

AMENDED SETTLEMENT AGREEMENT AND RELEASE

This Amended Settlement Agreement and Release (the “Settlement Agreement”) is entered into by and between Plaintiffs Chayla Clay, Chris Roman, Erica Ehrlichman, and Logan Reichert (“Plaintiffs”) for themselves and the Settlement Class Members (as defined below) on the one hand, and, on the other hand, CytoSport, Inc. (“CytoSport” or “Defendant”). Plaintiffs and Defendant, the Parties to the Settlement, are referred to collectively in this Settlement Agreement as the “Parties.”

I. RECITALS

1.01 On January 23, 2015, Plaintiffs filed a class action in the Southern District of California captioned Clay et al. v. CytoSport, Inc., Civ. No. 3:15-cv-00165 (S.D. Cal.) (the “Action”). On March 15, 2017, Plaintiffs filed a First Amended Class Action Complaint (“Amended Complaint”). The Amended Complaint alleged that the labels for certain of Defendant’s powder and shake protein products were false and misleading.

1.02 On July 31, 2018, the Court granted in part and denied in part Defendant’s Motion for Summary Judgment.

1.03 On September 7, 2018, the Court granted in part and denied in part Plaintiffs’ motion for class certification and excluded certain testimony from one of Plaintiffs’ experts.

1.04 On September 21, 2018, Defendant filed a Rule 23(f) petition with the Ninth Circuit, requesting permission to appeal the District Court’s class-certification order.

1.05 On December 21, 2018, the Ninth Circuit granted Defendant’s Rule 23(f) petition.

1.06 On February 5, 2019, the Ninth Circuit vacated, at the parties’ request, the briefing schedule on Defendant’s appeal.

1.07 On December 23, 2019, the District Court denied preliminary approval without prejudice and issued guidance for revising various terms of the Agreement.

1.08 Defendant denies all material allegations contained in the Amended Complaint. Defendant specifically denies Plaintiffs’ allegations that its shake products contain less protein than is stated on the labels and that its powder products were falsely labeled as including “lean

lipids.” Defendant also specifically contends that the claims in the Amended Complaint cannot be tried on a class basis. Nevertheless, given the risks, uncertainties, burden, and expense of continued litigation, Defendant has agreed to settle all claims alleged in the Amended Complaint on the terms set forth in this Agreement, subject to Court approval.

1.09 Plaintiffs reaffirm the validity of all material allegations contained in the Amended Complaint as borne true and accurate after discovery to date. Plaintiffs maintain the testing results shows the shake products contain less protein than is stated on the labels and that the powder products were falsely labeled as including “lean lipids.” Plaintiffs contend that the Court decision granting class certification was correctly decided. Nevertheless, given the risks, uncertainties, burden, and expense of continued litigation, Plaintiffs have agreed to settle all claims alleged in the Amended Complaint on the terms set forth in this Agreement, subject to Court approval.

1.10 This Settlement Agreement resulted from good faith, arm’s-length settlement negotiations over several months, including two in-person, all-day mediation sessions before David Rotman, Esq. (Mediated Negotiations). Plaintiffs and Defendant submitted detailed mediation statements to Mr. Rotman setting forth their respective views as to the strengths of their cases.

1.11 The Parties understand, acknowledge, and agree that the execution of this Settlement Agreement constitutes the settlement and compromise of disputed claims. This Settlement Agreement is inadmissible as evidence against any of the Parties except to enforce the terms of the Settlement Agreement and is not an admission of wrongdoing or liability on the part of any Party to this Settlement Agreement. The Parties desire and intend to effect a full, complete, and final settlement and resolution of all existing disputes and claims as set forth herein.

1.12 The Settlement contemplated by this Settlement Agreement is subject to preliminary approval and final approval by the Court, as set forth herein. This Settlement Agreement is intended by the Parties to fully, finally, and forever resolve, discharge, and settle

the Released Claims, upon and subject to the terms and conditions hereof.

II. DEFINITIONS

2.01 “Agreement” or “Settlement Agreement” means this Amended Settlement Agreement and Release between Plaintiffs and Defendant and each and every exhibit attached hereto.

2.02 “CAFA Notice” refers to the notice pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715(b), to be provided by the Class Administrator pursuant to Section 8.05.

2.03 “Cash Award” means a cash payment from the Settlement Fund to a Settlement Class Member.

2.04 “Claims Deadline” means the date by which Class Members must submit a claim in order to receive a Cash Award and will be set as seventy-five (75) calendar days after the Settlement Notice Date. The Claims Deadline may be extended by up to fifteen (15) days, for a total of ninety (90) days, upon recommendation of the Class Administrator, with the Parties’ approval.

2.05 “Class Administration” means the activities of the Class Administrator consistent with the terms of this Settlement.

2.06 “Class Administrator” means the Angeion Group.

2.07 “Class Counsel” means and includes Jason J. Thompson and Trent Kashima of Sommers Schwartz, P.C., and Nick Suciu III of Barbat, Mansour & Suciu PLLC.

2.08 “Class Notice” means any type of notice that has been or will be provided to the Settlement Classes pursuant to this Agreement and any additional notice that might be ordered by the Court.

2.09 “Class Periods” means the following periods:

- “Michigan Shake Settlement Class Period” means January 23, 2009 to either (1) the date that is 60 days after the motion for preliminary approval is filed; or (2) the date of the entry of the Preliminary Approval Order, whichever is earlier.

