

FIRST AMENDED SETTLEMENT AGREEMENT AND RELEASE

The parties hereto, by and through their respective counsel, in consideration for and subject to the promises, terms and conditions contained in this First Amended Settlement Agreement and Release (“Settlement Agreement”), hereby agree, subject to Court approval pursuant to Federal Rule of Civil Procedure 23, as follows:

I. RECITALS

WHEREAS, on or about July 18, 2011, Plaintiff Claire Delacruz (“Plaintiff”) initiated a class action lawsuit against CytoSport, Inc. (“CytoSport,” together with Plaintiff, the “Parties” and each a “Party”) in the United States District Court for the Northern District of California, Case No. 4:11-cv-03532 (the “Action”);

WHEREAS, Plaintiff filed the now-operative Second Amended Complaint in the Action on April 18, 2012;

WHEREAS, Plaintiff has alleged that CytoSport has falsely or misleadingly represented the nutritional attributes and healthfulness of its Muscle Milk® Ready-to-Drink protein beverage (the “RTD”) and Muscle Milk® protein bar (the “Bar,” together with the RTD, the “Products”) by, among other things: (1) using the words “Healthy Sustained Energy” on the label of certain RTDs, (2) using the words “Healthy Fats” on the label of certain RTDs, (3) using the words “Good Carbohydrates” on the label of certain RTDs, (4) using the words “Healthy Sustained Energy” on the label of the Bars, (5) using the words “0g Trans Fat” on the label of the Bars, (6) including fractionated palm kernel oil and partially hydrogenated palm oil as ingredients in the Bars, and (7) using similar words and phrases in the advertising and marketing of the Products on CytoSport’s website and in television commercials;

WHEREAS, the Second Amended Complaint asserts claims for alleged violations of California’s Consumers Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*), California’s Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*), California’s False Advertising Law (Cal. Bus. & Prof. Code § 17500 *et seq.*), fraud, negligent misrepresentation, and unjust enrichment on behalf of a purported nationwide class of consumers;

WHEREAS, Plaintiff, by and through her counsel, has conducted an investigation into the facts and law relating to the matters alleged in the Action by, *inter alia*, conducting fact discovery (including the depositions of three senior CytoSport executives and the production of thousands of pages of documents) and exchanging expert reports, as well as legal research and briefing on the sufficiency of the claims in the Second Amended Complaint;

WHEREAS, Plaintiff and her counsel hereby acknowledge that in the course of their investigation they received, examined, and analyzed information, documents, products, and other items that they deem necessary and appropriate to enable them to enter into this Settlement Agreement on a fully informed basis;

WHEREAS, this Settlement Agreement was reached as a result of extensive arms-length negotiations between counsel for Plaintiff and Defense Counsel and after multiple mediation sessions with the Hon. Edward A. Panelli (ret.) and Hon. Carl J. West (ret.), both currently affiliated with JAMS;

WHEREAS, counsel for Plaintiff has considered that, if the claims asserted in the Action are not settled now by voluntary agreement among the parties, future proceedings (including appeals) would be protracted and expensive, involve highly complex legal and factual issues relating to class certification, liability, and damages, and would involve substantial uncertainties, delays, and other risks inherent in litigation. In light of these factors, counsel for Plaintiff and Plaintiff have concluded that it is desirable and in the best interests of Plaintiff and the members of the putative class to settle the claims asserted in the Action at this time upon the terms set forth in this Settlement Agreement;

WHEREAS, counsel for Plaintiff and Plaintiff have concluded that the settlement embodied in this Settlement Agreement is fair, reasonable, adequate, and in the best interests of the putative class;

WHEREAS, CytoSport has vigorously denied and continues to vigorously deny all of the claims and contentions alleged in the Action, denies any wrongdoing and denies any liability to Plaintiff or any members of the putative class;

WHEREAS, CytoSport has also considered the risks and potential costs of continued litigation, on the one hand, and the benefits of the proposed settlement, on the other hand, and desires to settle the Action upon the terms and conditions set forth in this Settlement Agreement;

WHEREAS, CytoSport has agreed not to oppose class action treatment of the claims alleged in the Action solely for the purpose of effecting the compromise and settlement of those claims on a class basis as set forth herein and not for any other purpose; and

NOW THEREFORE, it is hereby stipulated and agreed, by and between the Parties, through their respective counsel, that: (a) the Action be fully and finally compromised, settled, and released upon final settlement approval by the Court after a hearing or hearings as provided for in this Settlement Agreement; and (b) upon such approval by the Court, a Final Order and Judgment, substantially in the form attached hereto as Exhibit "B," be entered dismissing the Action with prejudice, once the Effective Date (as defined below) has been reached, all upon the following terms and conditions.

II. DEFINITIONS

1. "Bar Date" means the final time and date by which a Claim Form must be received by the Settlement Administrator in order for a Settlement Class Member to be entitled to any of the settlement consideration contemplated in this Settlement Agreement.

2. "Claim Form" means the claim and release form(s) substantially in the form attached hereto as Exhibit "C," which may be modified to meet the requirements of the Claims Administrator, pursuant to which Settlement Class Members can recover one of the benefits described in Paragraphs 32 through 34.

3. "Claim Period" means the time period from the Notice Date through the Bar Date, which is the time period that Settlement Class Members will have to claim the benefits and payments contemplated by Paragraphs 32 through 34 of this Settlement Agreement.

4. "Class Counsel" means the law firm of Baron & Budd, P.C.

5. "Class Period" means the period of time beginning July 18, 2007 through December 31, 2012.

6. “Court” means the United States District Court for the Northern District of California and the Judge assigned to the Action.

7. “Defense Counsel” means the law firm of Gibson, Dunn & Crutcher LLP.

