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17
18 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

19 CHAYLA CLAY, ERICA
EHRlichMAN, LOGAN
20 REICHERT, and CHRIS ROMAN,
individually and on behalf of all
21 others similarly situated,

22 Plaintiffs,

23 vs.

24 CYTOSPORT, INC., a California
Corporation,
25 Defendant.
26

Case No. 3:15-cv-00165-L-AGS

**DEFENDANT CYTOSPORT, INC.'S
ANSWER TO PLAINTIFFS' FIRST
AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

1 Defendant CytoSport, Inc. (“CytoSport”) hereby answers the First Amended
2 Class Action Complaint (“Complaint”) filed by Plaintiffs Chayla Clay, Erica
3 Ehrlichman, Logan Reichert, and Chris Roman (collectively, “Plaintiffs”) as follows:

4 **I. INTRODUCTION**

5 1. Answering Paragraph 1, CytoSport admits that it formulates, advertises,
6 and sells Muscle Milk® and CytoSport® branded powdered and ready-to-drink
7 (“RTD”) protein supplements throughout the United States, including California,
8 Michigan, and Florida. CytoSport admits that Muscle Milk® and CytoSport®
9 branded products are marketed to a variety of consumers. CytoSport denies the
10 remaining allegations in Paragraph 1.

11 2. Answering Paragraph 2, CytoSport admits that the total protein contents
12 of its RTD protein products (CytoSport® Whey Isolate Protein Drink, CytoSport
13 Monster Milk®: Protein Power Shake, Genuine Muscle Milk®: Protein Nutrition
14 Shake, and Muscle Milk Pro Series 40™: Mega Protein Shake (collectively the
15 “Muscle Milk RTD Products”)) are displayed on the front and back of each product’s
16 label. CytoSport denies the remaining allegations in Paragraph 2.

17 3. Answering Paragraph 3, CytoSport lacks sufficient knowledge or
18 information to form a belief as to the truth of the allegations in the first sentence and,
19 on that basis, denies the allegations therein. CytoSport admits that the labels for
20 Muscle Milk®: Lean Muscle Protein Powder, Muscle Milk Light®: Lean Muscle
21 Protein Powder, Muscle Milk® Naturals: Nature’s Ultimate Lean Muscle Protein,
22 Muscle Milk® Gainer: High Protein Gainer Powder Drink Mix, and Muscle Milk
23 Pro Series 50™: Lean Muscle Mega Protein Powder (collectively the “Muscle Milk
24 Powder Products”) indicate that the products include a “Precision Protein Blend,”
25 including proteins from multiple sources, and amino acids, such as L-Glutamine.
26 CytoSport denies the remaining allegations in Paragraph 3.

1 4. Answering Paragraph 4, CytoSport lacks sufficient knowledge or
2 information to form a belief as to the truth of the allegations in the first sentence and,
3 on that basis, denies the allegations therein. CytoSport admits that Muscle Milk®:
4 Lean Muscle Protein Powder, Muscle Milk Light®: Lean Muscle Protein Powder,
5 Muscle Milk® Naturals: Nature’s Ultimate Lean Muscle Protein, Muscle Milk Pro
6 Series 50™: Lean Muscle Mega Protein Powder, and Monster Milk®: Lean Muscle
7 Protein Supplement (collectively the “Lean Muscle Milk Products”) include the term
8 “lean muscle” in the name of the product, with the word “lean” being used to
9 describe “muscle.” CytoSport denies the remaining allegations in Paragraph 4.

10 5. CytoSport denies the allegations in Paragraph 5.

11 6. Answering Paragraph 6, CytoSport admits that the Lean Muscle Milk
12 Products labels include the term “lean muscle” in the name of the product, with the
13 word “lean” being used to describe “muscle.” CytoSport further admits that some of
14 the labels state that “the Lean Lipids™ used in the products are a blend of canola oil,
15 sunflower oil and medium chain triglycerides (MCTs).” CytoSport denies the
16 remaining allegations in Paragraph 6.

17 7. CytoSport denies the allegations in Paragraph 7.