- “Powder Settlement Class Period” means January 23, 2011 to December 31, 2018.
- “Shake Settlement Class Period” means January 23, 2011 to either (1) the date that is 60 days after the motion for preliminary approval is filed; or (2) the date of entry of the Preliminary Approval Order, whichever is earlier.

2.10 “Class Products” means the following products:

- “Powder Settlement Class Products” means Muscle Milk: Lean Muscle Protein Powder; Muscle Milk Light: Lean Muscle Protein Powder; Muscle Milk Naturals: Nature’s Ultimate Lean Muscle Protein; Muscle Milk Gainer; High Protein Gainer Powder Drink Mix; Muscle Milk Pro Series 50: Lean Muscle Mega Protein Powder; and Monster Milk: Lean Muscle Protein Supplement.
- “Shake Settlement Class Products” means Cytosport Whey Isolate Protein Drink; Monster Milk: Protein Power Shake; Genuine Muscle Milk: Protein Nutrition Shake; and Muscle Milk Pro Series 40: Mega Protein Shake.

2.11 “Class Representatives” means Plaintiffs Chayla Clay, Chris Roman, Erica Ehrlichman, and Logan Reichert.

2.12 “Court” means the United States District Court for the Southern District of California and U.S. District Judge James Lorenz.

2.13 “Defendant” is CytoSport, Inc.

2.14 “Effective Date” means the date when the Judgment has become final as provided in Section 13.

2.15 “Exclusion Deadline” means seventy-five (75) calendar days after the Settlement Notice Date. The Exclusion Deadline may be extended by up to fifteen (15) days, for a total of ninety (90) days, upon recommendation of the Class Administrator, with the Parties’ approval.

2.16 “Fairness Hearing” means the hearing held by the Court to determine whether to finally approve the Settlement set forth in this Settlement Agreement as fair, reasonable, and

adequate.

2.17 “Final Approval Order” means the order to be submitted to the Court in connection with the Fairness Hearing, substantially in the form attached hereto as **Exhibit C**.

2.18 “Final Distribution Date” means the earlier of (i) the date as of which all the checks for Cash Awards have been cashed, or (ii) 210 calendar days after the date on which the last check for a Cash Award was issued.

2.19 “Funding Date” means two (2) business days after the Effective Date.

2.20 “Litigation” means the action described by the Amended Complaint filed in the Southern District of California, Clay et al. v. CytoSport, Inc., Civ. No. 3:15-cv-00165 (Dkt. 156).

2.21 “Notice” means the notices to be provided to Settlement Class Members substantially in the form set forth in Section 8. The forms of notice are attached hereto collectively as **Exhibit B**.

2.22 “Objection Deadline” means seventy-five (75) calendar days after the Settlement Notice Date. The Objection Deadline may be extended by up to fifteen (15) days, for a total of ninety (90) days, upon recommendation of the Class Administrator, with the Parties’ approval.

2.23 “Preliminary Approval Order” means the proposed order to be submitted to the Court in connection with the Motion for Preliminary Approval, substantially in the form attached hereto as **Exhibit A**.

2.24 “Released Claims” means the claims released in Section 14.

2.25 “Released Parties” means CytoSport, Inc. and CytoSport Holdings, Inc. and all of their current, former, and future parents, predecessors, successors, affiliates, assigns, subsidiaries, divisions, or related corporate entities, and all of their respective current, future, and former employees, officers, directors, shareholders, assigns, agents, trustees, administrators, executors, insurers, attorneys, and customers.

2.26 “Request for Exclusion” means the written submission submitted by a Settlement Class Member to be excluded from the Settlement consistent with the terms of this Agreement.

2.27 “Settlement” means the settlement set forth in this Agreement between Plaintiffs

and Defendant and each and every exhibit attached hereto.

2.28 “Settlement Benefit” means the Settlement Fund and the costs of class notice and claims administration.

2.29 “Settlement Classes” means and includes the following classes:

- “Powder Settlement Class” means and includes all consumers in the United States (including its states, districts or territories) who purchased a Powder Settlement Class Product that had the phrase “lean lipids,” “lean protein,” “lean muscle protein,” or “new leaner formula” on the label during the Powder Settlement Class Period. Excluded from the Powder Settlement Class are: (1) employees of Defendant, including its current and former directors, officers and counsel; (2) any entity that has a controlling interest in Defendant; (3) Defendant’s affiliates and subsidiaries; and (4) the judge to whom this case is assigned and any member of the judge’s immediate family.
- “Shake Settlement Class” means and includes all consumers in the United States (including its states, districts or territories) who purchased a Shake Settlement Class Product during the Shake Settlement Class Period or, for members of the Michigan subclass only, the Michigan Shake Settlement Class Period. Excluded from the Shake Settlement Class are: (1) employees of Defendant, including its current and former directors, officers and counsel; (2) any entity that has a controlling interest in Defendant; (3) Defendant’s affiliates and subsidiaries; and (4) the judge to whom this case is assigned and any member of the judge’s immediate family.

2.30 “Settlement Class Members” means the Plaintiffs and those persons who are members of the Shake Settlement Class, the Powder Settlement Class, or both, and who do not submit a timely and valid Request for Exclusion from the Settlement Class.

2.31 “Settlement Fund” means the \$12,000,000 fund consisting of the non-reversionary cash sum that Defendant will pay to settle this Litigation and obtain a release of all

Released Claims in favor of all Released Parties.

2.32 “Settlement Notice Date” means ten (10) calendar days after the Preliminary Approval Order is issued. The Settlement Notice Date may be extended by up to five (5) additional days, for a total of fifteen (15) days, upon recommendation of the Class Administrator, with the Parties’ approval.