8. “Effective Date” means the date on which the Final Order and Judgment (defined below) in the Action becomes “Final.” As used in this Settlement Agreement, “Final” means three business days after all of the following conditions have been satisfied:

(a) The Final Order and Judgment has been entered; and

(b) (i) if reconsideration and/or appellate review is not sought from the Final Order and Judgment, the expiration of the time for the filing or noticing of any motion for reconsideration, appeal, petition, and/or writ; or (ii) if reconsideration and/or appellate review is sought from the Final Order and Judgment: (A) the date on which the Final Order and Judgment is affirmed and is no longer subject to judicial review, or (B) the date on which the motion for reconsideration, appeal, petition, or writ is dismissed or denied and the Final Order and Judgment is no longer subject to judicial review.

9. “Final Fairness Hearing” means the hearing that is to take place after the entry of the Preliminary Approval Order and after the Notice Date for purposes of: (a) entering the Final Order and Judgment and dismissing the Action with prejudice; (b) determining whether the Settlement should be approved as fair, reasonable, adequate and in the best interests of the Settlement Class Members; and (c) to rule upon an application by Class Counsel for an award of attorneys’ fees.

10. “Final Order and Judgment” means an order fully and finally approving the Settlement and dismissing the Action with prejudice, substantially in the form attached hereto as Exhibit “B.”

11. “Long Form Notice” means the long form “NOTICE OF SETTLEMENT,” substantially in the form attached hereto as Exhibit “D.”

12. “Notice Date” means the date that the Summary Notice is initially published in USA Today (or another newspaper, as provided in Exhibit F), and shall be within 60 days of the Court’s entry of the Preliminary Approval Order.

13. “Preliminary Approval Order” means the Order Preliminarily Approving Settlement and Notice Procedures, substantially in the form attached hereto as Exhibit “A.”

14. [This paragraph intentionally left blank.]

15. “Released Claims”

(a) “Released Claims” means any and all claims, demands, rights, damages, obligations, suits, liens, and causes of action over every nature and description whatsoever, ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including unknown claims (as described in paragraph 47 below) as of the Effective Date by Plaintiff and all Settlement Class Members (and Plaintiff’s and Settlement Class Members’ respective heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns) that:

(i) were brought or that could have been brought against the Released Parties (as hereinafter defined), or any of them, and that arise out of or are related in any way to any or all of the acts, omissions, facts, matters, transactions, or occurrences that were or could have been directly or indirectly alleged or referred to in the Action (including, but not limited to alleged violations of any and all federal, state, commonwealth, district, or territorial consumer protection, unfair competition, and/or false or deceptive advertising statutes (including, but not limited to, Cal. Bus. & Prof. Code § 17200 *et seq.*, Cal. Bus. & Prof. Code § 17500 *et seq.*, and Cal. Civ. Code § 1750 *et seq.*); breach of contract; breach of express or implied warranty; fraud; negligent misrepresentation; unjust enrichment, restitution, trespass, conversion, declaratory or injunctive relief, and other equitable claims or claims sounding in contract and tort); and

(ii) relate in any way to any claim, advertisement, representation, assertion, promise, or similar statement made by any of the Released Parties in any forum or medium whatsoever about, concerning, regarding, portraying, and/or relating to the healthfulness

or nutritional attributes of the Products, including but not limited to all claims that relate in any way to: the use of the words “Healthy Sustained Energy” and/or “Sustained Energy” with respect to the Products; the use of the words “Healthy Fats” with respect to the Products; the use of the words “Good Carbohydrates” with respect to the Products; the calories provided by the Products; the ingredients in the Products, including but not limited to the amounts and/or presence of: (a) fractionated palm kernel oil, partially hydrogenated palm oil, or any variant thereof, (b) *trans* fat, (c) sugars of any type, or (d) artificial sweeteners of any type; the amount and/or presence of fat or saturated fat in the Products; the amount and/or presence of cholesterol in the Products; the amount and/or presence of carbohydrates in the Products; the amount and/or presence of protein in the Products; the marketing of the Products as “premium,” “healthy,” part of a “healthy lifestyle,” as a “healthy alternative beverage” and/or related statements; guidelines concerning when and/or in what quantities to use the Products; and compliance with any federal, state, or local labeling requirements with respect to the healthfulness, nutritional content, and/or the nutritional attributes of the Products.

(b) “Released Claims” do not include claims for personal injury.

16. “Released Parties” means: CytoSport and each of its employees, assigns, attorneys, agents, and all of its past, present, and future officers and directors; all of CytoSport’s parents, subsidiaries, divisions, affiliates, predecessors, and successors, and each of their respective employees, assigns, attorneys, agents, resellers and past, present and future officers and directors; and any and all persons, entities, or corporations involved in any way in the development, formulation, manufacture, sale, or marketing of the Products or their labeling, packaging, or advertising.

17. “Releasing Parties” means Plaintiff and all Settlement Class Members, and each of their predecessors, successors, assigns, heirs, or executors.

18. “Settlement” means the settlement embodied in this Settlement Agreement.

19. “Settlement Administrator” means the qualified third party selected by the parties and approved by the Court in the Preliminary Approval Order to administer the Settlement,

including providing Summary Notice. The parties agree to recommend that the Court appoint Garden City Group as Settlement Administrator. If Garden City Group is unavailable or the parties agree otherwise, the parties may recommend a different proposed Settlement Administrator.

20. “Settlement Class” means all persons who purchased the Products at retail in the United States during the Class Period. Excluded from the Settlement Class are all persons who are employees, directors, officers, and agents of CytoSport or its subsidiaries and affiliated companies, as well as the Court and its immediate family and staff.

21. “Settlement Class Member(s)” means any member of the Settlement Class who does not elect exclusion or opt out from the Settlement Class pursuant to the terms and conditions for exclusion set out in this Settlement Agreement, the Long Form Notice, and the Summary Notice.

22. “Summary Notice” means the summary “Notice of Proposed Class Action Settlement,” substantially in the form attached hereto as Exhibit “E.”

23. “Total Settlement Value” means the amount of \$5,000,000, which is the total monetary value that the Parties ascribe to all relief, benefits, fees, costs, expenses, and any and all other expenditures to be paid by CytoSport as described herein.