18 8. The allegations in Paragraph 8 raise a legal question to which no answer
19 is needed. To the extent that Paragraph 8 raises factual allegations and it would be
20 appropriate to answer, CytoSport denies the allegations in Paragraph 8.

21 **II. JURISDICTION AND VENUE**

22 9. CytoSport admits that allegations in Paragraph 9.

23 10. Answering Paragraph 10, CytoSport admits that it conducts business in
24 this District. CytoSport lacks sufficient knowledge or information to form a belief as
25 to the truth of the remaining allegations in Paragraph 10 and its subparts, and, on that
26 basis, denies the allegations therein.

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III. PARTIES

11. Answering Paragraph 11, CytoSport lacks sufficient knowledge or information to form a belief as to the truth of the allegations, and, on that basis, denies the allegations therein.

12. Answering Paragraph 12, CytoSport lacks sufficient knowledge or information to form a belief as to the truth of the allegations, and, on that basis, denies the allegations therein.

13. Answering Paragraph 13, CytoSport lacks sufficient knowledge or information to form a belief as to the truth of the allegations, and, on that basis, denies the allegations therein.

14. Answering Paragraph 14, CytoSport lacks sufficient knowledge or information to form a belief as to the truth of the allegations, and, on that basis, denies the allegations therein.

15. Answering Paragraph 15, CytoSport admits that it is a California Corporation with its headquarters in Benicia, California. CytoSport admits that it markets, advertises, distributes, and sells Muscle Milk® and CytoSport® branded protein powders and RTD products throughout the United States. CytoSport denies the remaining allegations in Paragraph 15.

IV. SUBSTANTIVE ALLEGATIONS

16. Answering Paragraph 16, CytoSport lacks sufficient knowledge or information to form a belief as to the truth of the allegations in the first and last sentences of Paragraph 16, and, on that basis, denies the allegations therein. CytoSport admits that Milk Protein Isolate is an ingredient in Muscle Milk RTD products and that Milk Protein Isolate has a higher concentration of protein than in milk. CytoSport denies the remaining allegations in Paragraph 16.

1 17. Answering Paragraph 17, CytoSport admits that each RTD product lists
2 its respective protein content on the front and back of its labels. CytoSport denies the
3 remaining allegations in Paragraph 17.

4 18. Answering Paragraph 18, CytoSport admits that its CytoSport® Whey
5 Isolate Protein Drink's label states that the product contains 32 grams of protein on
6 the front of the packaging and the Nutrition Facts Panel states that there are 32 grams
7 of protein per bottle (15 grams per serving). CytoSport lacks sufficient knowledge or
8 information to form a belief as to the truth of the allegations regarding Labdoor and,
9 on that basis, denies such allegations. CytoSport denies the remaining allegations in
10 Paragraph 18.

11 19. Answering Paragraph 19, CytoSport admits that the label on CytoSport
12 Monster Milk®: Protein Power Shake states that the product contains 45 grams of
13 protein on the front of the packaging and the Nutrition Facts Panel states that there
14 are 45 grams of protein per bottle (18 grams per serving). CytoSport lacks sufficient
15 knowledge or information to form a belief as to the truth of the allegations regarding
16 Labdoor and, on that basis, denies such allegations. CytoSport denies the remaining
17 allegations in Paragraph 19.

18 20. Answering Paragraph 20, CytoSport admits that the labels on 17 fl. oz.
19 containers of Genuine Muscle Milk®: Protein Nutrition Shakes state that the product
20 contains 32 grams of protein per bottle on the front of the package and in the
21 Nutrition Facts section. CytoSport lacks sufficient knowledge or information to form
22 a belief as to the truth of the allegations regarding Labdoor and, on that basis, denies
23 such allegations. CytoSport denies the remaining allegations in Paragraph 20.