2.33 “Settlement Website” means the Internet website operated by the Class Administrator as described in Section 8.03.

III. ALL PARTIES RECOMMEND APPROVAL OF THE SETTLEMENT

3.01 Defendant’s Position on the Conditional Certification of Settlement Class.

Defendant disputes that a litigation class would be manageable and further maintains that the certified litigation classes will be reversed on appeal. Solely for purposes of avoiding the expense and inconvenience of further litigation, Defendant does not oppose the certification of the Settlement Classes for the purposes of only this Settlement. Preliminary certification of the Settlement Classes will not be deemed a concession that certification of a litigation class is appropriate, nor will Defendant be precluded from challenging class certification in further proceedings in this Litigation or in any other action if the Settlement Agreement is not finalized or finally approved. If the Settlement Agreement is not finally approved by the Court for any reason whatsoever, the certification of the Settlement Classes will be void, and no doctrine of waiver, estoppel, or preclusion will be asserted in any litigated certification proceedings in this Litigation or any other judicial proceeding. No agreements made by or entered into by Defendant in connection with the Settlement Agreement may be used by Plaintiffs, any Settlement Class Member, or any other person to establish any of the elements of class certification in any litigated certification proceedings, whether in this Litigation or any other judicial proceeding.

3.02 Plaintiffs’ Position on the Conditional Certification of Settlement Class. Plaintiffs aver that the Court was correct in finding that a litigation class would be manageable and further maintains that the certified litigation classes will not be reversed on appeal. If the Settlement Agreement is not finally approved by the Court for any reason whatsoever, the certification of

the Settlement Classes will be void, and no doctrine of waiver, estoppel, or preclusion will be asserted in any litigated certification proceedings in this Litigation or any other judicial proceeding. No agreements made by or entered into by Plaintiffs in connection with the Settlement Agreement may be used by Defendant, other than enforcing the settlement.

3.03 Plaintiffs' Belief in the Merits of Case. Plaintiffs believe that the claims asserted in this Litigation have merit and that the evidence developed to date supports the claims. This Settlement will in no event be construed or deemed to be evidence of or an admission or concession on the part of Plaintiffs that there is any infirmity in the claims asserted by Plaintiffs, or that there is any merit whatsoever to any of the contentions and defenses that Defendant has asserted.

3.04 Plaintiffs Recognize the Benefits of Settlement. Plaintiffs recognize and acknowledge, however, the expense and time that would be required to continue to pursue this Litigation against Defendant, as well as the uncertainty, risk, and difficulties of proof inherent in prosecuting such claims on behalf of the Settlement Classes. Plaintiffs have concluded that it is desirable that this Litigation and any Released Claims be fully and finally settled and released as set forth in this Settlement. Plaintiffs and Class Counsel believe that the Settlement set forth in this Agreement confers substantial benefits upon the Settlement Classes and that it is in the best interests of the Settlement Classes to settle as described herein.

IV. SETTLEMENT TERMS AND BENEFITS TO THE SETTLEMENT CLASS

4.01 Settlement Consideration. CytoSport will pay a non-reversionary cash sum in the amount of \$12,000,000 into the Settlement Fund. This amount will be paid by CytoSport to the Class Administrator on the Funding Date. In addition, CytoSport will pay the costs of notice and claims administration. Defendant will pay nothing apart from the Settlement Fund and the costs of notice and claims administration. CytoSport will also review its manufacturing processes and protocols to minimize variability of the protein content contained in its ready-to-drink protein shake products. Finally, CytoSport previously changed the labeling of its protein powder products to remove the references to "lean" that Plaintiffs challenged in the Litigation.

4.02 Eligibility for Cash Awards. Cash Awards will be made to Settlement Class Members who submit a valid claim by the Claims Deadline. Settlement Class Members who belong to both the Shake Settlement Class and the Powder Settlement Class may submit a request for a Cash Award from each class.

4.03 Cash Award Amount for Shake Settlement Class Members. Each Shake Settlement Class Member may file a claim for a cash payment based on the Shake Settlement Class Products purchased during the Shake Settlement Class Period. Shake Settlement Class Members will be entitled to submit a claim for \$1 per purchased Shake Settlement Class Product, subject to pro rata adjustment. Shake Settlement Class Members' claims without proof of purchase will be subject to a maximum claim of \$25, subject to pro rata adjustment, but Shake Settlement Class Members' claims with proof of purchase will have no cap, subject to pro rata adjustment.

4.04 Cash Award Amount for Powder Settlement Class members. Each Powder Settlement Class Member may file a claim for a cash payment based on the Powder Settlement Class Products purchased during the Powder Settlement Class Period. Powder Settlement Class Members will be entitled to submit a claim for \$3 for each purchase of a product weighing 2 ³/₄ lbs or less and \$5 for each purchase of a product weighing more than 2 ³/₄ lbs, subject to pro rata adjustment. Powder Settlement Class Members' claims without proof of purchase will be subject to a maximum claim of \$25, subject to pro rata adjustment, but Powder Settlement Class Members' claims with proof of purchase will have no cap, subject to pro rata adjustment.

4.05 Pro Rata Adjustment of Cash Awards. If the total value of all Approved Claims either exceeds or falls short of the funds available for distribution to Class Members, then the amounts of the cash payments will be reduced or increased pro rata, as necessary, to use all of the funds available for distribution to Class Members.

