SOMMERS SCHWARTZ, P.C.
Trenton R. Kashima, Esq. (SBN 291405)
tkashima@sommerspc.com
402 West Broadway, Suite 1760
San Diego, California 92101
Telephone: (619) 762-2126
Facsimile: (619) 762-2123

[Additional Counsel Listed on Signature Page]

*Attorneys for Plaintiffs and the Classes*

**UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

CHAYLA CLAY, ERICA EHRLICHMAN, LOGAN REICHERT, and CHRIS ROMAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CYTOSPORT, INC., a California corporation,

Defendant.

Case No: 3:15-cv-00165-L-DHB

**NOTICE OF RENEWED MOTION AND RENEWED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Hearing date: April 6, 2020
Time: 10:30 a.m.
Judge: Hon. M. James Lorenz

[No Oral Argument Unless Ordered by the Court]

**TO THE HONORABLE M. JAMES LORENZ, THE PARTIES AND THEIR ATTORNEYS OF RECORD**:

**PLEASE TAKE NOTICE**, that on April 6, 2020 at 10:30 a.m.,[1] by and through their counsel, Plaintiffs and Class Representatives Chayla Clay, Erica Ehrlichman, Logan Reichert, and Chris Roman ("Plaintiffs"), will and hereby do move the Court for an order:

1. Granting preliminary approval of the proposed class Settlement, based on the terms included in the Amended Settlement Agreement ("Settlement Agreement") attached as Exhibit A to the accompanying Declaration of Trenton R. Kashima, as a fair and reasonable compromise of the Classes' claims;

2. Certifying the Settlement Classes defined in the Settlement Agreement.

3. Finding the Class Notice is the best means practicable of providing notice under the circumstances and when completed shall constitute due and sufficient notice of the action, the Settlement, and the Fairness Hearing to all persons affected by or authorized to participate in the Settlement in full compliance with Federal Rules of Civil Procedure 23(c) and (e) and the requirements of due process;

4. Approving the form and content of the proposed Class Notice and establishing a schedule for the dissemination of notice to the Class Members and the deadlines for the Class Members to request exclusion from the Settlement and submit claims;

5. Appointing Angeion Group, LLC as the Settlement Administrator; and

6. Scheduling a Fairness Hearing, at which Class Members may be heard, to determine all necessary matters concerning the Settlement Agreement, including whether the proposed Settlement Agreement is fair, adequate, and reasonable, whether this Court should grant final approval, whether there should be any attorney's fees and expense award and/or incentive award, and the amounts of any such awards.

[1] No oral arguments will be held unless ordered by the Court.

This Motion is brought pursuant to Federal Rule of Civil Procedure 23(e) and is supported by the Memorandum of Points and Authorities filed contemporaneously herewith, the Declarations of Trenton Kashima, Jason T. Thompson, Nick Suciu III, and Steven Weisbrot and the exhibits attached thereto, and the court record.

Dated: March 3, 2020

Respectfully submitted,

SOMMERS SCHWARTZ, P.C.

/s/ Trenton R. Kashima

Trenton R. Kashima, Esq.
402 West Broadway, Suite 1760
San Diego, California 92101 Telephone:
(619) 762-2126
Facsimile: (619) 762-2123

SOMMERS SCHWARTZ P.C.
Jason J. Thompson, Esq.
JThompson@sommerspc.com
One Towne Square, 17th Floor
Southfield, MI 48076
Telephone: (248) 355-0300
Telephone: (248) 355-0300

FINKELSTIEN & KRINSK LLP Jeffrey
R. Krinsk, Esq.
jrk@classactionlaw.com
550 West C Street, Suite 1760
San Diego, California 92101 Telephone:
(619) 238-1333
Facsimile: (619) 238-5425

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

*Attorneys for Plaintiffs and the Classes*

SOMMERS SCHWARTZ, P.C.
Trenton R. Kashima, Esq. (SBN 291405)
tkashima@sommerspc.com
402 West Broadway, Suite 1760
San Diego, California 92101
Telephone: (619) 762-2126
Facsimile: (619) 762-2123

[Additional Counsel Listed on Signature Page]

*Attorneys for Plaintiffs and the Classes*

**UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

CHAYLA CLAY, ERICA EHRLICHMAN, and LOGAN REICHERT, and CHRIS ROMAN, individually and on behalf of all others similarly situated ,

Plaintiffs,

v.

CYTOSPORT, INC., a California corporation,

Defendant.

Case No: 3:15-cv-00165-L-DHB

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RENEWED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

Hearing date: April 6, 2020
Time: 10:30 a.m.
Judge: Hon. M. James Lorenz

[No Oral Argument Unless Ordered by the Court]

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Statutes**

**Regulations**

Pursuant to Federal Rule of Civil Procedure 23(e), Plaintiffs Chayla Clay, Erica Ehrlichman, Logan Reichert, and Chris Roman move this Court for preliminary approval of the Settlement with Defendant Cytosport Inc., the terms of which are set forth in the Amended Settlement Agreement ("Agreement") attached as Exhibit A to the Declaration of Trenton R. Kashima ("Kashima Decl. II"), filed herewith.[1]

Plaintiffs previously moved for preliminary approval of the Settlement. ECF No. 222-1. Court denied preliminary approval without prejudice and gave the parties guidance regarding how to revise the settlement and accompanying materials in certain respects to address the Court's concerns. The parties acted on the Court's guidance, made revisions, and now move for preliminary approve of the revised agreement. This Motion largely follows the arguments previously forwarded by Plaintiffs in support of preliminary approval (*see* ECF No. 222-1), noting the relevant changes made to the Amended Settlement Agreement, which includes:

- The definition of the "Settlement Classes" include only *consumers* of the Class Products (Agreement at ¶ 2.29);
- The Settlement Administrator is required to staff the Toll-Free Telephone Number with *live* representatives (*Id.* at ¶ 8.04);
- The parties will provide a template Request for Exclusion on the Settlement Website (*Id.* at ¶ 11.02);
- Requests for Exclusion can be submitted by mail or *online* (*Ibid.*);
- Class Members can submit written objections *or* oral objection at the Fairness Hearing (*Id.* at ¶ 11.04);
- The "Released Claims" was limited to the scope allowed by *Hesse v. Spring Corporation*, 598 F.3d 581 (9th Cir. 2010) (*Id.* at ¶ 14.01);
- References regarding "assisting other" from initiating a claim was removed from the release language (*Id.* at ¶ 14.04); and
- Language was changed to reflect Trenton Kashima's change of law firm (*Id.* at ¶ 2.07).

*See* Kashima Decl. II, at ¶ 53. Additionally, Plaintiffs submit the declaration of Steven Weisbrot ("Weisbrot Decl. II"), filed herewith, which further details the reach and

[1] All capitalized terms used herein have the same definitions as those defined in the Settlement Agreement.

scope of the notice process.

## I. INTRODUCTION

After a hard-fought litigation including multiple rounds of written discovery, depositions, expert discovery, extensive motion practice, and two rounds of mediations, Plaintiffs and Defendant reached a Settlement. Plaintiffs' underlying action alleges that Defendant misleadingly advertised the fat, L-Glutamine and protein content of its protein supplements; claims that Defendant vigorously denies. The Settlement addresses these allegations and provides the Class with $12 million dollars of relief, in addition to requiring Defendant to pay for the administration of the Settlement and Notice to the Class. Compared to Plaintiffs' initial estimates, the individual recovery offered under this Settlement could exceed the amount Class Members could reasonably expect at trial. Accordingly, this Settlement provides a significant and immediate benefit to the Settlement Class.