III. SUBMISSION OF THE SETTLEMENT TO THE COURT

24. Promptly upon the signing of this Settlement Agreement, Class Counsel shall submit this Settlement Agreement to the Court for entry of the Preliminary Approval Order, for the purpose of, among other things:

(a) Approving the Long Form Notice and Summary Notice, substantially in the form set forth at Exhibits “D” and “E”;

(b) Finding that the requirements for provisional certification of the Settlement Class have been satisfied, appointing Plaintiffs as the representatives of the Settlement Class, and Class Counsel as counsel for the Settlement Class, and preliminarily

approving the Settlement as being within the range of reasonableness such that the Long Form Notice and Summary Notice should be provided pursuant to this Settlement Agreement;

(c) Scheduling the Final Fairness Hearing to determine whether the Settlement should be approved as fair, reasonable, adequate and in the best interests of the Settlement Class Members, and to determine whether a Final Order and Judgment should be entered dismissing the Action with prejudice;

(d) Preliminarily approving the form of the Final Order and Judgment;

(e) Directing that notice of the Settlement and of the Fairness Hearing shall be given to the Settlement Class as follows:

(i) Publishing, starting on the Notice Date and finishing within forty-five days thereafter, the Summary Notice in accordance with the plan of publication described in Exhibit F hereto; and, in addition, that the mutually agreed-upon press release described in Exhibit F shall be posted on the websites of both Class Counsel and Defendant.

(ii) providing a link in the Long Form Notice and the Summary Notice to a settlement website to be designed and administered by the Settlement Administrator that will contain the settlement documents (including but not limited to the Long Form Notice and the Claim Form), a list of important dates, and any other information to which the parties may agree; and

(iii) having the Settlement Administrator contact by email all of CytoSport's customers who purchased the Products during the Class Period for whom CytoSport has valid email addresses, to provide such customers with the Summary Notice.

(f) Providing that Settlement Class Members will have until the Bar Date to submit Claim Forms;

(g) Providing that any objections by any Settlement Class Member to the certification of the Settlement Class and the proposed Settlement contained in this Settlement Agreement, and/or the entry of the Final Order and Judgment, shall be heard and any papers submitted in support of said objections shall be considered by the Court at the Fairness Hearing

only if, on or before the date(s) specified in the Long Form Notice, the Summary Notice and Preliminary Approval Order, such objector files with the Court a notice of the objector's intention to appear, and otherwise complies with the requirements in Paragraphs 67 through 68 of this Settlement Agreement;

(h) Establishing dates by which the parties shall file and serve all papers in support of the application for final approval of the Settlement and/or in response to any valid and timely objections;

(i) Providing that all Settlement Class Members will be bound by the Final Order and Judgment dismissing the Action with prejudice unless such members of the Settlement Class timely file valid written requests for exclusion or opt out in accordance with this Settlement Agreement and the Long Form Notice;

(j) Providing that Settlement Class Members wishing to exclude themselves from the Settlement will have until the date specified in the Long Form Notice, the Summary Notice, and the Preliminary Approval Order to submit a valid written request for exclusion or opt out to the Settlement Administrator;

(k) Providing a procedure for Settlement Class Members to request exclusion or opt out from the Settlement, by timely mailing such request to the Settlement Administrator;

(l) Pending the Fairness Hearing, staying all proceedings in the Action, other than proceedings necessary to carry out or enforce the terms and conditions of this Settlement Agreement and the Preliminary Approval Order; and

(m) Pending the Fairness Hearing, enjoining Plaintiffs and Settlement Class Members, or any of them, from commencing or prosecuting, either directly or indirectly, any action asserting any of the Released Claims.

25. Following the entry of the Preliminary Approval Order, the Long Form Notice and Summary Notice shall be given and published in the manner directed and approved by the Court.

26. The parties agree that the notice plan contemplated by this Settlement Agreement is valid and effective, that it provides reasonable notice to the Settlement Class, and that it represents the best practicable notice under the circumstances.

IV. THE SETTLEMENT CONSIDERATION

A. Injunctive Relief

27. No later than forty-five days following the Effective Date, CytoSport will implement the following changes with respect to the Products:

(a) CytoSport will cease to use the words “Healthy, Sustained Energy” on the Principal Display Panel on the newly printed packaging of any of the Products; and

(b) CytoSport will cease to use the words “Healthy Fats” on newly printed packaging of the RTD Product; provided, however that CytoSport may use the term “Healthy Fats” on the packaging of the RTD Product or any related product so long as (i) such product contains fewer than 0.5 grams of saturated fat per serving, or (ii) CytoSport also includes the words “See nutrition information for saturated fat content” in connection with the words “Healthy Fats.”

28. CytoSport may continue to use any labels printed earlier than forty-five days following the Effective Date, regardless of whether those labels comply with the restrictions set forth in the preceding paragraph, until seventy-five days following the Effective Date. After seventy-five days after the Effective Date, CytoSport may only use labels that comply with the restrictions set forth in the preceding paragraph on any new Products manufactured after that date.

29. Nothing in this Settlement Agreement shall be construed to require CytoSport to relabel any Product manufactured on or before seventy-five days after the Effective Date, even if it is not sold until after that date.

30. CytoSport shall be required to abide by the requirements in the Paragraphs 27(a)-(b) for no longer than three years following the Effective Date.

31. The Parties hereby agree that the monetary value of the injunctive relief described in paragraphs 27-28 herein is \$1,000,000 (such amount the “Agreed Injunctive Relief Value”).

B. Monetary Relief

32. The Available Monetary Relief shall consist of the total sum of \$1,000,000. CytoSport will contribute the Available Monetary Relief for distribution to eligible Settlement Class Members who purchased the Products in the United States during the class period, and the remaining amount, if any, in *cy pres* to the American Heart Association as follows:

(a) A Settlement Class Member will be entitled to receive \$30.00 total for his or her purchases of the Products during the Class Period. To be eligible for the amount described in the preceding sentence, such Settlement Class Member must complete a Claim Form and provide his or her name, email address, and mailing address. Such Settlement Class Member must also submit a signed attestation form in which he or she describes, under penalty of perjury, which of the Products he or she purchased during the Class Period and the location of such purchases.