24 21. Answering Paragraph 21, CytoSport admits that the labels on 14 fl. oz.
25 containers of Genuine Muscle Milk®: Protein Nutrition Shakes state that the product
26 contains 25 grams of protein per bottle on the front of the package and in the
27 Nutrition Facts section. CytoSport denies the remaining allegations in Paragraph 21.
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1 22. Answering Paragraph 22, CytoSport admits that the label for Muscle
2 Milk Pro Series 40™: Mega Protein Shakes (14 fl. oz.) states that the product
3 contains 40 grams of protein on the front of the package and in the Nutrition Facts
4 section. CytoSport denies the remaining allegations in Paragraph 22.

5 23. CytoSport denies the factual allegations in Paragraph 23. To the extent
6 that Paragraph 23 purports to state a summary of applicable federal law, no answer is
7 needed. To the extent an answer is appropriate, CytoSport denies that Paragraph 23
8 fully states all governing statutes and regulations.

9 24. CytoSport denies the factual allegations in Paragraph 24. To the extent
10 that Paragraph 24 purports to state a summary of federal law, no answer is needed.
11 To the extent an answer is appropriate, CytoSport denies that Paragraph 24 fully
12 states all governing statutes and regulations.

13 25. CytoSport denies the factual allegations in Paragraph 25. To the extent
14 that Paragraph 25 purports to state a summary of California law, no answer is
15 needed. To the extent an answer is appropriate, CytoSport denies that Paragraph 25
16 fully states all governing statutes and regulations.

17 26. CytoSport denies the factual allegations in Paragraph 26. To the extent
18 that Paragraph 26 purports to state a summary of Florida and Michigan law, no
19 answer is needed. To the extent an answer is appropriate, CytoSport denies that
20 Paragraph 26 fully states all governing statutes and regulations.

21 27. CytoSport denies the allegations in the last sentence of Paragraph 27.
22 CytoSport lacks sufficient knowledge or information to form a belief as to the truth
23 of the remaining allegations in Paragraph 27 and, on that basis, denies the same.

24 28. CytoSport denies the allegations in Paragraph 28.

25 29. CytoSport denies the allegations in Paragraph 29.

26 30. CytoSport denies the factual allegations in Paragraph 30. To the extent
27 that Paragraph 29 purports to state a summary of law, no answer is needed. To the
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1 extent an answer is appropriate, CytoSport denies that Paragraph 30 fully states all
2 applicable law.

3 31. CytoSport denies the allegations in Paragraph 31.

4 32. CytoSport admits the general allegations in Paragraph 32.

5 33. Answering Paragraph 33, CytoSport denies that Plaintiffs accurately or
6 completely characterize the functioning of amino acids. CytoSport denies the
7 remaining allegations in Paragraph 33.

8 34. Answering Paragraph 34, CytoSport denies that Plaintiffs accurately or
9 completely characterize the functioning of amino acids. CytoSport denies the
10 remaining allegations in Paragraph 34.

11 35. Answering Paragraph 35, CytoSport denies that Plaintiffs accurately or
12 completely characterize the functioning of L- glutamine or amino acids. CytoSport
13 denies the remaining allegations in Paragraph 35.

14 36. Answering Paragraph 36, CytoSport denies that Plaintiffs accurately or
15 completely characterize the functioning of L- glutamine. CytoSport denies the
16 remaining allegations in Paragraph 36.

17 37. Answering Paragraph 37, CytoSport admits that certain of its product
18 labels state “protein blend,” or “Precision Protein Blend” described as “a unique mix
19 of complete multi-source proteins,” with “calcium sodium caseinate, milk protein
20 isolate, whey protein isolate, whey protein hydrolysate, whey protein concentrate,
21 lactoferrin, L-glutamine and taurine, which provide amino acids ... to help you
22 recover from exercise and build muscle.” CytoSport further admits that certain of its
23 products may be added to water, milk, smoothies, or other foods. Cytosport admits
24 that certain of its product labels state “individuals looking to build size and gain
25 muscle mass.” Cytosport denies the remaining allegations in Paragraph 37.

26 38. Answering Paragraph 38, CytoSport admits that certain Muscle Milk®
27 Powder Products labels state they contain a “protein blend” including calcium
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1 sodium caseinate, milk protein isolate, whey protein isolate, whey protein
2 hydrolysate, whey protein concentrate, lactoferrin, L-glutamine, and taurine.
3 CytoSport denies the remaining allegations in Paragraph 38.