Given the extensive relief provided, it is unsurprising that the proposed Settlement is the result of lengthy and contentious negotiations conducted with the assistance of an experienced mediator, David Rotman, Esq. The Settlement was only reached after the Court ruled on Plaintiffs' Motion for Class Certification and Defendant's Motion for Summary Judgment, and the Ninth Circuit had accepted Defendant's petition for review under Rule 23(f). Additionally, as noted herein, the Settlement (as amended) addresses each of the concerns in the Court's previous order on Preliminary Approval. Accordingly, this Settlement is the result of well-informed arm's length negotiations.

If approved, the Settlement will bring an end to what has otherwise been, and likely would continue to be, contentious and costly litigation under extremely favorable terms to the Settlement Class. Therefore, Plaintiffs request that the Court preliminarily approve the Settlement, order that Class Notice be disseminated, and schedule a final approval hearing.

## II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### A. The Factual Allegations and Causes of Action

Plaintiffs filed this class action on January 23, 2015. *See generally* Plaintiffs' Complaint [Dkt. No. 1]. Defendant manufactures and markets the popular Muscle Milk protein supplements. *See generally* First Amended Complaint ("FAC") [Dkt. No. 156]. at ¶ 1. There are two product types involved in this case: the "Powder Products" and the ready-to-drink "Shake Products" (collectively referred to herein as the "Class Products"). *Id.* at ¶¶ 2-3. The Powder Products are protein drink powders that consumers typically mix with water or milk. The Shake Products come in a premixed liquid form and are sold as individual serving sized containers.

#### 1. The Lean Claims

During the Class Period, Defendant labeled its Powder Products with a number of "Lean" claims, including: (1) the front labels stated that they contain "[XX] g LEAN PROTEIN"; (2) the Products identified as "LEAN MUSCLE PROTEIN," "LEAN MUSCLE PROTEIN SUPPLEMENT," "LEAN MUSCLE PROTEIN POWDER," or "NEW LEANER FORMULA"; and (3) the vast majority of the products also advertise they contain "Lean Lipids." *See* Declaration of Trenton Kashima ("Kashima Decl. I") [Dkt. No. 157-21], ¶¶ 7-9, App. A.

Plaintiffs contend that the "Lean" claims are both misleading and illegal under federal law. FAC, ¶¶ 46-52. The Powder Products are fortified with oils and fats. Kashima Decl. I, ¶ 27. Plaintiffs, thus, argue that use of the term lean to describe these Products was misleading.[2] Further, pursuant to the Food, Drug, and Cosmetic Act ("FDCA"), federal regulations prohibit the use of the word "lean" unless the food meets the requirements of 21 C.F.R. § 101.62(e). *See* 21 C.F.R. § 101.62(a). Plaintiffs assert that each "Lean" Muscle Milk Product fails to satisfy 21 C.F.R. § 101.62(e) and is a *per*

[2] The lean claims involve the following products: Muscle Milk: Lean Muscle Protein Powder; Muscle Milk Light: Lean Muscle Protein Powder; Muscle Milk Naturals: Nature's Ultimate Lean Muscle Protein; Muscle Milk Pro Series 50: Lean Muscle Mega Protein Powder; and Monster Milk: Lean Muscle Protein Supplement.

*se* violation of the FDCA.[3]

2. The Protein Claims

Plaintiffs further alleges that Defendant's Shake Products do not contain the advertised quantity of protein. *Id.*, ¶¶ 16-30. The shake Products state that they contain a specific amount of protein per container. Kashima Decl., I ¶¶ 18-20, App. C; *see also id.*, Exs. S & T.[4] Plaintiffs assert the stated protein content of the Products is deficient. 21 C.F.R. § 101.9(g)(4)(i).

Based on these assertions, Plaintiffs alleged—on behalf of a National Class—that Defendant had violated the California Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE §§ 17200 *et seq.*, and the California False Advertising Law ("FAL") a CAL. BUS. & PROF. CODE §§ 17500 *et seq*. FAC, ¶¶ 61-69, 83-104. Plaintiffs also claim, on behalf of classes of purchasers of Shake and Powder Products in California, Michigan, and Florida, that the advertisements of the Class Products violate their respective state's consumer protection statutes[5], warranty laws, and the Magnuson–Moss Warranty Act ("MMWA"), 15 U.S.C. § 2301 *et seq*. FAC, ¶¶ 61-146.[6]

**B. Procedural History**

1. Defendant's Motion to Dismiss

On March 30, 2015, Defendant moved to dismiss Plaintiffs' claims. *See generally* Defendant's Motion to Dismiss [Dkt. No. 24-1]. It was argued that Plaintiffs' allegations were preempted by the FDCA, were subject to the Primary

[3] California, Florida and Michigan have each expressly adopted the requirements of FDCA into their own state statutory regimes. *See* CAL. HEALTH & SAFETY CODE § 110100; FL.ST. § 500.11; M.C.L. § 289.8101.

[4] The protein claims involve the following products: 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.

[5] For the California Subclass, the UCL, FAL, and Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1700 *et seq*. For the Michigan Subclass, the Michigan Consumer Protection Act, M.C.L. §§ 445.901 *et seq*. For the Florida Subclass, the Florida Deceptive and Unfair Trade Practices Act, FL.ST. §§ 501.201 *et seq*.

[6] Plaintiffs also challenged the L-Glutamine claims made on Defendant's Powder Products. FAC, ¶¶ 31-45. These claims were not certified, and are no longer being pursued.

Jurisdiction Doctrine, Plaintiffs lacked standing to bring their claims, and Plaintiffs' allegations were insufficient to satisfy the elements of their underlying causes of action. *See generally id.*

The Court denied Defendant's Motion to Dismiss in its entirety. Order Denying Motion to Dismiss [Dkt. No. 53]. In doing so, the Court clarified the correct protein testing methodology applicable under federal law and that Plaintiffs would have to prove their case under these standards. *Id.* at pp. 5:20-6:4 & 7:3-23.

2. Plaintiffs' Motion for Judgment on the Pleadings

After Defendant answered the Complaint, Plaintiffs filed a Motion for Judgment on the Pleadings to contest the validity of Defendant's twenty-seven affirmative defenses. Dkt. No. 68-1. The Court granted Plaintiffs' Motion as to all but seven of Defendant's affirmative defenses. Order Granting in Part and Denying in Part Plaintiffs' Motion [Dkt. No. 163]. Between Defendant's Motion to Dismiss and Plaintiffs' Motion for Judgment on the Pleading, the parties had defined the scope of the dispute.

3. Plaintiffs' Motion for Class Certification and Defendant's Motion for Partial Summary Judgment and to Exclude Certain Opinions of Dr. Howlett

On September 9, 2016, Plaintiffs moved to certify national and three separate state classes. *See* Dkt. No. 109. Defendant, however, moved for an extension of time to file its response to Plaintiffs' Motion for Class Certification, arguing that Defendant needed additional time to conduct expert discovery. Defendant's *Ex Parte* Motion for Extension of Time [Dkt. No. 121]. Accordingly, the Court referred the discovery dispute to the Magistrate Judge and denied Plaintiffs' Motion for Class Certification without prejudice. *See* Order Granting in Part Defendant's *Ex Parte* Application [Dkt. No. 124].

In turn, the Magistrate Judge decided on the parties' discovery dispute and entered an order resetting the class certification deadline to March 3, 2017. Order Granting in Part and Denying in Part Joint Motion for a Status Conference and Briefing

Schedule [Dkt. No. 133]. But, before Plaintiff filed the Motion for Class Certification, Defendant filed a Motion for Partial Summary Judgment and to Exclude Certain Opinions of Dr. Howlett (Plaintiffs' Damages Expert). *See* Order Regarding Briefing Plaintiffs' Motion for Class Certification [Dkt. No. 154]. The Court denied Defendant's Motion for Summary Judgment without prejudice and ordered that Defendant refile its Motion with its opposition to Plaintiffs' Motion for Class Certification. This would allow the concurrent briefing of both parties' Motions for a single hearing, if necessary. Order Regarding Briefing Plaintiffs' Motion for Class Certification [Dkt. No. 154].