4.06 Second Distribution. If any funds are unclaimed or remain unused after the initial distribution, those funds will be distributed to Settlement Class Members who cashed the initial payment, on a pro rata basis, to the extent the cost of such redistribution is considered

economical by the Claims Administrator, Class Counsel, and Defendant as provided for in Section 10.01d. After the second distribution, or if a second distribution is considered not to be economical, then any unclaimed or unused funds will be used to offset the costs of Class Administration.

V. ATTORNEYS' FEES, COSTS AND PAYMENT TO CLASS REPRESENTATIVES

5.01 Attorneys' Fees and Costs. After an agreement was reached among the Parties as to all principal terms and conditions of this Settlement Agreement, the Parties entered into arm's-length discussions regarding attorneys' fees, costs, and expenses with Class Counsel, including discussions through and with the assistance of the third-party mediator, David Rotman. Class Counsel will move the Court for an award of attorneys' fees and costs not exceeding 33.3% (one-third) of the Settlement Benefit, to be paid from the Settlement Fund. Class Counsel will file their motion for fees and expenses and post the motion and all supporting papers on the Settlement Website no later than fourteen (14) days before the Claims Deadline, Objection Deadline, and Exclusion Deadline.

5.02 Payment to Class Representatives. The Class Representatives will ask the Court to award them a payment for the time, effort, expense, and service that they personally invested in the Litigation. Defendants will not object to such payment to be paid to the Class Representatives from the Settlement Fund provided that the payment does not exceed \$10,000 per Class Representative, subject to Court approval. Class Counsel will file the motion for service awards and post the motion and all supporting papers on the Settlement Website no later than fourteen (14) days before the Claims Deadline, Objection Deadline, and Exclusion Deadline.

5.03 Settlement Independent of Award of Fees, Costs and Payment to Class Representatives. The awards of attorneys' fees, costs, and payment to the Class Representatives set forth in Sections 5.01 and 5.02 are subject to and dependent upon the Court's approval. However, this Settlement is not dependent or conditioned upon the Court's approving Plaintiffs' requests for such payments or awarding the particular amounts sought by Plaintiffs. In the event the Court declines Plaintiffs' requests or awards less than the amounts sought, this Settlement

will continue to be effective and enforceable by the Parties.

VI. PRELIMINARY APPROVAL

6.01 Order of Preliminary Approval. As soon as practicable after the execution of this Agreement, Plaintiffs will move the Court for entry of the Preliminary Approval Order in substantially similar form as the proposed order attached as Exhibit A. In the motion for preliminary approval, Plaintiffs will request that the Court:

- a. preliminarily approve the Settlement and this Agreement as fair, adequate, and reasonable and within the reasonable range of possible final approval;
- b. approve the forms of Notice and find that the notice program constitutes the best notice practicable under the circumstances and satisfies due process and Rule 23 of the Federal Rules of Civil Procedure;
- c. set the date and time for the Fairness Hearing, which may be continued by the Court from time to time without further notice; and,
- d. set the Claims Deadline, Objection Deadline, and Exclusion Deadline.

VII. CLASS ADMINISTRATION

7.01 Third-Party Class Administrator. The Class Administrator will be responsible for all matters relating to the administration of this Settlement, as set forth herein. Those responsibilities include, but are not limited to, giving notice, obtaining new addresses for returned mail, setting up and maintaining the Settlement Website and toll-free telephone number, fielding inquiries about the Settlement, acting as a liaison between Settlement Class Members and the Parties regarding claims information, directing the mailing of Cash Awards to Settlement Class Members, and any other tasks reasonably required to effectuate the foregoing. The Class Administrator will provide regular updates on the claims status to counsel for all Parties. Counsel for all parties and the Class Administrator will reach an agreement for the amounts to be paid to the Class Administrator for services rendered under this Settlement Agreement before any undertaking by the Class Administrator.

7.02 Payment of Notice and Class Administration Costs. Defendant will pay the Class

Administrator for the reasonable costs of Notice and Class Administration in a time and manner agreed upon by Defendant and the Class Administrator.

VIII. NOTICES

8.01 Timing of Class Notice. Class Notice will commence within fifteen (15) calendar days following entry of the Preliminary Approval Order as described herein.

8.02 Settlement Notice. The Class Administrator will provide notice through advertisement in suitable print publications and through targeted internet and social-media based advertisement. The form of the advertisements shall be agreed to by the Parties with input from the Class Administrator. The specific notice regime will also be agreed to by the Parties with input from the Class Administrator. The Class Administrator will propose a notice regime which is targeted to reach the same demographic as the purchasers of the Class Products.

8.03 Settlement Website. By the Settlement Notice Date, the Class Administrator will maintain and administer a dedicated settlement Website containing class information and related documents. The URL for the Settlement Website shall be selected by the Parties, with the assistance of the Class Administrator. At a minimum, such documents will include the Settlement Agreement and attached exhibits, and when filed, the Preliminary Approval Order, all submissions regarding final settlement approval, attorney's fees and costs, payment to the Class Representatives for time and expense, and the Final Approval Order. The Website shall permit members of the Settlement Class who elect to do so to register online to receive (a) email notice that the Court has granted Final Approval of the Settlement, (b) updates on the deadlines to submit Claims and Requests for Exclusion and make Objections, and (c) the status of payments under the terms of the Settlement. The Website will be taken down and rendered inaccessible by 240 calendar days after the final distribution to class members.

8.04 Toll-Free Telephone Number. Within ten (10) business days of the issuance of the Preliminary Approval Order, the Class Administrator will set up a toll-free telephone number for receiving toll-free calls related to the Settlement, with the ability to reach a live representative. That telephone number will be maintained until the Exclusion Deadline. After that time, and for

a period of ninety (90) calendar days thereafter, a recording will advise any caller to the toll-free telephone number that details regarding the Settlement may be reviewed on the related Settlement Website.