(b) If the aggregate value of the claims made pursuant to this paragraph 32(a) does not exceed \$1,000,000, then CytoSport will pay the difference between the aggregate amount of such claims and the sum of \$1,000,000 as follows:

(i) First, the amount to be paid to each Settlement Class Member who completed a Claim Form shall be increased on a *pro rata* basis, up to the \$1,000,000 aggregate total of Available Monetary Relief, so that each claimant may receive up to \$60.00.

(ii) Next, if the total payments made to the Settlement Class Members who completed a Claim Form pursuant to paragraphs 32(a) and 32(b)(i) does not exceed the Available Monetary Relief, then CytoSport shall pay any remaining Available Monetary Relief to the American Heart Association as a *cy pres* donation.

(c) If the total payments made to Settlement Class Members who completed a Claim Form exceeds the Available Monetary Relief, then the amount to be paid to each Settlement Class Member shall be reduced on a *pro rata* basis such that the aggregate value of all such claims equals the Available Monetary Relief.

33. In no event shall CytoSport be required to pay any amount greater than the Available Monetary Relief for payments pursuant to paragraph 32. CytoSport shall provide funds to be paid to each Settlement Class Member who submitted a valid Claim Form, as described in paragraphs 32(a) and 32(b)(i), to the settlement administrator no later than 30 days after the Effective Date. The settlement administrator shall then take reasonable steps to promptly distribute the funds to Settlement Class Members who submitted a valid Claim Form. CytoSport shall provide funds to the settlement administrator no later than 180 after the Effective Date for any payments made to the American Heart Association pursuant to paragraph 32(b)(ii).

C. Balance of the Total Settlement Value

34. A Balance of the Total Settlement Value shall be calculated as the Total Settlement Value less the following: (i) the Agreed Injunctive Relief Value (*i.e.*, \$1,000,000); (ii) distributions to Settlement Class Members and the American Heart Association in accordance with paragraph 32 (*i.e.*, \$1,000,000); (iii) payments to Class Counsel and the Class Representative as described in paragraphs 38-44, herein; and (v) all costs of providing notice to the Settlement Class and administering the settlement, including but not limited to the administration of the settlement described in paragraphs 51-66, herein.

35. If the Balance of the Total Settlement Value is greater than zero, then such amount shall be distributed in the form of distributions of current inventory, relabeled Muscle Milk® Light products, or other products with a similar nutrient profile, as follows: at charitable athletic events focused on health-related topics (*e.g.*, running events affiliated with cancer or heart disease prevention organizations, such as the Susan G. Komen Race for the Cure), according to a plan approved by the Court, which shall be submitted to the Court by the Parties in connection with the hearing on Final Approval of this Settlement Agreement. The products to

be distributed pursuant to this paragraph must be labeled consistently with the requirements of paragraphs 27-30 above. The products to be distributed must also have at least three months of valid use before the expiration date shown on the products, as of the date that the products are shipped to the intended beneficiaries. The value of any products distributed pursuant to this paragraph shall be measured exclusively according to the retail value of such products. The distribution of products contemplated by this paragraph shall occur over a period of three years following the Effective Date. The products distributed pursuant to this paragraph shall be in addition to any other charitable donations planned by CytoSport, and CytoSport shall not seek a tax deduction for such product donations.

36. In no event shall CytoSport be obligated to pay or disburse pursuant to this Settlement Agreement an amount in excess of the Total Settlement Value less the Agreed Injunctive Relief Value.

**V. ATTORNEYS FEE-AND-EXPENSE AWARD AND CLASS
REPRESENTATIVE AWARD**

37. Class Counsel may petition the Court for an award of attorneys' fees, costs, and expenses pursuant to California Civil Procedure Code Section 1021.5. For purposes of this Settlement Agreement And Release only, CytoSport does not oppose, and will not encourage or assist a third party in opposing, Class Counsel's request for attorneys' fees and costs totaling \$1,187,500; nor does CytoSport contest the reasonableness of the amount; nor does CytoSport contest Plaintiff's and Class Counsel's assertion that they have conferred a benefit on the public in prosecuting and settling the Action. .

38. Subject to Court approval, CytoSport will pay Class Counsel the attorneys' fees and costs and expenses, as ordered by the Court. Such payment by CytoSport will be in lieu of any statutory fees Plaintiff and/or Class Counsel might otherwise have been entitled to recover, and this amount shall be inclusive of all fees and costs of Class Counsel in the Action. Class Counsel will not seek in excess of \$1,187,500 for attorneys' fees and costs and expenses and, in any event, Plaintiffs and Class Counsel agree that CytoSport shall not pay, or be obligated to

pay, in excess of \$1,187,500 for attorneys' fees and costs, all of which funds shall be paid from the Total Settlement Value.

39. Class Counsel and Plaintiff will ask the court for the payment of a stipend from CytoSport to Plaintiff in the amount of \$5,000, such amount to be deemed a portion of the Total Settlement Value. CytoSport will not oppose this request by Class Counsel and Plaintiff for the stipend payment. Class Counsel and Plaintiff will not seek in excess of \$5,000 in stipend payments and, in any event, Plaintiff and Class Counsel agree that CytoSport shall not pay, or be obligated to pay, in excess of \$5,000 in stipend payments.