The parties' arguments on these matters proved extensive. Kashima Decl. II, at ¶ 20. In total, the parties submitted 135 pages of briefing and seventeen declarations (including five expert declarations) with over 4,000 pages of evidence in support of their respective class certification and summary judgment motions. *Id.*; *See* Dkt. Nos. 157-1, 170-1, 185 & 191. The Court ultimately granted in part, and denied in part, both Plaintiffs' Motion for Class Certification and Defendant's Motion for Summary Judgment. The Court granted summary judgment as to Plaintiffs' Michigan Consumer Protection Act (sections 445.903(1)(a), (e), (s) and (cc); but not 445.903(1)(c)), express warranty and MMWA claims (Order Regarding Motion for Summary Judgment [Dkt. No. 209]), while certifying the following classes:

> (1) the nationwide classes as to the UCL and FAL claims to the extent they are based on statements of protein content on protein shake labels and "lean" statements on protein powder labels; (2) the California subclasses as to the UCL, FAL and CLRA claims to the extent they are based on statements of protein content on protein shake labels; and UCL and FAL claims to the extent they are based on "lean" statements on protein powder labels; (3) the Florida subclasses as to the FDUTPA violation based on the protein content statements on protein shakes and "lean" statements on protein powders; and (4) the Michigan subclass as to the MCPA violation based on the protein content statements on protein shakes."

Order Regarding Class Certification [Dkt. No. 210], at p. 38.

4. Defendant's Appeal

Following the Court's ruling, Defendant filed a Petition for Permission to

Appeal the decision on class certification pursuant to Rule 23(f). *See* Dkt. No. 218. Defendant sought review of the Court's certification of a national class under the UCL and FAL, as well as the sufficiency of Plaintiffs' proposed damages model. *See Chayla Clay et al. v. Cytosport, Inc*., Case No. 18-80123 [Dkt. No. 1-2]. In a rare decision by the Ninth Circuit on December 21, 2018, the Petition was granted, but briefing was subsequently stayed at the parties' request to permit them to attempt to mediate a settlement. *Id.*, at Dkt. No. 11; Kashima Decl. II, at ¶ 24.

**C. The Parties' Discovery Efforts**

The parties have engaged in extensive discovery to prosecute this case. Plaintiffs propounded fifty-six document requests, thirty-two interrogatories, sixteen requests for admissions, and a number of subpoenas. *Id*. at ¶ 25. As a result, Plaintiffs have received and reviewed over 47,000 pages of documents, plus voluminous amounts of product sales data. *Id*. at ¶ 26. Plaintiffs deposed several of Defendant's key employees, including Defendant's Chief Marketing Officer, Senior Vice President of Innovation and Business Development, and Compliance Manager. *Id*., ¶ 27. In total, Plaintiffs took six depositions over seven days. *Id*.

The parties further relied on expert witnesses. Plaintiffs offered the declaration of Dr. William Campbell regarding the effects of L-glutamine on the human body, as well as the declarations of Dr. Jeffrey Harris and Dr. Elizabeth Howlett in support of Plaintiffs' proposed class damages model. *See* Dkt. Nos. 157-6, 157-7 & 157-8. Defendant offered the declarations of Professor Ravi Dhar and Dr. Keith R. Ugone to challenge Plaintiffs' damages model. *See* Dkt. Nos. 170-7 & 170-22. This discovery offered considerable insight into the likelihood Plaintiffs' prevailing on their claims and, consequently, the value of the case.[7]

The parties' discovery efforts have not only been extensive, but contentious.

[7] Defendant has also issued multiple document requests and interrogatories to Plaintiffs, all of which had been answered. Kashima Decl. II, ¶ 29. Defendant deposed each of the named Plaintiffs, and subpoenaed several retailers for the records of Plaintiffs' purchases. *Id*., ¶¶ 29-30.

The parties conferring on their various discovery requests expended significant effort. *Id*., ¶ 35. These discovery disputes required judicial intervention on three occasions. *See* Joint Motion for Determination of Discovery Dispute [Dkt. No. 89], Joint Motion for Determination of Discovery Dispute [Dkt. No. 95], Joint Motion for Determination of Discovery Dispute [Dkt. No. 125].

Plaintiffs' discovery efforts would have continued had the Settlement not have been negotiated. Kashima Decl. II, ¶ 33. The parties agreed to bifurcate discovery and had not yet fully explored the merits of their claims, including, likely, additional product testing. *Id*.

**D. Settlement Negotiations**

The parties had periodically discussed settlement of this case. On October 26, 2015, the parties attended an Early Neutral Evaluation Conference before Magistrate Judge David Bartick. *See* Dkt. No. 65. While Judge Bartick and the parties made a sincere effort, the case did not settle. Kashima Decl. II, ¶ 36.

The parties later agreed to meet for settlement discussion on March 1, 2016 in Walnut Creek, California. *Id*., ¶ 37. Again, while the parties elaborated as to their respective settlement positions, no significant progress was achieved. *Id*. Both parties accordingly focused on litigating this action. *Id*.

It was only following the Court's decision on Motions for Summary Judgment and Class Certification that settlement discussions began in earnest. *Id*., ¶ 38. Because the parties had, by this point, engaged in extensive discovery, including expert discovery regarding damages, and had the benefit of the Court's decision on key disputes, the parties were fully informed of the strengths and weakness of their respective claims. This allowed for frank and meaningful settlement discussions.

This time, the parties agreed to mediate before the well-respected mediator, David Rotman. The first mediation session with Mr. Rotman took place at his office in California on November 5, 2018. *Id*., ¶ 39. The parties discussed the structure of potential settlements and made some headway, but were unable to reach an agreement.

*Id.*, ¶ 48. The parties, nonetheless, continued their settlement discussions. *Id.*, ¶ 49.

The parties met with Mr. Rotman, again, on March 7, 2019, and eventually were able to come to an agreement on the material terms of the Settlement. *Id.*, ¶ 50. The Settlement Agreement was signed on May 12, 2019. *Id.*, ¶ 51.

### E. The Court's December 23, 2019 Order on Preliminary Approval and Amended Settlement Agreement

Plaintiffs initially submitted their Motion for Preliminary Approval on May 13, 2019 [ECF No. 222]. The Court denied the Motion, without prejudice, seeking additional information regarding the notice process and suggesting changes to the propose Settlement's class definitions and release. *See generally* Order Denying without Prejudice Plaintiffs' Unopposed Motion for Preliminary Approval ("Order") [ECF No. 229]. The parties met and conferred regarding the issues raised and agreed to resubmit the resulting amended Settlement for the Court's approval. Kashima Decl. II, at ¶¶ 52-53.

## III. SUMMARY OF THE PROPOSED SETTLEMENT

1. The Monetary Settlement Benefit

Defendant will contribute $12 million to a non-reversionary common fund (the "Settlement Fund") which will be paid out to Class members after payment of counsel's attorneys' fees and costs and the requested incentive awards. Agreement at ¶¶ 2.31, 4.01, 10.01. Defendant agreed to separately pay the costs of notice and claims administration. *Id.* at ¶ 2.31; Kashima Decl. II, at ¶ 61.

