealing.

107. As a result of Orexigen's breach of the implied covenant of good faith and fair dealing, Everyday Health has been damaged in an amount to be determined at trial, but in no event less than \$2,851,003.25, plus interest, costs, and disbursements.

**AS AND FOR THE FIFTH CAUSE OF ACTION
(Quantum Meruit/Unjust Enrichment)
(In the Alternative to First, Third, and Fourth Causes of Action)**

108. Everyday Health repeats and realleges the allegations stated in paragraphs 1 through 107 of the Complaint as if set forth fully herein.

109. Everyday Health, in good faith, performed promotional, marketing, and advertising services for Orexigen.

110. Orexigen accepted, used, and received the benefit from the promotional, marketing, and advertising services performed by Everyday Health.

111. Orexigen knew that Everyday Health did not charge Orexigen any upfront fees for its services, but that Everyday Health agreed and reasonably expected to be compensated for the services it provided to Orexigen based on the results of those services.

112. Everyday Health incurred considerable expenses in performing promotional, marketing, and advertising services for Orexigen because of its reasonable expectation of compensation.

113. As a result of the foregoing, Orexigen has been unjustly enriched at the expense of Everyday Health in an amount to be determined at trial, but in no event less than \$2,851,003.25, plus interest, costs, and disbursements.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays for relief as follows:

(1) That judgment be entered in favor of Plaintiff and against Defendant in an amount to be determined at trial, but in no event less than \$3,585,108.25, plus pre-judgment interest, comprised of:

- (a) \$1,639,225.92 for services rendered in the first and second quarters of 2017 under SOW No. 1;
- (b) An estimated amount of \$1,211,777.33 for services rendered in the third quarter of 2017 under SOW No. 1;
- (c) Additional Tail Payments under SOW No. 1 that continue to accrue; and
- (d) \$734,105 for Engagements delivered in April 2017 under SOW No. 6;

(2) That Defendant be ordered to provide the Contrave prescription and net sales value data necessary for Everyday Health to calculate the precise Promotion Fees due under SOW No. 1 for the third quarter of 2017 and the Tail Payments due under SOW No. 1 for the Tail Period;

- (3) That Plaintiff be awarded pre-judgment interest and interest on the judgment;
- (4) That Plaintiff be awarded its costs of suit; and
- (5) That the Court award Plaintiff such other and further relief as is just and proper.

Dated: November 22, 2017

DAVIS & GILBERT LLP

By: /s/ Neal H. Klausner

Neal H. Klausner
Jacklyn M. Siegel
1740 Broadway
New York, New York 10019
Telephone: (212) 468-4800
Facsimile: (212) 468-4888
nklausner@dglaw.com
jsiegel@dglaw.com

*Attorneys for Plaintiff
Everyday Health Media, LLC*