40. Plaintiff and Class Counsel, and each of them, agree that upon CytoSport's compliance with the terms and conditions of this Settlement Agreement, CytoSport will forever and finally have satisfied all of its obligations to Plaintiff and/or Class Counsel, or any of them, concerning payment of attorneys' fees, costs and expenses in the Action, and will forever and finally be absolved, released and discharged of any liability whatsoever to Plaintiff and/or Class Counsel, or any of them, concerning attorneys' fees in the Action. It is further agreed that under no circumstances will Class Counsel, or any of them, sue CytoSport for, or because of, relating to, concerning, or as a result of any payment or allocation of attorneys' fees and costs made in accordance with this Settlement Agreement. Under no circumstances will CytoSport be liable to Class Counsel, or any of them, for, because of, relating to, concerning or as a result of any payment or allocation of attorneys' fees made in accordance with this Settlement Agreement; and Class Counsel, and each of them, release CytoSport from any and all claims because of, relating to, concerning, or as a result of any payment or allocation of attorneys' fees and costs made in accordance with this Stipulation and Settlement. CytoSport shall have no responsibility for any taxes associated with the attorneys' fees, costs, and expenses paid by CytoSport pursuant to this Settlement Agreement.

41. CytoSport shall pay fifty percent (50%) of the attorneys' fees and expenses, awarded by the Court, by wire to a financial institution of Class Counsel's choosing within 30 days after the Effective Date. CytoSport shall pay the remaining fifty percent (50%) of such

attorneys' fees and expenses, awarded by the Court, by wire to a financial institution of Class Counsel's choosing in four equal monthly payments, subject to Plaintiff's and Class Counsel's compliance with the terms of the Settlement Agreement. Class Counsel shall provide sufficient wiring instructions to Defense Counsel at least ten business days before such payment is due.

42. CytoSport shall pay the stipend to Plaintiff described in paragraph 40 herein in accordance with Plaintiff's instructions within 30 days following the Effective Date.

43. The procedure for and the allowance or disallowance by the Court of any application for attorneys' fees, costs, expenses, or reimbursement to be paid to Class Counsel or for any stipend payments to be paid to Plaintiffs are not part of the settlement of the Released Claims as set forth in this Settlement Agreement, and are to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the settlement of the Released Claims as set forth in this Settlement Agreement. Any such separate order, finding, ruling, holding, or proceeding relating to any such applications for attorneys' fees or stipends, or any separate appeal from any separate order, finding, ruling, holding, or proceeding relating to any of them or reversal or modification of any of them, shall not operate to terminate or cancel this Settlement Agreement or otherwise affect or delay the finality of the Final Order and Judgment or the Settlement.

VI. RELEASES AND DISMISSAL OF ACTION

44. Upon the Effective Date, the Releasing Parties shall be deemed to have, and by operation of the Final Order and Judgment shall have, fully, finally and forever released, relinquished, and discharged all Released Claims against the Released Parties.

45. Members of the Settlement Class who have opted out of the Settlement by the date set by the Court do not release their claims and will have no right to obtain any benefits of the Settlement.

46. The Released Claims include known and unknown claims relating to the Action, and this Settlement Agreement is expressly intended to cover and include all such injuries or damages, including all rights of action thereunder. Settlement Class Members hereby expressly,

knowingly, and voluntarily waive the provisions of Section 1542 of the California Civil Code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Settlement Class Members expressly waive and relinquish any and all rights and benefits that they may have under, or that may be conferred upon them by, the provisions of Section 1542 of the California Civil Code, or any other law of any state or territory that is similar, comparable, or equivalent to Section 1542, to the fullest extent that they may lawfully waive such rights or benefits pertaining to the Released Claims. In connection with such waiver and relinquishment, the Settlement Class Members hereby acknowledge that they are aware that they or their attorneys may hereafter discover claims or facts in addition to or different from those that they now know or believe exist with respect to Released Claims, but that it is their intention to hereby fully, finally, and forever settle and release all of the Released Claims known or unknown, suspected or unsuspected, that they have against the Released Parties. In furtherance of such intention, the release herein given by the Settlement Class Members to the Released Parties shall be and remain in effect as a full and complete general release notwithstanding the discovery or existence of any such additional different claims or facts. Each of the parties expressly acknowledges that it has been advised by its attorney of the contents and effect of Section 1542, and with knowledge, each of the parties hereby expressly waives whatever benefits it may have had pursuant to such section. Settlement Class Members are not releasing any claims for personal injury. Plaintiffs acknowledge, and the Settlement Class Members shall be deemed by operation of the Final Judgment to have acknowledged, that the foregoing waiver was separately bargained for and a material element of the Settlement of which this release is a part.

47. Upon the Effective Date, the Action shall be dismissed with prejudice. Class Counsel shall have the responsibility for ensuring that the Action is timely dismissed with prejudice in accordance with the terms of this Settlement Agreement.

48. The Court shall retain jurisdiction over the Parties to this Settlement Agreement with respect to the future performance of the terms of this Settlement Agreement. In the event that any applications for relief are made, such applications shall be made to the Court.

49. Upon the Effective Date: (a) the Settlement Agreement shall be the exclusive remedy for any and all Released Claims of Settlement Class Members; and (b) the Settlement Class Members shall be permanently barred and enjoined from initiating, asserting, or prosecuting against the Released Parties in any federal or state court or tribunal any and all Released Claims.

VII. ADMINISTRATION OF THE SETTLEMENT

50. Within 30 days after the entry of the Preliminary Approval Order, CytoSport will coordinate with the Settlement Administrator to provide notice to the Settlement Class as provided in this Settlement Agreement.

51. Because the names, e-mail addresses, and other personal information about Settlement Class Members will be provided to the Settlement Administrator by the Settlement Class Members for purposes of providing payments and processing opt out requests, the Settlement Administrator will execute a non-disclosure agreement with CytoSport and will take all reasonable steps to ensure that any information provided to it by Settlement Class Members will be used solely for the purpose of effecting this Settlement. Any such information provided to the Settlement Administrator will not be provided to Plaintiff or Class Counsel; however, Class Counsel will designate one attorney who may inspect such information upon his or her execution of, and subject to, the terms of the non-disclosure agreement.