The Settlement Fund will be provided to the proposed Settlement Class, which mirrors the Class previously certified by the Court. *Compare* Order Regarding Class Certification [Dkt. No. 210], at pp. 38-41 and Agreement at ¶ 2.29.[8] The Settlement Fund will be distributed to the Settlement Class on a claims-made basis, according to

[8] 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. Agreement at ¶ 2.29

the number of Shake and Powder Products purchased during the Class Period:

> For Shake Products, Class Members with proof of purchase may submit claims for $1 per purchased shake, with no limit on the number of shakes that may be claimed. Class Members with no proof of purchase may submit claims for $1 per purchased shake, capped at $25.
>
> For the Powder Products, Class Members with proof of purchase may submit claims for $3 for each purchase of a product weighing 2 ¾ lbs or less and $5 for each purchase of each product weighing more than 2 ¾ lbs, with no limit on the number of purchases that may be claimed. Class Members with no proof of purchase may submit claims for $3 for each purchase of a product weighing 2 ¾ lbs or less and $5 for each purchase of each product weighing more than 2 ¾ lbs, capped at $25.

*Agreement at* ¶ at ¶¶ 4.01-4.04.

If the amount of money claimed by the Class exceeds the net amount provided by the Settlement Fund, each Class Member will receive a reduced *pro rata* share of the Fund. *Id*., at ¶ 4.05. However, if the funds claimed is less than the net amount in the Settlement Fund, each Class Member will receive a *pro rata* share of any remaining money. *Id*.

To receive a cash payment, Class Members must file a timely and valid Claim Form. *Id.* at ¶¶ 4.02, 9.01. The Claim Form may be completed either online or by mail and must provide: (i) the number and type of Class Product(s) purchased, and (ii) that the purchase or purchases were made within the applicable Class Period. *Id.* The Settlement Administrator will be responsible for reviewing all claims to determine their validity. *Id.* at ¶ 9.02.

In additional to the monetary benefit, Defendant has removed the challenged "lean" references from the Powder Product's labels. Agreement, at ¶ 4.01. Defendant has also agreed to review its manufacturing processes and protocols to minimize variability of the protein content contained in its Shake Products. *Id*.

2. The Release of Claims by the Class

In exchange for the Settlement benefits, Settlement Class members will release Defendant and related entities from:

> 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).

*Id*. at ¶ 14.01. The definition of Released Claims was specifically limited to the scope allowed by *Hesse* in response to the Court's concerns in its Preliminary Approval Order. Order at ¶ 2; Kashima Decl. II, at ¶ 53.[9]

3. Proposed Notice and Class Members' Right to Opt Out or Object

The parties have agreed to disseminate the Class Notice through an aggressive advertisement campaign:

> The notice program features a robust media campaign consisting of state-of-the-art targeted internet banner notice, print publication notice in widely-read consumer magazines, sponsored notice on two leading class action-related websites, and two advanced custom social media campaigns. The notice program also includes a dedicated website and toll-free telephone line where Class Members can learn more about their rights and responsibilities in the litigation.

Weisbrot Decl. II at ¶ 9. The proposed forms of notice are attached to the class administrator's declaration for the Court's review. Weisbrot Decl. II at Exs. A-D.

The advertisements will direct Settlement Class Members to a website, created by the Settlement Administrator, that will advise Class Members of the pendency of the Action, including the nature of the Action, the Settlement's essential terms, the Class Members' right to submit a claim, object to the Settlement, or request exclusion from the Class within 75 days of the distribution of the Class Notice; the Class Members' right to appear before the Court at the Final Approval Hearing; and the time and place of the Final Approval Hearing. Agreement, at ¶¶ 8.01-8.04; Weisbrot Decl.

[9] The parties also removed any language enjoining class members from "assist[ing] others" in filing claims against Defendant. *See* Agreement at ¶ 14.01; *see also* Order at ¶ 2; Kashima Decl. II, at ¶ 53.

II at Exs. A-D (copies of the proposed online and publication notices). To address the Court's concerns, the Amended Settlement Agreement allows Class Members to request exclusion both by mail and online. Agreement at ¶ 11.02; *see also* Order at ¶ 6; Kashima Decl. II, at ¶¶ 53-54.

Additionally, Class Members are entitled to object either by submitting an objection to the Court *or* by orally raising such objections at the Final Fairness Hearing. *Id.* at ¶ 11.04; *see also* Order at ¶ 7; Kashima Decl. II, at ¶¶ 53-54. All written objections, regardless of timeliness, that are submitted by the Final Fairness Hearing may be considered by the Court. Agreement at ¶ 11.04; *see also* Order at ¶ 7; Kashima Decl. II, at ¶¶ 53-54. Additionally, Class Members will be informed that they can both object to the Settlement and submit a claim thereunder. Kashima Decl. II, at ¶ 54 and Ex. A; *see also* Order at ¶ 7.

The Notices will also contain information regarding the allocation of the Settlement Fund. Agreement at ¶ 11.04. The notice will provide the necessary information for Class Members to make an informed decision regarding the Settlement. *Id.* In addition, the Settlement Administrator will (1) maintain a toll-free number that Class Members can use to request a copy of the Settlement Agreement, a claims form, and obtain any other information concerning the Settlement; (2) process and record timely requests to be excluded from the Settlement; and (3) serve notice of the Settlement on the appropriate state and federal officials pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715. *Id.,* at ¶¶ 8.04-8.05, 11.02-11.04. The toll-free line will be staffed by live operators during business hours (9 a.m. EST to 5 p.m. EST). Weisbrot Decl. II at ¶ 23, *See also* Order at ¶ 6; Kashima Decl. II, at ¶ 53.

4. Plaintiffs' Incentive Awards and Class Counsel's Attorneys' Fees and Costs

As is customary in common fund cases, Class Counsel intend to seek up to 30.78% or $3,832,010.86 of the common fund as an award of attorneys' fees. *Id.* at ¶ 5.01. Plaintiffs' counsel also incurred over $317,574.14 in costs litigating this action

to date, and those costs too should be reimbursed from the common fund. *Id.*; Kashima Decl. II, p. 19 n.1. Finally, Plaintiffs' counsel intend to seek incentive awards of $10,000.00 for each of the named Plaintiffs, for their assistance in helping to prosecute the case and for participating in discovery and multiple mediations. *Id.* at ¶ 5.02.

## IV. THE CLASS DEFINITION SHOULD BE CONDITIONALLY CERTIFIED AS AMENDED BY THE SETTLEMENT

The reasons to certify the Settlement Class remain unchanged from Plaintiffs' previous Motion for Preliminary Approval (as well as their successful Motion for Class Certification). The Parties, however, have amended the Settlement Agreement to address the concerns of the Court.

### A. The Amended Settlement Agreement Addresses the Concerns Expressed by the Court

In the Court's previous Order on Preliminary Approval, the Court held that the Settlement Class should be limited to "consumers." Order, at ¶ 1. The Amended Settlement Agreement, accordingly, limits the proposed Settlement Classes to consumers:

> "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.
>
> "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.

Agreement at ¶ 2.29. Additionally, references regarding "assisting other" from initiating a claim were removed from the Settlement Agreement. *Id.* at ¶ 14.04. No other changes to the previously proposed Settlement Class were made.

### B. The Settlement Class Should be Certified

While several classes were certified in this case, the parties' Settlement contemplates a slightly different class definition for settlement purposes (as noted

above).[10] "An order that grants or denies class certification may be altered or amended before final judgment." FED. R. CIV. P. 23(c)(1)(C); *Armstrong v. Davis,* 275 F.3d 849, 871 n. 28 (9th Cir. 2001) ("[w]here appropriate, the district court may redefine the class"). Modifying the class definition is particularly appropriate where the motion is unopposed. *Ades v. Omni Hotels Mgmt. Corp*., No. 13-2468, 2015 U.S.Dist.LEXIS 126121, *5 (C.D. Cal. Sept. 21, 2015). "In considering the appropriateness of [modifying a class], the standard of review is the same as a motion for class certification: whether the Rule 23 requirements are met." *Czuchaj v. Conair Corp.*, No. 3:13-cv-1901, 2016 WL 4272374, at *2 (S.D. Cal. Aug. 15, 2016).