4 39. Answering Paragraph 39, CytoSport admits that it lists L-glutamine as
5 an ingredient on the labels of the Muscle Milk Powder Products. CytoSport denies
6 the remaining allegations in Paragraph 39.

7 40. CytoSport denies the factual allegations in Paragraph 40. To the extent
8 that Paragraph 40 purports to state a summary of applicable federal, California,
9 Florida, or Michigan law, no answer is needed. To the extent an answer is
10 appropriate, CytoSport denies that Paragraph 40 fully states all governing statutes
11 and regulations.

12 41. Answering Paragraph 41, CytoSport admits that L-glutamine may be
13 important for athletes, including those who engage in intense physical exercise
14 routines or certain fitness programs. CytoSport denies the remaining allegations of
15 Paragraph 41.

16 42. CytoSport denies the factual allegations in Paragraph 42. To the extent
17 that Paragraph 42 purports to state a summary of applicable federal law, no answer is
18 needed. To the extent an answer is appropriate, CytoSport denies that Paragraph 42
19 fully states all governing statutes and regulations.

20 43. CytoSport denies the allegations in Paragraph 43.

21 44. CytoSport denies the allegations in Paragraph 44.

22 45. CytoSport denies the allegations in Paragraph 45.

23 46. Answering Paragraph 46, first sentence, CytoSport admits that protein
24 intake is considered in dieting and weight loss. Answering Paragraph 46, sentences
25 three and four, CytoSport admits that certain products include the term “lean muscle”
26 in the name of the product, with the word “lean” being used to describe “muscle,”
27 and the labels describe the “Lean Lipids™” used in the products. Answering
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1 Paragraph 46, sentence four, CytoSport admits that it uses the term “Lean Lipids” as
2 a common law trademark. CytoSport lacks sufficient knowledge or information to
3 form a belief as to the truth of the remaining allegations, and, on that basis, denies
4 the allegations therein.

5 47. CytoSport denies the factual allegations in Paragraph 47. To the extent
6 that Paragraph 47 purports to state a summary of applicable federal, California,
7 Florida, and Michigan law, no answer is needed. To the extent an answer is
8 appropriate, CytoSport denies that Paragraph 47 fully states all governing statutes
9 and regulations.

10 48. CytoSport denies the factual allegations in Paragraph 48 To the extent
11 that Paragraph 48 purports to state a summary of applicable federal law, no answer is
12 needed. To the extent an answer is appropriate, CytoSport denies that Paragraph 48
13 fully states all governing statutes and regulations.

14 49. CytoSport denies the allegations in Paragraph 49.

15 50. Answering Paragraph 50, CytoSport admits that the Lean Lipids™ used
16 in the Lean Muscle Milk Products are a blend of canola oil, sunflower oil and
17 medium chain triglycerides. CytoSport denies the remaining allegations in
18 Paragraph 50.

19 51. CytoSport denies the allegations in Paragraph 51.

20 52. CytoSport denies the allegations in Paragraph 52.

21 **V. CLASS ACTION ALLEGATIONS**

22 53. Assuming the allegations in Paragraph 53 and its subparts raise factual
23 issues for which an answer is appropriate, CytoSport admits that Plaintiffs purport to
24 bring this action and seek such certification, but denies that there is any factual or
25 legal basis to certify a class.

26 54. Assuming the allegations in Paragraph 54 and its subparts raise factual
27 issues for which an answer is appropriate, CytoSport admits that Plaintiffs purport to
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1 reserve such rights, but denies that there is any factual or legal basis to certify a
2 class.

3 55. CytoSport denies the factual allegations in Paragraph 55 and denies that
4 there is any factual or legal basis to certify a class.

5 56. CytoSport denies the factual allegations in Paragraph 56 and denies that
6 there is any factual or legal basis to certify a class.

7 57. CytoSport denies the factual allegations in Paragraph 57 and denies that
8 there is any factual or legal basis to certify a class.