8.05 CAFA Notice. The Defendant will provide the CAFA Notice and the Class Administrator will be responsible for serving the required CAFA Notice within ten (10) calendar days after the filing of the Preliminary Approval Motion.

IX. CLAIMS

9.01 Claim Requirements. A maximum of one claim, submitted on a single Claim Form, may be submitted by each Settlement Class Member. To receive a Cash Award, each Settlement Class Member must include information in the Claim Form—completed online or in hard copy mailed to the Settlement Administrator—confirming under penalty of perjury the following: (i) the number and type of Class Product(s) purchased, and (ii) that the purchase or purchases were made within the applicable Class Period. Settlement Class Members who qualify may request a Cash Award from both the Shake Settlement Class and the Powder Settlement Class.

9.02 Review of Claim Forms. The Settlement Administrator will be responsible for reviewing all claims to determine their validity. The Settlement Administrator will reject any claim that does not comply in any material respect with the instructions on the Claim Form or the terms of paragraphs 9.01, above, or is submitted after the Claims Deadline.

X. DISTRIBUTION PROCESS

10.01 Distribution of the Settlement Fund. The Class Administrator will distribute the funds in the Settlement Fund in the following order and within the time period set forth with respect to each such payment:

a. first, no later than five (5) business days after the Funding Date has been reached and the Class Representatives and Class Counsel have provided W-9 forms, the Class Administrator will pay to Class Counsel the attorneys' fees, costs, expenses, and time and expense or incentive awards ordered by the Court as set forth in Sections 5.01 and 5.02;

b. next, no later than fifteen (15) business days after the Funding Date, the Class Administrator will pay the Cash Awards to Settlement Class Members pursuant to Section 9;

c. next, if 210 calendar days after the first distribution there are uncashed checks that would yield an amount that, after administration costs, would allow a second pro rata distribution to those Settlement Class Members who cashed the first payment check that Class Counsel and Defendant deem economical under Section 4.06, the Claims Administrator will distribute any such funds on a pro rata basis to those Settlement Class Members;

d. next, if a second pro rata distribution is not made, the uncashed amount will be used to offset the costs of Class Administration.

e. Finally, if a second pro rata distribution is made, the amount of any checks that remain uncashed 210 calendar days after that distribution will be used as provided by the paragraph above.

10.02 Mailing of Settlement Checks. Initial Cash Awards will be sent to Settlement Class Members by the Class Administrator via U.S. mail or through digital payments like PayPal no later than fifteen (15) business days after the Funding Date. If a settlement check is returned, the Class Administrator will attempt to obtain a new mailing address for that Settlement Class Member by taking the steps described in Section 8.03. If, after a second mailing, the settlement check is again returned, no further efforts need be taken by the Class Administrator to resend the check. The Class Administrator will advise Class Counsel and counsel for Defendants of the names of the Settlement Class Members whose checks are returned by the postal service as soon as practicable. Each original settlement check, whether issued in a first or second distribution, will be negotiable for one hundred eighty (180) calendar days after it is issued. Upon a timely request made by a Settlement Class Member, the Class Administrator may re-issue a settlement check that was issued in either a first or second distribution, provided that the re-issued check will not be negotiable beyond thirty (30) days or the date that is one hundred eighty (180) calendar days after the date of issuance of the original check to such Settlement Class Member,

whichever is longer.

10.03 No Person shall have any claim against Plaintiffs, Class Counsel, the Class Administrator, Defendant or their counsel, the Released Parties, or any other person designated by Class Counsel, the Class Administrator, or the Court to assist in claims administration, based on the administration of and processing and payment of claims consistent with the terms of this Settlement Agreement.

XI. EXCLUSIONS AND OBJECTIONS

11.01 Potential Claimants. Each member of a Settlement Class who does not timely and validly request exclusion from the Settlement following the procedures required by this Agreement will be a Settlement Class Member.

11.02 Exclusions from the Settlement. Members of a Settlement Class who wish to exclude themselves from that Settlement Class may do so only by submitting a timely, valid Request for Exclusion to the Class Administrator. The parties will provide a template Request for Exclusion on the Settlement Website. To be timely, the Request for Exclusion must be postmarked or submitted online by the Exclusion Deadline. To be valid, the Request for Exclusion must (a) be made in writing and mailed or submitted online; (b) contain the full name and address of the Settlement Class Member; (c) state that the Settlement Class Member wishes to be excluded from the Settlement; and (d) be signed individually by the Settlement Class Member. All Settlement Class Members who submit a timely, valid Request for Exclusion will be excluded from the Settlement Classes and will not be bound by the terms of this Agreement, and all Settlement Class Members who do not submit a timely, valid Request for Exclusion will be bound by this Agreement and the Judgment, including the releases in Section 14 below.

11.03 Reporting of Requests for Exclusion. The Class Administrator will provide the Parties with copies of each Request for Exclusion that it receives and will provide a list of all Settlement Class Members who have timely and validly excluded themselves from the Settlement in its declaration filed with the Court, as required by Section 12.01.