Here, streamlining the Settlement Class definition will help in the administration of the Settlement and make it less confusing for Class members to determine which Class and products they are eligible for (as well limiting the scope of the release to the relevant time periods).[11] *Compare* Order Regarding Class Certification [Dkt. No. 210] *with* Agreement at ¶ 2.29.

Beyond the slightly different wording of the Settlement Class definition, the legal reasoning and the evidentiary support for certifying the Class are the same as those previously asserted in Plaintiffs' Motion for Class Certification.[12] And the Court's reasoning to certify the action as a class action applies equally Settlement Class. *See* Order Regarding Class Certification [Dkt. No. 210].

The Settlement Class still encompasses millions of individuals; an amount so numerous that joinder of all members is impracticable. *Id.,* at pp. 5-6. The case still involves the same common contentions of law and fact, which predominate, making

[10] While Defendant does not oppose the amendment of the class for settlement purposes, Defendant does not waive its right to challenge the propriety of the Court's September 7, 2018 Order. Should the Settlement not be finalized or finally approved, certification of the Settlement Classes will be void, the parties will return to the position occupied before the Settlement. Agreement at ¶ 3.01.

[11] The lean claims were removed from the Powder Products' labels by December 31, 2016. Kashima Decl. II, ¶ 5.

[12] Plaintiff incorporates the arguments from its Motion for Class Certification and Reply in support thereof into this Motion as fully asserted herein. *See* Dkt. No. 157 & 185.

class-wide resolution of the case superior to individual litigation. The parties stipulated that the formulation and amount of protein did not vary materially between different batches of the same product during the class period. *See id.,* at pp. 20-21. Thus, it should not be difficult to decide Plaintiffs' state law consumer protection claims, which are determined using an objective "reasonable person" standard, on a classwide basis. *See id.,* at pp. 11-19, 25-26. While this class action also remains manageable at trial (*see id.,* at pp. 36-28); this is less of a concern in settlement context. *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems.")

Finally, the identity of the Class Representatives has not changed. Nor has the identity of their Counsel. Therefore, Plaintiffs are still adequate and their claims are still typical of the Settlement Class. *See* Order Regarding Class Certification [Dkt. No. 210], at pp. 34-36. Thus, the proposed Settlement Class should be conditionally certified as amended.

## V. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

Settlements of class actions are favored. *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation."). When the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, preliminary approval is appropriate. *McDonald v. Bass Pro Outdoor World, LLC*, No. 13–cv–889, 2014 WL 3867522, *6 (S.D. Cal. Aug. 5, 2014); FED. R. CIV. P. 23(e)(2).

The Court may examine a number of factors when determining preliminary approval, including: (1) whether the relief provided to the class is commensurate with

"the costs, risks, and delay" of anticipated trial and appeal; (2) "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;" and (3) "the terms of any proposed award of attorney's fees, including timing of payment." FED. R. CIV. P. 23(e)(2)(C). Additionally, the Court should consider "the proposal was negotiated at arm's length," "whether the proposal treats class members equitably relative to each other," and whether "the class representatives and class counsel have adequately represented the class." FED. R. CIV. P. 23(e)(2)(A), (B) & (D).

Here, the Settlement remains a fair and reasonable compromise of the Settlement Class' claims. In addition, the Parties have amended the release contained in the Settlement in a response to the issue identified by the Court in the Preliminary Approval Order. Order at ¶ 2; Agreement at *Id*. at ¶ 14.01. These changes address the concerns the Court had regarding the Settlement Agreement.

### A. The Amended Settlement Agreement Addresses the Concerns Expressed by the Court

In the Court's previous order on Preliminary Approval, the Court noted concerns with the release proposed. Order, at ¶ 2. As noted above, the parties have limited the release to only include claims based on the factual predicates of the First Amended Complaint. *Id*.; *see also* FAC and Agreement at ¶ 14.01. "Settlements of this breadth are common and unobjectionable." *Rangel v. PLS Check Cashers of California, Inc*., 899 F.3d 1106, 1110-11 (9th Cir. 2018) (affirming dismissal of released claims that were or "could have been pled based on the factual allegations" in settled class action). In exchange for this reasonable release, the Settlement provides the *very* remedies that the Plaintiffs sought in the First Amended Complaint: complete monetary relief for the alleged misrepresentations.

### B. The Settlement Provides Fair and Immediate Relief to the Class

#### 1. The Settlement Benefits Achieved are Excellent

Each participating Settlement Class Member will receive $1 per purchased

Shake Product, $3 for each purchase of a Powder Product weighing 2 ¾ lbs or less, and $5 for each purchase of a Powder Product weighing more than 2 ¾ lbs. Agreement, at ¶¶ 4.01-4.04. When the amount of individual recovery under the Settlement is compared to the amount that could have been recovered at trial, it represents considerable value. *See Lerma v. Schiff Nutrition Int'l, Inc*., No. 11CV1056, 2015 WL 11216701, at *5 (S.D. Cal. Nov. 3, 2015) ("[R]estitutionary disgorgement, which is the price paid minus the value actually received—not nonrestitutionary disgorgement of profits—is the proper measure of damages on the unfair competition and false advertising claims.").

Based on information assembled from the parties' discovery, Plaintiffs' damages expert was able to estimate that each gram of protein missing from the Shake Products would be worth *approximately $0.06 per gram*. Declaration of Dr. Jeffrey Harris [Dkt. No. 157-7] at ¶¶ 18, 23. Plaintiffs further alleged that Defendant's Shake Products contained *between three and eleven less grams of protein per bottle then advertised*. FAC at ¶¶ 18-21. Consequently, the expected individual recovery at trial for the protein claims was between *$0.24 and $0.66 per bottle—less than the amount agreed to under the Settlement*. Kashima Decl. II, ¶ 46.

The individual recovery for the Powder Products is similarly favorable. Class Counsel initially estimated that damages associated with the "lean" claims would be approximately 4-5% of the retail price of the Powder Products. *Id.* at ¶ 44. Based on this assumption, the Settlement benefit will likely exceed the expected recovery at trial. For example, Defendant's most popular product during the Class Period was the Genuine Muscle Milk Powder. *Id.* The average retail price of the Genuine Muscle Milk Powder was approximately $25.00 for a 2.47 lbs. package and $49.00 for a 4.94 lbs. package. *Id.* Thus, Plaintiffs anticipated a possible recovery at trial of between *$1.00 and $2.45 per package; less than the $3 to $5 dollars proposed under the Settlement*. *Id.*

Nonetheless, recovery under the Settlement is not only a function of the number

of Class Products purchased, but the number of Claims submitted. Given the *pro rata* distribution under the Settlement, Plaintiffs estimate that the average individual Class Member recovery will be approximately *$52.07*, also a meaningful amount. *Id.*, at ¶ 61.

When viewed in the aggregate, the Settlement still provides significant value. Based on information from the parties' initial discovery, Plaintiffs were able to estimate that the total liability would be between $41 million and $139 million, under the most optimistic circumstances. *Id.* at ¶ 47. Here, the Settlement provides for at least $12.45 million in relief to the Settlement Class, or *approximately 9-30% of the total outstanding liability*.[13] This is well within the bounds of reasonableness in a consumer class action (*See City of Omaha Police & Fire Ret. Sys. v. LHC Grp.*, No. 6:12–1609, 2015 WL 965696, at *7-8 (W.D. La. Mar. 3, 2015) (finding that a "7.4%–10.3% [recovery] of estimated provable damages" amounts to "a high degree of success" because "[t]he typical recovery in most class actions generally is three-to-six cents on the dollar.")) and is more favorable than a recently approved settlement in a similar protein supplement case. *See Gregorio v. Premier Nutrition Corporation*, 1:17-cv-05987, ECF No. 101 (S.D.N.Y Jan. 17, 2019) (unpublished) (approving a $9 million class settlement regarding allegations that a popular protein drink did not contain the amount of protein advertised).