9 58. CytoSport denies the factual allegations in Paragraph 58 and denies that
10 there is any factual or legal basis to certify a class.

11 59. CytoSport denies the factual allegations in Paragraph 59 and denies that
12 there is any factual or legal basis to certify a class.

13 60. CytoSport denies the factual allegations in Paragraph 60 and denies that
14 there is any factual or legal basis to certify a class.

15 **VI. FIRST COUNT**

16 **Violation of CAL. BUS. & PROF. CODE §§ 17500, *et seq.***
17 **Untrue, Misleading and Deceptive Advertising**
18 **(On Behalf of the Nationwide Class and the California Sub-class)**

19 61. Answering Paragraph 61, CytoSport incorporates by reference and
20 replays all of the admissions, denials, and allegations contained in the paragraphs
21 above.

22 62. Answering Paragraph 62, CytoSport admits that it has and does label,
23 advertise, market and offer its Muscle Milk® and CytoSport® products for sale.
24 CytoSport denies the remaining allegations in Paragraph 62.

25 63. CytoSport denies the allegations in Paragraph 63.

26 64. CytoSport denies the factual allegations in Paragraph 64. To the extent
27 that Paragraph 64 purports to state a summary of applicable California law, no
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1 answer is needed. To the extent an answer is appropriate, CytoSport denies that
2 Paragraph 64 fully states all governing statutes and regulations.

3 65. CytoSport denies the allegations in Paragraph 65.

4 66. CytoSport denies the allegations in Paragraph 66.

5 67. CytoSport denies the allegations in Paragraph 67.

6 68. CytoSport denies the allegations in Paragraph 68.

7 69. Answering Paragraph 69, CytoSport admits that Plaintiffs purport to
8 seek the relief claimed. CytoSport denies the factual allegations in Paragraph 69 and
9 denies that there is any factual or legal basis for Plaintiffs' requested relief.

10 **VII. SECOND COUNT**

11 **Violation of CAL. CIV. CODE §§ 1750, et seq.**
12 **Misrepresentation of a Product's standard, quality,**
13 **sponsorship, approval, and/or certification**
14 **(On Behalf of the California Sub-class)**

15 70. Answering Paragraph 70, CytoSport incorporates by reference and
16 repleads all of the admissions, denials, and allegations contained in the paragraphs
17 above.

18 71. CytoSport admits the allegations in Paragraph 71.

19 72. CytoSport admits the allegations in Paragraph 72.

20 73. Answering Paragraph 73, CytoSport lacks sufficient knowledge or
21 information to form a belief as to the truth of the allegations in Paragraph 73 and, on
22 that basis, denies the allegations therein.

23 74. CytoSport admits the allegations in Paragraph 74.

24 75. CytoSport denies the allegations in Paragraph 75.

25 76. CytoSport denies the allegations in Paragraph 76.

26 77. CytoSport denies the allegations in Paragraph 77.

27 78. CytoSport denies the allegations in Paragraph 78.

28 79. CytoSport denies the factual allegation in Paragraph 79. To the extent
the Paragraph 79 purports to state a summary of applicable law, no answer is needed.

1 To the extent an answer is appropriate, CytoSport denies that Paragraph 79 fully
2 states all governing statutes and regulations.

3 80. Answering Paragraph 80, CytoSport admits that Plaintiffs purport to
4 seek injunctive relief. CytoSport denies the factual allegations in Paragraph 80 and
5 denies that there is any factual or legal basis for Plaintiffs' requested relief.

6 81. Answering Paragraph 81, CytoSport admits that it received a letter via
7 certified mail dated January 23, 2015 noticing alleged violations of the CLRA and
8 demanding that the alleged violations be remedied.

9 82. To the extent that Paragraph 82 purports to state a summary of
10 applicable California law, no answer is needed. To the extent an answer is
11 appropriate, CytoSport denies that Paragraph 82 fully states all governing statutes
12 and regulations.

13 **VIII. THIRD COUNT**

14 **Violation of CAL. BUS. & PROF. CODE §§ 17200, *et seq.***
15 **Unlawful Business Acts and Practices**
16 **(On Behalf of the Nationwide Class and the California Sub-class)**

17 83. Answering Paragraph 83, CytoSport incorporates by reference and
18 replays all of the admissions, denials, and allegations contained in the paragraphs
19 above.