11.04 Objections. Settlement Class Members who wish to object to this Settlement may

do so by filing a timely, valid Objection with the Court, appearing at the Fairness Hearing, or both. For a written Objection to be timely, the Objection must be filed with the Court by the Objection Deadline. To be valid, the Objection must state: (a) the Settlement Class Member's full name and address; (b) the class product(s) that the Settlement Class Member purchased and the date(s) of purchase; (c) the specific reasons for the Settlement Class Member's Objection, and whether they apply only to the objector, to a specific subset of the class, or to the entire class, as required by Fed. R. Civ. P. 23(e)(5)(a); (d) the objector's signature; and (e) the signature of the objector's counsel, if any. Any documents that the Objector wants to be considered must be attached to the Objection. Regardless of whether an Objector files a written objection, the Objector may appear at the Fairness Hearing. If the Objector has not filed a written objection, the Objector must satisfy the requirements of Fed. R. Civ. P. 23(e)(5)(a) at the Fairness Hearing. The Parties will have the right to obtain document discovery and take depositions relevant to any Objection.

11.05 Fairness Hearing. Any Settlement Class Member who has timely filed an Objection and stated therein an intent to appear may appear at the Fairness Hearing, either in person or through an attorney hired at the Settlement Class Member's own expense, to object to the fairness, reasonableness, or adequacy of this Agreement or the Settlement.

XII. FINAL APPROVAL AND JUDGMENT ORDER

12.01 No later than fourteen (14) calendar days before the Fairness Hearing, the Class Administrator will file with the Court and serve on counsel for all Parties a declaration stating that the Notice required by the Agreement has been completed in accordance with the terms of the Preliminary Approval Order, and describe the important aspects of the notice process such as digital impressions, claims, opt outs, telephone calls etc.

12.02 If the Court issues the Preliminary Approval Order and all other conditions precedent to the Settlement have been satisfied, no later than fourteen (14) calendar days before Fairness Hearing and fourteen (14) days after the Objection Deadline:

- a. All Parties will request, individually or collectively, that the Court enter

the Final Approval Order in substantially similar form as the proposed order attached as Exhibit C, with Class Counsel filing a memorandum of points and authorities in support of the motion;

- b. Defendant may file a memorandum in support of the motion; and
- c. Class Counsel and Defendant may file memoranda addressing any

Objections submitted to the Settlement.

12.03 At the Fairness Hearing, the Court will consider and determine whether the Settlement should be finally approved as fair, reasonable, and adequate, rule on Objections to the Settlement, determine whether the fee award to Class Counsel and payment to the Class Representatives for time and expense should be approved, and determine whether a Judgment finally approving the Settlement should be entered.

12.04 This Agreement is subject to and conditioned upon the issuance by the Court of a Final Approval Order that grants final approval of this Agreement and enters a final Judgment and:

- a. finds that the Notice provided satisfies the requirements of due process and Federal Rule of Civil Procedure Rule 23(e)(1);
- b. finds that Settlement Class Members have been adequately represented by the Class Representatives and Class Counsel;
- c. finds that the Settlement Agreement is fair, reasonable, and adequate with respect to the Settlement Classes, that each Settlement Class Member will be bound by this Agreement, including the releases in Section 14.01 and the covenant not to sue in Section 14.04, and that this Settlement Agreement should be and is approved;
- d. dismisses with prejudice all claims of the Settlement Class Members asserted in the Litigation;
- e. permanently enjoins each and every Settlement Class Member from bringing, joining, or continuing to prosecute any Released Claims against any of the Defendant or the Released Parties; and,
- f. retains jurisdiction of all matters relating to the interpretation,

administration, implementation, effectuation, and enforcement of this Settlement Agreement.

XIII. FINAL JUDGMENT

13.01 The judgment entered at the Fairness Hearing will be deemed final:

a. Thirty (30) calendar days after entry of the Judgment approving the Settlement if no document is filed within that time seeking appeal, review, or rehearing of the Judgment or taking some other action that would extend the time for seeking appeal or review of the Judgment; or

b. If any such document is filed or action is taken, then five (5) business days after the date upon which all appellate and other resulting proceedings have been finally terminated in such a manner as to permit the Judgment to take effect in substantially the form described in Section 12.04.

XIV. RELEASE OF CLAIMS

14.01 Released Claims. Upon the Effective Date, Plaintiffs and each Settlement Class Member, as well as their respective assigns, heirs, executors, administrators, successors, and agents, hereby release, resolve, relinquish, and discharge each and all of the Released Parties from each of the Released Claims (as defined below). The Plaintiffs and the Settlement Class Members further agree that they will not institute any action or cause of action (in law, in equity or administratively), suits, debts, liens, or claims, known or unknown, fixed or contingent, which they may have or claim to have, in state or federal court, in arbitration, or with any state, federal or local government agency or with any administrative or advisory body, arising from or reasonably related to the Released Claims. The release does not apply to members of the Settlement Class who opt out of the Settlement by submitting a valid and timely Request for Exclusion. "Released Claims" means any and all claims, causes of action, suits, obligations, debts, demands, agreements, promises, liabilities, damages, losses, controversies, costs, expenses, and attorneys' fees of any nature whatsoever, whether based on any federal law, state law, common law, territorial law, foreign law, contract, rule, regulation, any regulatory promulgation (including, but not limited to, any opinion or declaratory ruling), common law, or

equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, punitive or compensatory, that arise out of or relate in any way to the claims asserted or the factual allegations made in the Amended Complaint in this Action, including without limitation the marketing, advertising, promotion, or distribution of the Class Products and the purchase of any of the Class Products at any time during the Class Period. This release is intended to cover the full scope allowed by *Hesse v. Spring Corporation*, 598 F.3d 581 (9th Cir. 2010).