2. The Settlement is Fair for All Class Members

Moreover, the Settlement does not improperly discriminate between any segments of the Settlement Class. FED. R. CIV. P. 23(e)(2)(C). Each Settlement Class Member is entitled to the same relief calculated from the same formula. Settlement

[13] The total benefit to the Class is measured as the value of the Settlement Fund ($12 million) and the cost of administration of the Settlement (estimated to be between $446,944 and $654,989) or, at least, $12,446,944. *See* Kashima Decl. II, ¶ 62; *Staton v. Boeing Co.,* 327 F.3d 938, 966 (9th Cir. 2003) ("constructing a hypothetical fund' by adding together the amount of money Boeing would pay in damages, the amount of fees provided to various counsel, the cost of the class action notices paid for by Boeing, and a gross amount of money ascribed to all the injunctive relief contained in the agreement")\

Agreement at ¶¶ 4.01-4.04. Indeed, the only variation between Class Members' recovery is a function of the type and number of qualifying products purchased during the Class Period. *Id*. Given that both restitution and damages accrued by Settlement Class Member would be logically proportional to the number of products purchased and the price of those products, the payment formula forwarded in the Settlement Agreement is both rationally based and directly related to the claims asserted. *See In re Omnivision Techs., Inc*., 559 F. Supp. 2d 1036, 1045 (N.D. Cal. 2008) ("It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits.").

3. The Settlement Utilizes a Simple Claims Process and Ensures that the Class Retains the Entirety of the Settlement Fund

"Approving a plan for the allocation of a class settlement fund is governed by the same legal standard that applies to the approval of the settlement terms: the distribution plan must be 'fair, reasonable and adequate.'" *Edwards v. Nat'l Milk Producers Fed'n*, No. 11-CV-04766, 2017 WL 3616638, at *4 (N.D. Cal. June 26, 2017). Here, Settlement Class Members may participate in the Settlement *via* a clear and uncomplicated claims process. Individuals are only required to submit a simple claim form stating the number and type of products purchased (with the option to provide proof of purchase, if available) to participate. Agreement, ¶ 9.01 (only requiring a Class Member to confirm the number and type of Class Product(s) purchased within the applicable Class Period). This information can be submitted to the Settlement Administrator either online or by mail. *Id*. Settlement Class Members are provided 75 days to submit their claims. *Id.* at ¶ 2.04.[14] In return, Class Members with valid claims are provided a check. This process is common and has been approved in other consumer class actions. *See, e.g., Brown v. Hain Celestial Grp., Inc.,* No. 3:11-CV-03082, 2016 WL 631880, at *3, 11 (N.D. Cal. Feb. 17, 2016)

[14] The Claims Deadline may be extended for another 15 days (90 total), upon recommendation of the Settlement Administrator and approval by the parties. Agreement, at ¶ 2.04.

(approving a similar claims process); *In re Magsafe Apple Power Adapter Litig*., No. 5:09-CV-01911, 2015 WL 428105, at *9 (N.D. Cal. Jan. 30, 2015) (approving a similar claims process, even absent the ability to submit claims online).

Moreover, the Settlement envisions a *pro rata* distribution of any unallocated funds to the participating Settlement Class Members and a secondary distribution of any unclaimed funds after the initial payment. Agreement, at ¶¶ 4.05-.06. This "redistribution of unclaimed class action funds to existing class members is proper and preferred" because it "ensures that 100% of the [settlement] funds remain in the hands of class members." *Hester v. Vision Airlines,* Inc., No. 2:09-CV-00117, 2017 WL 4227928, at *2 (D. Nev. Sept. 22, 2017); *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 117 (D.D.C. 2015) (citing NEWBERG ON CLASS ACTIONS § 12:28 (5th ed. 2015)) ("as a general matter, 'a court's goal in distributing class action damages is to get as much of the money to the class members in as simple a manner as possible'").

**C. The Risk of Further Litigation Favors Settlement**

When evaluating the Settlement benefits, the Settlement should be weighed against the uncertainty of protracted litigation, and, in this case, at least one appeal. "It can be difficult to ascertain with precision the likelihood of success at trial. The Court cannot and need not determine the merits of the contested facts and legal issues at this stage, [Citation], and to the extent courts assess this factor, it is to 'determine whether the decision to settle is a good value for a relatively weak case or a sell-out of an extraordinary strong case.'" *Misra v. Decision One Mortg. Co*., No. SACV070994, 2009 WL 4581276, at *7 (C.D. Cal. Apr. 13, 2009).

Plaintiffs remain confident regarding their claims and the Court's class certification ruling, but concede success is not guaranteed. While Plaintiffs were able to certify a Class, such orders are not immutable. "A district court may decertify a class at any time." *Rodriguez v. W. Publ'g Corp*., 563 F.3d 948, 966 (9th Cir. 2009); *see also* FED. R. CIV. P. 23(c)(1)(C). Plaintiffs would have to maintain the class through trial, which has proven difficult in national consumer class actions. *See, e.g.,*

*Czuchaj*, 2016 WL 1240391 (decertifying a national class due to differences in state law). Indeed, Defendant's Petition for Appeal Pursuant to Rule 23(f) was accepted and, absent this Settlement, the parties will argue the propriety of class certification before the Ninth Circuit.

Even if Plaintiffs could maintain the Class, their ability to prove the merits of the case present a further risk. Plaintiffs recognize that their damages analysis has encountered difficulties in other courts. *See, e.g., Saavedra v. Eli Lilly & Co*., No. 2:12–cv–9366, 2014 WL 7338930, at *6 (C.D. Cal. Dec. 18, 2014) (rejecting damages model where expert had not yet collected any data from which to determine class-wide damages); *Werdebaugh v. Blue Diamond Growers*, No. 12–CV–02724, 2014 WL 7148923, at *12-13 (N.D. Cal. Dec. 15, 2014) (rejecting damages model that failed to control for other critical factors affecting price). Moreover, litigating a complex case through trial is inherently perilous regardless of the strength of the claims:

> [N]othing is assured when litigating against commercial giants with vast litigative resources, particular in such complex litigation as this, which would strain the cognitive capacities of any jury. Defense judgments were hardly beyond the realm of possibility. Accordingly, this factor weighs in favor of preliminary approval.

*Rebney v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1140 (1990). "The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several years of litigation." *In re Nvidia Derivs. Litig*. , No. C-06-06110, 2008 WL 5382544, at *3 (N.D. Cal. Dec. 22, 2008).

For these reasons, this Settlement, like all settlements, is a product of compromise. Nonetheless, Class Members are provided the opportunity to obtain more than 100% of the damages asserted. This Settlement is inherently reasonable when compared to the relief ordinarily obtained in other similar cases. *In re Newbridge Networks Sec. Litig*., No. CIV. A. 94–1678, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) ("[A]n agreement that secures roughly six to twelve percent of a potential trial recovery, while preventing further expenditures and delays and eliminating the risk that no recovery at all will be won, seems to be within the targeted

range of reasonableness.").

**D. Complexity, Expense, and Likely Duration of Further Litigation**

Continuing to litigate this action would incur additional expenses, coupled with considerable time to proceed through trial and post-trial motions. This case has already been pending for four years. Now that Defendant's Rule 23(f) Petition has been granted by the Ninth Circuit, the appellate review of this case would likely extend this case at least another two years before trial preparations could begin.

But even if Plaintiffs secured a favorable judgment, it would not end the dispute. Any judgment can be appealed, which would take another few years. Kashima Decl. II, at ¶ 69. Defendant has demonstrated that it is willing to seek appellate review; nothing indicates that Defendant's tactics will change. *Id.* at ¶ 70. "Avoiding such a trial and the subsequent appeals in this complex case strongly militates in favor of settlement rather than further protracted and uncertain litigation." *Nat'l Rural Telecomms. Coop v. DirecTV*, 221 F.R.D. 523, 527 (C.D. Cal. 2004).