52. The Settlement Administrator shall administer the Settlement in accordance with the terms of this Settlement Agreement and, without limiting the foregoing, shall:

(a) Treat any and all documents, communications and other information and materials received in connection with the administration of the Settlement as confidential and shall not disclose any or all such documents, communications or other information to any person or entity except as provided for in this Settlement Agreement or by court order; and

(b) Receive opt out and other requests from members of the Settlement Class to exclude themselves from the Settlement and provide to Class Counsel and Defense Counsel a copy thereof within three days of receipt. If the Settlement Administrator receives any exclusion forms or other requests from Settlement Class Members to exclude themselves from the Settlement after the deadline for the submission of such forms and requests, the Settlement Administrator shall promptly provide Class Counsel and Defense Counsel with copies thereof.

53. CytoSport will reimburse the Settlement Administrator for reasonable costs, fees, and expenses of providing notice to the Settlement Class and administering the Settlement in accordance with this Settlement Agreement, and such funds shall be drawn from the Total Settlement Value. The Parties specifically agree that CytoSport shall not be liable for the costs, fees, and expenses of providing notice to the Settlement Class and administering the Settlement above and beyond the funds available included in the Total Settlement Value. The Parties agree that if the costs, fees and expense of providing notice to the Settlement Class and administering the Settlement in accordance with this Settlement Agreement exceed \$307,500, then CytoSport shall be entitled to deduct the next \$42,500 from the payment of attorneys' fees and costs awarded by the Court, but CytoSport shall be solely responsible for any notice and claims administration costs that exceed \$350,000. By way of example, if notice and claims administration costs total \$500,000, then CytoSport shall pay the Settlement Administrator the total sum of \$500,000, but shall deduct the sum of \$42,500 from the payment of attorneys' fees and costs awarded by the Court leaving the sum of \$1,145,000 owed to Plaintiff's counsel (*i.e.* $\$1,187,500 - \$42,500 = \$1,145,000$) (all of which payments shall be deducted from the Total Settlement Value).

54. Each Settlement Class Member shall submit a Claim Form, to be completed in hard copy or on-line, listing each of the Products purchased. When requested in the Claim Form, the Claim Form shall be signed under penalty of perjury. Claim Forms will be: (a) included on the settlement website to be designed and administered by the Settlement Administrator; and (b)

made readily available from the Settlement Administrator, as provided in the Preliminary Approval Order.

55. Any Settlement Class Member who, in accordance with the terms and conditions of this Settlement Agreement, neither seeks exclusion from the Settlement Class nor files a Claim Form will not be entitled to receive any payments, benefit, or any other relief pursuant to this Settlement Agreement, but will be bound together with all Settlement Class Members by all of the terms of this Settlement Agreement, including the terms of the Final Order and Judgment to be entered in the Action and the releases provided for herein, and will be barred from bringing any action against any of the Released Parties concerning the Released Claims.

56. Claim Forms that do not meet the requirements set forth in this Settlement Agreement and in the Claim Form instructions shall be rejected. Where a good faith basis exists, the Settlement Administrator may reject a Settlement Class Member's Claim Form for, among other reasons, the following:

- (a) The Settlement Class Member seeks payment for products that are not covered by the terms of this Settlement Agreement;
- (b) Failure to fully complete and/or sign the Claim Form;
- (c) Illegible Claim Form;
- (d) The Settlement Class Member cannot identify which of the Products he or she purchased;
- (e) The Claim Form is fraudulent;
- (f) The Claim Form is duplicative of another Claim Form;
- (g) The person submitting the Claim Form is not a Settlement Class Member;
- (h) Failure to submit a Claim Form by the Bar Date; and/or
- (i) The Claim Form otherwise does not meet the requirements of this Settlement Agreement.

57. The Settlement Administrator shall determine whether a Claim Form meets the requirements set forth in this Settlement Agreement. Each Claim Form shall be submitted to and

reviewed by the Settlement Administrator, who shall determine in accordance with the terms and conditions of this Settlement Agreement the extent, if any, to which each claim shall be allowed. The Settlement Administrator shall use all reasonable efforts and means to identify and reject duplicate and/or fraudulent claims, including, without limitation, maintaining a record of each and every payment made to a Settlement Class Member.

58. Claim Forms that do not meet the terms and conditions of this Settlement Agreement shall be rejected by the Settlement Administrator. The Settlement Administrator shall notify the Settlement Class Member through the email address provided in the Claim Form of the rejection. Class Counsel and Defense Counsel shall be provided with copies of all such notifications to Settlement Class Members.

59. No person shall have any claim against CytoSport, Defense Counsel, Plaintiff, Plaintiff's counsel, the Settlement Class, Class Counsel, and/or the Settlement Administrator based on any eligibility determinations or distributions made in accordance with this Settlement Agreement. This provision does not affect or limit in any way the right of review by the Court or referee of any disputed Claim Forms as provided in this Settlement Agreement.

60. Any Settlement Class Member who fails to submit a Claim Form by the Bar Date shall be forever barred from receiving any benefit pursuant to this Settlement Agreement, but shall in all other respects be bound by all of the terms of this Settlement Agreement including the terms of the Final Order and Judgment to be entered in the Action and the releases provided for herein, and will be barred from bringing any action against any of the Released Parties concerning any of the Released Claims. Where an attestation form is required to be submitted as part of the Claim Form, the Claim Form will be deemed to have been submitted only when the attestation form is postmarked, if received with a postmark, or equivalent mark by a courier company indicated on the envelope or mailer and if mailed with pre-paid postage and addressed in accordance with the instructions set out in the Claim Form. In all other cases, including the submission of claims on-line, the Claim Form shall be deemed to have been submitted when it is actually received by the Settlement Administrator.

61. Class Counsel and Defense Counsel shall have the right to inspect the Claim Forms and supporting documentation received by the Settlement Administrator at any time upon reasonable notice.

62. The Settlement Administrator shall distribute payments to eligible Settlement Class Members on a date that occurs only after the Effective Date.