20 84. To the extent that Paragraph 84 purports to state a summary of
21 applicable California law, no answer is needed. To the extent an answer is
22 appropriate, CytoSport denies that Paragraph 84 fully states all governing statutes
23 and regulations.

24 85. CytoSport admits the allegations in Paragraph 85.

25 86. To the extent that Paragraph 86 purports to state a summary of
26 applicable California and federal law, no answer is needed. To the extent an answer
27 is appropriate, CytoSport denies that Paragraph 86 fully states all governing statutes
28 and regulations.

1 87. CytoSport denies the factual allegations in Paragraph 87. To the extent
2 that Paragraph 87 purports to state a summary of applicable federal law, no answer is
3 needed. To the extent an answer is appropriate, CytoSport denies that Paragraph 87
4 fully states all governing statutes and regulations.

5 88. CytoSport denies the factual allegations in Paragraph 88. To the extent
6 that Paragraph 88 purports to state a summary of applicable federal law, no answer is
7 needed. To the extent an answer is appropriate, CytoSport denies that Paragraph 88
8 fully states all governing statutes and regulations.

9 89. CytoSport denies the factual allegations in Paragraph 89. To the extent
10 the Paragraph 89 purports to state a summary of applicable California law, no answer
11 is needed. To the extent an answer is appropriate, CytoSport denies that
12 Paragraph 89 fully states all governing statutes and regulations.

13 90. CytoSport denies the allegations in Paragraph 90.

14 91. Answering Paragraph 91, CytoSport admits that Plaintiffs purport to
15 seek the relief claimed. CytoSport denies the factual allegations in Paragraph 91 and
16 denies that there is any factual or legal basis for Plaintiffs' requested relief.

17 **IX. FOURTH COUNT**

18 **Violation of CAL. BUS. & PROF. CODE §§ 17200, *et seq.*** 19 **Unfair Business Acts and Practices** 20 **(On Behalf of the Nationwide Class and the California Sub-class)**

21 92. Answering Paragraph 92, CytoSport incorporates by reference and
22 replays all of the admissions, denials, and allegations contained in the paragraphs
23 above.

24 93. CytoSport denies the allegations in Paragraph 93.

25 94. CytoSport denies the allegations in Paragraph 94.

26 95. Answering Paragraph 95, CytoSport denies that it deceptively markets,
27 advertises, packages, or labels its Muscle Milk® or CytoSport® products.
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1 96. Answering Paragraph 96, CytoSport denies that it deceptively markets,
2 advertises, packages, or labels its Muscle Milk® or CytoSport® products or that any
3 consumers were injured.

4 97. CytoSport denies the allegations in Paragraph 97.

5 98. CytoSport denies the allegations in Paragraph 98.

6 99. Answering Paragraph 99, CytoSport admits that Plaintiffs purport to
7 seek the relief stated. CytoSport denies the factual allegations in Paragraph 99 and
8 denies that there is any factual or legal basis for Plaintiffs’ requested relief.

9 **X. FIFTH COUNT**

10 **Violation of CAL. BUS. & PROF. CODE §§ 17200, et seq.**
11 **Fraudulent Business Acts and Practices**
12 **(On Behalf of the Nationwide Class and the California Sub-class)**

13 100. Answering Paragraph 100, CytoSport incorporates by reference and
14 repleads all of the admissions, denials, and allegations contained in the paragraphs
15 above.

16 101. CytoSport denies the allegations in Paragraph 101.

17 102. CytoSport denies the allegations in Paragraph 102.

18 103. CytoSport denies the allegations in Paragraph 103.

19 104. Answering Paragraph 104, CytoSport admits that Plaintiffs purport to
20 seek the relief stated. CytoSport denies the factual allegations in Paragraph 104 and
21 denies that there is any factual or legal basis for Plaintiffs’ requested relief.