**E. The Class Representatives and Class Counsel Adequately Represented the Class Through Contentious and Informed Settlement Negotiations**

"A critical factor in determining whether a settlement is worthy of court approval under FRCP 23(e) is whether the class has been 'fairly and adequately' represented by the class representative during settlement negotiations." *In re California Micro Devices Sec. Litig.*, 168 F.R.D. 257, 260 (N.D. Cal. 1996); *see also* FED. R. CIV. P. 23(e)(2)(A). "A presumption of correctness is said to 'attach to a class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery.'" *In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594403, at *9 (C.D. Cal. June 10, 2005); *see also* FED. R. CIV. P. 23(e)(2)(B). "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enterprises Sec. Litig.,* 47 F.3d 373, 378 (9th Cir. 1995). Thus, "the Court should not without good cause substitute its judgment for [counsel's]." *Boyd v. Bechtel Corp.,*

485 F. Supp. 610, 622 (N.D. Cal. 1979).

In this case, the Class was represented by individuals who had previously been subject to judicial scrutiny. The undersigned counsel and the named Plaintiffs were deemed adequate and appointed to represent the certified Class prior to negotiating the Settlement. Order Regarding Class Certification [Dkt. No. 210]; Kashima Decl. II, ¶ 38. Thus, this Settlement does not engender the same concerns associated with cases where class certification is delayed until a class settlement has been reached. *See, e.g., Mars Steel Corp. v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago*, 834 F.2d 677, 681-82 (7th Cir. 1987) (noting the criticisms and practical concerns with negotiating a class settlement before class certification) (J, Posner).

Additionally, Class Counsel and the Class Representatives faithfully represented the Class and vigorously litigated this case on their behalf. The Settlement was only reached after the parties had weighty amount of discovery. Class Counsel have reviewed thousands of pages of written evidence, took several key depositions, and conducted expert discovery. Kashima Decl. II, ¶¶ 25-32. The parties had litigated key legal theories, so the proffered bargain was made with the benefit of "adversarial investigation." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) ("Our… adequacy inquiry is directed to the vigor with which the named representatives and their counsel will pursue the common claims.").

It is likely for these reasons that the parties' settlement discussions were so contentious. The parties' settlement discussions lasted several months and the dispute was only resolved in their second mediation session with Mr. Rotman. *Id.*, ¶¶ 48-51. "Where a 'case is near trial, and the parties have conducted extensive discovery' and thoroughly litigated the issues, the extent of discovery and the stage of the proceedings weigh in favor of the proposed settlement." *Low v. Trump Univ., LLC*, 246 F. Supp. 3d 1295, 1302 (S.D. Cal. 2017).[15]

[15] Nothing suggests that Class Counsel's or the Class Representatives'

**F. The Proposed Fee and Incentive Awards are not Extraordinary**

In discharging its duty to determine the fairness of attorneys' fees awarded in a class action settlement, the Court's primary concern is to ensure that the process of negotiation leading to the fee has "adequately protected the class from the possibility that class counsel were accepting an excessive fee at the expense of the class." *Staton,* 327 F.3d at 977; *see also* FED. R. CIV. P. 23(e)(2)(C)(iii). The amount of attorneys' fees and costs that Class Counsel intends to request is approximately 30 percent of the benefits received by the Settlement Class, demonstrating that the fee and cost award to be requested will not be extraordinary. Kashima Decl. II, at p. 18 n.1; *see also, e.g., In re Pacific Enterprises Sec. Litig*., 47 F.3d 373, 379 (9th Cir. 1995) (affirming award of 33% of $12 million common fund); *In re Activision Sec. Litig.,* 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) (awarding 32.8% of $3.5 million common fund); *In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454 (9th Cir. 2000) (affirming award of 33.3% of $1.725 million). In fact, attorneys representing a class "routinely recover attorneys' fees in the range of 20 to 40 percent of the common fund." *In re Quantum Health Res., Inc*., 962 F. Supp. 1254, 1258 (C.D. Cal. 1997). At the time of the Final Approval Hearing, Class Counsel will request that the Court award fees based upon the value of the benefits achieved in the proposed Settlement and will present their time and expense declarations to allow for a cross-check under the lodestar/multiplier method.

It is also well established that courts have discretion to approve incentive awards for class representatives as compensation for their expenditure of time and for having undertaken the risks inherent in serving as a named plaintiff. *See, e.g., Staton*, 327 F.3d at 977; *Van Vranken v. Atl. Richfield*, 901 F. Supp. 294, 299 (N.D. Cal. Aug. 16, 1995). The Incentive Awards that Defendant has agreed to pay to each Plaintiff ($10,000.00) are likewise well within the customary range of awards in cases of this

recommendation of this Settlement is unreasonable. Plaintiffs' counsel has extensive class action experience and Plaintiffs have no conflict with the Class. Kashima Decl. II, ¶ 57, Ex. B; Declaration of Jason Thompson, concurrently filed herewith; Declaration of Nick Suciu III, concurrently filed herewith; *Hanlon*, 150 F.3d at 1020 (adequacy looks to the competence of class counsel and the named plaintiffs and their counsel have any conflicts of interest with other class members).

magnitude and are not extraordinary. *Bellinghausen v. Tractor Supply Co.,* 306 F.R.D. 245, 267 (N.D. Cal. 2015) ("Incentive awards typically range from $2,000 to $10,000") (collecting cases). Nevertheless, at the Final Approval Hearing, Plaintiffs will supply declarations establishing that Plaintiffs contributed value to the resolution of the case and that the requested Incentive Awards are reasonable.

The Settlement is not conditioned on the Court's approval of either Class Counsel's fee request or Plaintiffs' incentive award. Agreement at ¶ 5.03. Any payment of any attorneys' fees or incentive awards will only occur upon the payment of funds to the Settlement Administrator for distribution to the Class. Here, any payment to Class Counsel and Plaintiffs are aligned with that of the Class.

The Settlement was a product of extensive arm's length negotiations and involved counsel experienced in class litigation. It provides the Settlement Class meaningful relief, likely more than that which could have been achieved at trial. The Settlement does not suffer any obvious deficiencies. It is for these reasons that Plaintiffs request that the Settlement be preliminarily approved.

## VI. THE PROPOSED NOTICE WILL ADEQUATELY APPRISE THE CLASS OF THEIR RIGHTS UNDER THE SETTLEMENT

Should the Court grant preliminary approval, due process requires the best notice practicable, reasonably calculated under the circumstances to apprise a class member of the settlement. *Silber v. Mabon,* 18 F.3d 1449, 1453-54 (9th Cir. 1994); FED. R. CIV. P. 23(e)(1)(B). The parties have agreed to retain an experienced class notice and claims administrator, Angeion Group. *See* Weisbrot Decl. II. The proposed Notice plan provides for *targeted* publication notice and the content of the notice allows the Class to make an educated decision regarding this Settlement.

### A. Amended Settlement Agreement Addresses the Concerns Expressed by the Court

The Court previously noted a number of concerns regarding the previously proposed Class Notice, and requested further information the notice process. *See* Order at ¶¶ 3-7. The Parties addressed each of the Court's points through the revisions

in the Amended Settlement Agreement:

- The Settlement Administrator is required to staff the Toll-Free Telephone Number with live representatives (Agreement at ¶ 8.04);
- The parties will provide a template Request for Exclusion on the Settlement Website (*Id.* at ¶ 11.02);
- Requests for Exclusion can be submitted by mail or online (*Ibid.*); and
- Class Members can submit written objections *or* oral objections at the Fairness Hearing (*Id.* at ¶ 11.04).