63. If the Settlement is not approved or for any reason the Effective Date does not occur, no payments or distributions of any kind shall be made pursuant to this Settlement Agreement.

64. All notification duties imposed by 28 U.S.C. § 1715 shall be borne by CytoSport, including the corresponding expenses, and shall be separate and in addition to any other obligation imposed herein.

65. CytoSport and the Released Parties are not and will not be obligated to compute, estimate, or pay any taxes on behalf of any Plaintiff, any Settlement Class Member, Plaintiff's counsel, Class Counsel, and/or the Settlement Administrator.

VIII. OBJECTIONS AND OPT-OUTS BY SETTLEMENT CLASS MEMBERS

66. Any Settlement Class Member who intends to object to the fairness, reasonableness, and/or adequacy of the Settlement must send a written objection by fax, U.S. mail, or e-mail to the Settlement Administrator and send by U.S. mail or e-mail a copy to Class Counsel and Defense Counsel at the address set forth below postmarked no later than the date specified in the Preliminary Approval Order. Settlement Class Members who object must set forth their full name, current address, and telephone number. Objections must be served:

Upon Class Counsel at:

BARON & BUDD, P.C.
ROLAND TELLIS
MARK PIFKO
15910 Ventura Boulevard, Suite 1600
Encino, California 91436
Telephone: 818.839.2333
Facsimile: 818.986.9698
E-mail: mpifko@baronandbudd.com

Upon CytoSport at:

GIBSON, DUNN & CRUTCHER LLP
G. CHARLES NIERLICH
TIMOTHY W. LOOSE
MATTHEW L. BERDE
555 Mission St., Suite 3000
San Francisco, CA 94105
Telephone: 415.393.8200
Facsimile: 415.393.8306
E-mail: mberde@gibsondunn.com

67. Objecting class members must state in writing all objections and the reasons for each objection, and state whether the objecting class member intends to appear at the Fairness Hearing either with or without separate counsel. No member of the Settlement Class shall be entitled to be heard at the Fairness Hearing (whether individually or through separate counsel) or to object to the Settlement, and no written objections or briefs submitted by any member of the Settlement Class shall be received or considered by the Court at the Fairness Hearing, unless written notice of the objecting class member's intention to appear at the Fairness Hearing and copies of any written objections and/or briefs shall have been filed with the Court and served on Class Counsel and Defense Counsel on or before the date specified in the Preliminary Approval Order. Members of the Settlement Class who fail to file and serve timely written objections in the manner specified above shall be deemed to have waived all objections and shall be foreclosed from making any objection (whether by appeal or otherwise) to the Settlement.

68. Members of the Settlement Class may elect to opt out of the settlement, relinquishing their rights to benefits hereunder. Members of the Settlement Class who opt out of the Settlement will not release their claims pursuant to this Settlement Agreement. Putative class members wishing to opt out of the Settlement must send to the Settlement Administrator by fax, U.S. Mail, or e-mail a letter including their name, address, and telephone number and providing a clear statement communicating that they elect to be excluded from the Settlement Class, do not wish to be a Settlement Class Member, and elect to be excluded from any judgment entered pursuant to the Settlement. Any request for exclusion or opt out must be postmarked on or before the opt out deadline provided in the Court's Preliminary Approval Order. The date of the postmark on the mailing envelope shall be the exclusive means used to determine whether a request for exclusion has been timely submitted. Members of the Settlement Class who fail to submit a valid and timely request for exclusion on or before the date specified in the Court's Preliminary Approval Order shall be bound by all terms of this Settlement Agreement and the Final Order and Judgment, regardless of whether they have requested exclusion from the Settlement.

69. Any member of the Settlement Class who submits a timely request for exclusion or opt out may not file an objection to the Settlement and shall be deemed to have waived any rights or benefits under this Settlement Agreement.

70. Not later than three business days after the deadline for submission of requests for exclusion or opt out, the Settlement Administrator shall provide to Class Counsel and Defense Counsel a complete opt out list together with copies of the opt out requests. Notwithstanding any other provision of this Settlement Agreement, if more than 1,000 members of the Settlement Class opt out of the Settlement, CytoSport, in its sole discretion, may rescind and revoke the entire Settlement and this Settlement Agreement, thereby rendering the Settlement null and void in its entirety, by sending written notice that CytoSport revokes the settlement pursuant to this paragraph to Class Counsel within 10 business days following the date the Settlement Administrator informs CytoSport of the number of Settlement Class members who have requested to opt out of the Settlement pursuant to the provisions set forth above.

71. On the date set forth in the Preliminary Approval Order, a Final Fairness Hearing shall be conducted to determine final approval of the Settlement. Upon final approval of the Settlement by the Court at or after the Final Fairness Hearing, the parties shall present the Final Order and Judgment, substantially in the form attached to this Settlement Agreement as Exhibit "B," to the Court for approval and entry.

**IX. SCOPE AND EFFECT OF CERTIFICATION OF SETTLEMENT CLASS
AND RELEASE OF CLAIMS**

72. For purposes of settlement only, the parties and their counsel agree that the Court should make preliminary findings and enter the Preliminary Approval Order (substantially in the form attached at Exhibit "A") granting provisional certification of the Settlement Class subject to final findings and ratification in the Final Order and Judgment, and appointing Plaintiff as the representative of the Settlement Class and Class Counsel as counsel for the Settlement Class.

73. CytoSport does not consent to certification of the Settlement Class for any purpose other than to effectuate the Settlement of the Action. If this Settlement Agreement is

terminated pursuant to its terms, or the Effective Date for any reason does not occur, the order certifying the Settlement Class for purposes of effectuating this Settlement Agreement, and all preliminary and/or final findings regarding that class certification order, shall be automatically vacated upon notice of the same to the Court, the Action shall proceed as though the Settlement Class had never been certified pursuant to this Settlement Agreement and such findings had never been made, and the Action shall return to the procedural status quo in accordance with this paragraph.