14.02 Waiver of Unknown Claims. Without limiting the foregoing, the Released Claims specifically extend to claims that Plaintiffs and Settlement Class Members do not know or suspect to exist in their favor at the time that the Settlement and the releases contained therein become effective. This Section constitutes a waiver, without limitation as to any other applicable law, of Section 1542 of the California Civil Code, which provides:

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

This Section also constitutes a waiver of any other law of any jurisdiction (domestic or foreign) or principle of common law that is similar, comparable, or equivalent to Section 1542.

14.03 Acknowledgement of Waiver of Unknown Claims. Plaintiffs and the Settlement Class Members understand and acknowledge the significance of their waivers of California Civil Code Section 1542 and similar federal and state statutes, case law, rules, or regulations relating to limitations on releases. In connection with such waivers and relinquishment, Plaintiffs and the Settlement Class Members acknowledge that they are aware that they may hereafter discover facts in addition to, or different from, those facts that they now know or believe to be true with respect to the subject matter of the Settlement, but that it is their intention to release fully, finally, and forever all Released Claims with respect to the Released Parties, and in furtherance of such intention, the releases of the Released Claims will remain in effect notwithstanding the discovery

or existence of any such additional or different facts.

14.04 Covenant Not to Sue. Plaintiffs agree and covenant, and each Settlement Class Member will be deemed to have agreed and covenanted, not to sue any Released Party with respect to any of the Released Claims, and agree to be forever barred from doing so, in any court of law or equity, or any other forum.

XV. TERMINATION OF AGREEMENT

15.01 Either Plaintiffs or Defendant May Terminate the Agreement. Plaintiffs (by unanimous agreement of all Plaintiffs) and Defendant will each have the right to unilaterally terminate this Agreement by providing written notice of their election to do so (“Termination Notice”) to all other Parties hereto within ten (10) business days of any of the following occurrences:

- a. the Court rejects, materially modifies, materially amends or changes, or declines to issue a Preliminary Approval Order or a Final Approval Order with respect to the Settlement Agreement;
- b. an appellate court reverses the Final Approval Order, and the Settlement Agreement is not reinstated without material change by the Court on remand;
- c. any court incorporates terms into, or deletes or strikes terms from, or modifies, amends, or changes the Preliminary Approval Order, the Final Approval Order, or the Settlement Agreement in a way that Plaintiffs or Defendant reasonably consider material, unless the modification or amendment is accepted in writing by all Parties, except that, as provided above, the Court’s approval of attorneys’ fees and costs and service awards, or their amounts, is not a condition of the Settlement; or

15.02 Revert to Status Quo If Plaintiffs or Defendant Terminates. If either Plaintiffs or Defendant terminates this Agreement as provided in Section 15.01, the Agreement will be of no force and effect; the Parties’ rights and defenses will be restored, without prejudice, to their respective positions as if this Agreement had never been executed; and any orders entered by the Court in connection with this Agreement will be vacated. However, any payments made to the

Class Administrator for services rendered to the date of termination will not be refunded to Defendant.

15.03 Defendant's Option to Terminate. If more than 250 class members opt out of the settlement, CytoSport has the right in its sole discretion, but not the obligation, to terminate the settlement and revert to the status quo ante.

XVI. NO ADMISSION OF LIABILITY

16.01 Defendant denies any liability or wrongdoing of any kind associated with the claims alleged in the Amended Complaint. Defendant has denied and continues to deny each and every material factual allegation and all claims asserted against it in the Litigation. Nothing herein will constitute an admission of wrongdoing or liability, or of the truth of any allegations in the Litigation. Nothing herein will constitute an admission by Defendant that the Litigation is properly brought on a class or representative basis, or that classes may be certified, other than for settlement purposes. To this end, the Settlement of the Litigation, the negotiation and execution of this Agreement, and all acts performed or documents executed pursuant to or in furtherance of the Settlement are not, will not be deemed to be, and may not be used as an admission or evidence of: (i) any wrongdoing or liability on the part of Defendant or of the truth of any of the allegations in the Litigation; (ii) any fault or omission on the part of Defendant in any civil, criminal, or administrative proceeding in any court, arbitration forum, administrative agency, or other tribunal; or (iii) the appropriateness of these or similar claims for class certification.

16.02 Pursuant to Federal Rule of Evidence Rule 408 and any similar provisions under the laws of any state, neither this Agreement nor any related documents filed or created in connection with this Agreement will be admissible in evidence in any proceeding, except as necessary to approve, interpret, or enforce this Agreement.

XVII. MISCELLANEOUS

17.01 Entire Agreement. This Agreement, the exhibits hereto, and the confidential termination provision referenced in Section 15.03 above constitute the entire agreement between the Parties. No representations, warranties, or inducements have been made to any of the Parties,

other than those representations, warranties, and inducements contained in this Agreement.

17.02 Governing Law. This Agreement will be governed by the laws of the State of California.

17.03 Jurisdiction. The Court will retain continuing and exclusive jurisdiction over the Parties to this Agreement, including the Plaintiffs and all Settlement Class Members, for purposes of the administration and enforcement of this Agreement.

17.04 No Construction Against Drafter. This Agreement was drafted jointly by the Parties and, in construing and interpreting this Agreement, no provision of this Agreement will be construed or interpreted against any Party based upon the contention that this Agreement or a portion of it was purportedly drafted or prepared by that Party.

17.05 Resolution of Disputes. The Parties will cooperate in good faith in the administration of this Settlement and use their best efforts to promptly file a Motion for Preliminary Approval with the Court and to take any other actions required to effectuate this Settlement. Any unresolved dispute regarding the administration of this Agreement will be decided by the Court or by a mediator upon agreement of the Parties.