*See* Kashima Decl. at ¶ 53. With these changes, the notice program described by the Settlement provides the Class with sufficient notice of the terms of the Settlement.

**B. Notice is Reasonably Calculated to Reach the Settlement Class**

Preliminary approval permits notice to be given to class members of the settlement and the right to be heard. Rule 23 provides that the Court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *See also Amchem Prods. Inc.,* 521 U.S. at 617.

Notice of this Settlement will be provided *via* a multifaceted advertisement campaign that is designed to specifically reach purchasers of the Class Products. *See* Weisbrot Decl. II at ¶¶ 5-8. Based on review of the class definition, the Settlement Administrator determined the potential audience size is estimated at 2,998,000 individuals. See ECF No. 222-9 ("Weisbrot Decl. I") at ¶ 14. The Angeion Group will service notice primarily through online advertisements (including on social media platforms such as Twitter and Facebook). This notice program is appropriate as the Settlement Class Members are "heavy internet users, who surf the internet an average of 25 hours per week (compared to the national average of 19 hours per week)." *Id.* at ¶ 16. To ensure that these advertisements are delivered to Settlement Class Members, the Settlement Administrator will use advanced targeting, machine learning, and a known and verifiable target audience profile. *See* Weisbrot Decl. II at ¶¶ 4-15. These advertisements will use "an algorithm that identifies and examines the

Target Audience's demographic profile and uses advanced technology to place advertisements on the websites where members of the audience are likely to visit." *Id.* at ¶ 5.

The Settlement Administrator will monitor information regarding those individuals who click on the banner advertisements and change the reach of the notice campaign to better target the appropriate online audiences. *Id.* These targeted online advertisements will run for 60 consecutive days, starting on the Court-approved Notice Date and are designed to result in serving approximately 5,217,000 impressions. *Id.* at ¶ 15. These advertisements will be augmented with Social Media notice, including advertisements that target Facebook users who exhibited interest in fitness or protein supplements and monitoring Twitter traffic for discussion of the Settlement. *Id.* at ¶¶ 16-18. These social media campaigns will run for a minimum of eight consecutive weeks, stating on the Court-approved Notice Date. *Id.* The Facebook campaign of the Notice Program is designed to result in an estimated daily reach of between 13,000-38,000 people per day over the course of the campaign. *Id.* at ¶ 18.

Notice will be further provided by publication. First, the Settlement will be promoted on two leading class action settlement websites, www.topclassactions.com and www.classaction.org. *Id.* at ¶ 22. While the reach of these websites is unknown, both websites regularly provide public notice of class settlements.[16] Second, the online notice will be supplemented by advertisements in print media to reach potential Class Members. *Id.* at ¶¶ 19-21. Specifically, *People* (with a circulation of 3,510,533) and *Sports Illustrated* (with a circulation of 2,700,000) were chosen for the notice program due to their strong reach among the Settlement Class. *Id.* (the Settlement Class reads an above-average 7 magazines per month). Collectively, the notice regime is predicted to directly reach 70.14% reach with an average frequency of 2.93 views per person.

[16] Indeed, these two websites represent the top Google search results for "class settlements." Accordingly, posting on these sites is designed reach those individual searching for the Settlement on the internet.

*Id.* at ¶ 26. The Court previously expressed concern whether the selection of *People* and *Sports Illustrated* targeted men more than women. But *People Magazine* readership is comprised of 72.2% female and 27.8% male, while *Sports Illustrated* readership is comprised of 77.34% male and 22.66% female, so the combination of the two strikes an ideal balance. *Id.* at ¶ 20.

While Plaintiffs considered posting notice of the Settlement at retailers of the Class Periods, such efforts would be both unduly costly, and administratively inefficient. Kashima Decl. II at ¶ 63; Weisbrot Decl. at ¶ 27. Through class certification discovery, Plaintiffs are aware that Defendant sell its products through bottlers and distributors to thousands of retailers. Kashmia Decl. II at ¶ 63. In order to identify each of the retailers, who actively sell the Class Products, Plaintiffs would have to contact (or subpoena) each of these distributors for their business records and compile a complete list. *Id*. Then, Plaintiff would have to print several thousand class notices and contact the retailers to secure their posting. *Id*. This method of notice would be prohibitively expensive and would not be a benefit to the Settlement Class Members. Weisbrot Decl. II at ¶ 27.

The notice distribution plan is based on a similar regime that was approved in other consumer cases. *See, e.g., Wilson v. Airborne, Inc.,* No. CV 07-770, 2008 WL 3854963, at *4 (C.D. Cal. Aug. 13, 2008); *Arnold v. Fitflop USA, LLC*, No. 11-CV-0973, 2014 WL 1670133, at *4 (S.D. Cal. Apr. 28, 2014); *Pappas v. Naked Juice Co of Glendora, Inc*., No. CV1108276, 2014 WL 12382279, at *5 (C.D. Cal. Jan. 2, 2014); *see also* The Federal Judicial Center, Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (noting that it is reasonable to reach between 70–95% of the class). And a similar result should follow here.

### C. The Notice Allows Settlement Class Members to Make an Informed Decision

Additionally, Class Notice "must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class

certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members." FED. R. CIV. P. § 23 (c)(2)(B). The purpose of these requirements is to ensure that Class Members are fully informed of their rights under the Settlement.

Class Notice will direct individuals to the Settlement Website (www.leanproteinsettlement.com). The Settlement Website will include the Class Notice, which is written in an easy-to-understand and clear language and provides Class Members with (1) more extensive information about the lawsuit; (2) a description of the benefits provided by the Settlement; (3) an explanation of how Class Members can exercise their right to object to or opt-out of the Settlement; (4) an explanation that any claims against Defendant that could have been litigated in this action will be released; (5) the names of counsel for the Class and information concerning attorneys' fees and incentive awards; and (6) the date and time of the fairness hearing. Kashima Decl. II, Ex. B. The Settlement Website will also contain relevant court documents and information regarding the claims process. *Id.* at ¶ 8.03.

The proposed Notice, combined with the right to exclude themselves from the Settlement, ensures that absent Class Members' due process rights are protected. *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 812 (1985) (due process requires that class members be given an opportunity to opt out). The Class Members have seventy-five (75) days in which to exercise their right to exclude themselves from or object to the Settlement either by *online or by mail*. Agreement, at ¶¶ 2.15, 2.22. In response to the Court's previous concern, template opt-out forms will be provided to the Class. *Id.*, at ¶ 11.02. And should a Settlement Class Member have any questions, they can receive additional information via the Settlement Website or by calling a *live* operator via a toll-free number, *id.*, at ¶ 8.04, consistent with the Court's comments. The Court should accordingly approve the notice plan because it satisfies the notice requirements

of Rule 23 and due process.

## VII. CONCLUSION

Plaintiffs request that the Court enter the proposed Preliminary Approval Order submitted concurrently herewith and set a hearing for final approval on the first date convenient to the Court.

Dated: March 3, 2020

Respectfully submitted,

SOMMERS SCHWARTZ, P.C.

/s/ Trenton R. Kashima

Trenton R. Kashima, Esq.
402 West Broadway, Suite 1760
San Diego, California 92101
Telephone: (619) 762-2126
Facsimile: (619) 762-2123

SOMMERS SCHWARTZ P.C.
Jason J. Thompson, Esq.
JThompson@sommerspc.com
One Towne Square, 17th Floor
Southfield, MI 48076
Telephone: (248) 355-0300
Telephone: (248) 355-0300

FINKELSTIEN & KRINSK LLP
Jeffrey R. Krinsk, Esq.
jrk@classactionlaw.com
550 West C Street, Suite 1760
San Diego, California 92101
Telephone: (619) 238-1333
Facsimile: (619) 238-5425

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

*Attorneys for Plaintiffs and the Classes*