74. In the event the terms or conditions of this Settlement Agreement, other than terms pertaining to attorneys' fees, costs, expenses, and/or stipend payments, are materially modified by any court, either party in its sole discretion to be exercised within 14 days after such a material modification may declare this Settlement Agreement null and void. For purposes of this paragraph, material modifications include but are not limited to any modifications to the definitions of the Settlement Class, Settlement Class Members, or Released Claims, changes to the notice plan described in Paragraph 24, and/or any modifications to the terms of the settlement consideration described in Paragraphs 27 through 34.

X. SETTLEMENT NOT EVIDENCE AGAINST PARTIES

75. The provisions contained in this Settlement Agreement are not and shall not be deemed a presumption, concession or admission by CytoSport of any default, liability or wrongdoing as to any facts or claims alleged or asserted in the Action, or in any actions or proceedings, nor shall they be interpreted, construed, deemed, invoked, offered, or received in evidence or otherwise used by any person in the Action, or in any other action or proceeding, whether civil, criminal or administrative. CytoSport does not admit that it or any of the Released Parties has or have engaged in any illegal or wrongful activity or that any person has sustained any damage by reason of any of the facts complained of in the Action. CytoSport does not consent to certification of the Settlement Class for any purpose other than to effectuate the Settlement of the Action.

XI. BEST EFFORTS

76. Class Counsel shall take all necessary actions to accomplish approval of the Settlement, notice, and dismissal of the Action. The parties and their counsel agree to cooperate fully with one another and to use their best efforts to effectuate the Settlement, including without limitation in seeking preliminary and final Court approval of the Settlement Agreement and the Settlement embodied herein, carrying out the terms of this Settlement Agreement, and promptly agreeing upon and executing all such other documentation as may be reasonably required to obtain final approval by the Court of the Settlement.

77. Each party will cooperate with the other party in connection with effectuating the Settlement or the administration of claims thereunder. Any requests for cooperation shall be narrowly tailored and reasonably necessary for the requesting party to recommend the Settlement to the Court, and to carry out its terms.

XII. MISCELLANEOUS PROVISIONS

78. The parties agree that the recitals are contractual in nature and form a material part of this Settlement Agreement.

79. This Settlement Agreement and its accompanying Exhibits set forth the entire understanding of the parties. No change or termination of this Settlement Agreement shall be effective unless in writing and signed by Class Counsel and Defense Counsel. Any and all previous agreements and understandings between or among the parties regarding the subject matter of this Settlement Agreement, whether written or oral, and including but not limited to the settlement agreement previously signed by the parties, are superseded by this Settlement Agreement.

80. This Settlement Agreement and the Settlement contemplated herein shall be governed by, and construed in accordance with, the laws of the State of California, without regard to conflict of laws principles.

81. All of the parties warrant and represent that they are agreeing to the terms of this Settlement Agreement based upon the legal advice of their respective attorneys, that they have

been afforded the opportunity to discuss the contents of this Settlement Agreement with their attorneys and that the terms and conditions of this document are fully understood and voluntarily accepted.

82. The waiver by any Party of a breach of any term of this Settlement Agreement shall not operate or be construed as a waiver of any subsequent breach by any Party. The failure of a Party to insist upon strict adherence to any provision of the Settlement Agreement shall not constitute a waiver or thereafter deprive such Party of the right to insist upon strict adherence.

83. The headings in this Settlement Agreement are inserted merely for the purpose of convenience and shall not affect the meaning or interpretation of this document.

84. This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same instrument. The date of execution shall be the latest date on which any Party signs the Settlement Agreement.

85. This Settlement Agreement has been negotiated among and drafted by Class Counsel and Defense Counsel. To the extent there is any uncertainty or ambiguity in this Settlement Agreement, none of the Parties will be deemed to have caused any such uncertainty or ambiguity. Accordingly, this Settlement Agreement should not be construed favor of or against one Party as to the drafter, and the Parties agree that the provisions of California Civil Code § 1654 shall not apply to the construction or interpretation of this Settlement Agreement.

86. Except as specifically provided in this Settlement Agreement, the Parties and/or their counsel will not issue any press release or make other public statements regarding the Settlement or the Action without the prior written approval of all Parties, other than to state that the Action “has been resolved.”

87. The Parties believe that this Settlement Agreement is a fair, adequate, and reasonable settlement of the Action, and they have arrived at this Settlement through arms-length negotiations, taking into account all relevant factors, present and potential.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties hereto, and intending to be legally bound hereby,
have duly executed this Settlement Agreement as of the date set forth below.

DATED: May 8, 2013

By: 
Claire Delacruz

DATED: May 8, 2013

BARON & BUDD, P.C.
ROLAND TELLIS
MARK PIFKO

By: 
Roland Tellis

Attorneys for Plaintiff,
Claire Delacruz

DATED: May __, 2013

CYTOSPORT, INC.

By: _____
Bobbie White

DATED: May __, 2013

GIBSON, DUNN & CRUTCHER LLP
G. CHARLES NIERLICH
TIMOTHY W. LOOSE
MATTHEW L. BERDE

By: _____
G. Charles Nierlich

Attorneys for Defendant,
CYTOSPORT, INC.

SETTLEMENT AGREEMENT

IN WITNESS WHEREOF, the parties hereto, and intending to be legally bound hereby,
have duly executed this Settlement Agreement as of the date set forth below.

DATED: May __, 2013

By: _____
Claire Delacruz

DATED: May __, 2013

BARON & BUDD, P.C.
ROLAND TELLIS
MARK PIFKO

By: _____
Roland Tellis

Attorneys for Plaintiff,
Claire Delacruz

DATED: May 8, 2013

CYTOSPORT, INC.

By: 
Bobbie White

DATED: May 8, 2013

GIBSON, DUNN & CRUTCHER LLP
G. CHARLES NIERLICH
TIMOTHY W. LOOSE
MATTHEW L. BERDE

By: 
G. Charles Nierlich

Attorneys for Defendant,
CYTOSPORT, INC.