17.06 Counterparts. This Agreement may be signed in counterparts, and the separate signature pages executed by the Parties and their counsel may be combined to create a document binding on all of the Parties and together will constitute one and the same instrument.

17.07 Time Periods. The time periods and dates described herein are subject to Court approval and may be modified upon order of the Court or written stipulation of the Parties.

17.08 Authority. Each person executing this Settlement Agreement on behalf of any of the Parties hereto represents that such person has the authority to so execute this Agreement.

17.09 No Oral Modifications. This Agreement may not be amended, modified, altered, or otherwise changed in any manner, except by a writing signed by all of the duly authorized agents of Defendant and Plaintiffs and approved by the Court. After entry of the Final Approval Order and Judgment, the Parties may by written agreement amend this Settlement Agreement and its implementing documents (including all exhibits hereto) without further notice to the

Class or approval by the Court if such changes are consistent with the Court's Final Order and Final Judgment and do not materially alter, reduce, or limit the rights of Settlement Class Members.

17.10 Publicity and Confidentiality. The Parties agree that they will not initiate any publicity of the Settlement, except that, after the judgment becomes final, as defined in Section 13.01, counsel may post the settlement on their law firm websites and submit the settlement to Michigan Lawyers Weekly, but all descriptions of the case and settlement must be accurate. Notice of the Settlement will be delivered exclusively through the notice process set forth in Section 8, above. Plaintiffs and Class Counsel, in responding to inquiries about the Litigation, shall not disparage Defendant or its products, and shall provide only accurate factual information about the Settlement.

17.11 Notices. Unless otherwise stated herein, any notice to the Parties required or provided for under this Agreement will be in writing and may be sent by electronic mail or hand delivery, postage prepaid, as follows:

If to Class Counsel:

Trenton R. Kashima
SOMMERS SCHWARTZ P.C.
ProteinSettlement@sommerspc.com
402 West Broadway
Suite 1760
San Diego, CA 92101
Telephone: (248) 355-0300

Nick Suciu III
BARBAT, MANSOUR & SUCIU PLLC
nicksuciu@bmslawyers.com
1644 Bracken Rd.
Bloomfield Hills, MI 48302
Telephone: (313) 303-3472

If to counsel for Settling Defendant CytoSport, Inc.:

Aaron D. Van Oort
aaron.vanoort@faegrebd.com
FAEGRE BAKER DANIELS
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901
Telephone: (612) 766-7000

IN WITNESS WHEREOF, the Parties hereto have caused this Amended Settlement Agreement to be executed, dated as of January __, 2020.

DATED: January __, 2020

Plaintiff Chayla Clay

01/23/2020

Chayla M Clay

DATED: January __, 2020

Plaintiff Chris Roman

DATED: January __, 2020

Plaintiff Erica Ehrlichman

DATED: January __, 2020

Plaintiff Logan Reichert

IN WITNESS WHEREOF, the Parties hereto have caused this Amended Settlement Agreement to be executed, dated as of January __, 2020.

DATED: January __, 2020

Plaintiff Chayla Clay

DATED: January __, 2020

Plaintiff Chris Roman

01/28/2020

Chris Roman

DATED: January __, 2020

Plaintiff Erica Ehrlichman

DATED: January __, 2020

Plaintiff Logan Reichert

IN WITNESS WHEREOF, the Parties hereto have caused this Amended Settlement Agreement to be executed, dated as of January __, 2020.

DATED: January __, 2020

Plaintiff Chayla Clay

DATED: January __, 2020

Plaintiff Chris Roman

DATED: January __, 2020

Plaintiff Erica Ehrlichman

01/22/2020



A handwritten signature in black ink, appearing to read "Erica Ehrlichman", is written over a horizontal line.

DATED: January __, 2020

Plaintiff Logan Reichert

IN WITNESS WHEREOF, the Parties hereto have caused this Amended Settlement Agreement to be executed, dated as of January __, 2020.

DATED: January __, 2020

Plaintiff Chayla Clay

DATED: January __, 2020

Plaintiff Chris Roman

DATED: January __, 2020

Plaintiff Erica Ehrlichman

DATED: January __, 2020

Plaintiff Logan Reichert

01/24/2020



DATED: January 23, 2020

CytoSport, Inc.

By: 

Name: FARZIN FIROOZNIYA

Title: VP & Asst. Secretary

APPROVED AS TO FORM AND CONTENT:

DATED: January 23, 2020

FAEGRE BAKER DANIELS LLP

By  _____

Aaron D. Van Oort

Attorney for Defendant CytoSport, Inc.

DATED: January __, 2020

SOMMERS SCHWARTZ P.C.


By _____

Jason J. Thompson

Attorney for Plaintiffs and Class Members

DATED: January __, 2020

BARBAT MANSOUR & SUCIU PLLC

By  _____

Nick Suci III

Attorney for Plaintiffs and Class Members

APPROVED AS TO FORM AND CONTENT:

DATED: January __, 2020

FAEGRE BAKER DANIELS LLP

By _____

Aaron D. Van Oort

Attorney for Defendant CytoSport, Inc.

DATED: January __, 2020

SOMMERS SCHWARTZ P.C.



By _____
Jason J. Thompson

Attorney for Plaintiffs and Class Members

DATED: January __, 2020

BARBAT MANSOUR & SUCIU PLLC

By _____

Nick Suciu III

Attorney for Plaintiffs and Class Members