22 **XI. SIXTH COUNT**

23 **Violation of FLA. STAT. §§ 501.201, et seq.**
24 **Deceptive and Unfair Trade Practices**
25 **(On Behalf of the Florida Sub-Class)**

26 105. Answering Paragraph 105, CytoSport incorporates by reference and
27 repleads all of the admissions, denials, and allegations contained in the paragraphs
28 above.

1 106. Answering Paragraph 106, CytoSport lacks sufficient knowledge or
2 information to form a belief as to the truth of the allegations in Paragraph 106 and,
3 on that basis, denies the allegations therein.

4 107. CytoSport admits the allegations in Paragraph 107.

5 108. CytoSport admits the allegations in Paragraph 108.

6 109. To the extent that Paragraph 109 purports to state a summary of
7 applicable Florida law, no answer is needed. To the extent an answer is appropriate,
8 CytoSport denies that Paragraph 109 fully states all governing statutes and
9 regulations.

10 110. CytoSport denies the factual allegations in Paragraph 110. To the extent
11 that Paragraph 110 purports to state a summary of applicable federal or state law, no
12 answer is needed. To the extent an answer is appropriate, CytoSport denies that
13 Paragraph 110 fully states all governing statutes and regulations.

14 111. CytoSport denies the factual allegations in Paragraph 111. To the extent
15 that Paragraph 111 purports to state a summary of applicable federal law, no answer
16 is needed. To the extent an answer is appropriate, CytoSport denies that
17 Paragraph 111 fully states all governing statutes and regulations.

18 112. CytoSport denies the allegations in Paragraph 112.

19 113. Answering Paragraph 113, CytoSport denies that it deceptively markets,
20 advertises, packages, or labels its Muscle Milk® or CytoSport® products.

21 114. Answering Paragraph 114, CytoSport denies that it deceptively markets,
22 advertises, packages, or labels its Muscle Milk® or CytoSport® products or that any
23 consumers were injured.

24 115. CytoSport denies the allegations in Paragraph 115.

25 116. CytoSport denies the allegations in Paragraph 116.

26 117. CytoSport denies the allegations in Paragraph 117.

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1 118. Answering Paragraph 118, CytoSport admits that Plaintiffs purport to
2 seek the relief stated. CytoSport denies the factual allegations in Paragraph 118 and
3 denies that there is any factual or legal basis for Plaintiffs' requested relief.

4 **XII. SEVENTH COUNT**

5 **Violation of M.C.L. §§ 445.901, et seq.**
6 **Deceptive and Unfair Trade Practices**
7 **(On Behalf of the Michigan Sub-Class)**

8 119. Answering Paragraph 119, CytoSport incorporates by reference and
9 replays all of the admissions, denials, and allegations contained in the paragraphs
10 above.

11 120. Answering Paragraph 120, CytoSport lacks sufficient knowledge or
12 information to form a belief as to the truth of the allegations in Paragraph 120 and,
13 on that basis, denies the allegations therein.

14 121. CytoSport admits the allegations in Paragraph 121.

15 122. To the extent that Paragraph 122 purports to state a summary of
16 applicable Michigan law, no answer is needed. To the extent an answer is
17 appropriate, CytoSport denies that Paragraph 122 fully states all governing statutes
18 and regulations.

19 123. Cytosport denies the factual allegations in Paragraph 123. To the extent
20 that Paragraph 123 purports to state a summary of applicable federal or state law, no
21 answer is needed. To the extent an answer is appropriate, CytoSport denies that
22 Paragraph 123 fully states all governing statutes and regulations.

23 124. To the extent that Paragraph 124 purports to state a summary of
24 applicable federal law, no answer is needed. To the extent an answer is appropriate,
25 CytoSport denies that Paragraph 124 fully states all governing statutes and
26 regulations.

27 125. CytoSport denies the allegations in Paragraph 125.

28 126. CytoSport denies the allegations in Paragraph 126.

1 127. CytoSport denies the allegations in Paragraph 127.

2 128. Answering Paragraph 128, CytoSport admits that Plaintiffs purport to
3 seek the relief stated. CytoSport denies the factual allegations in Paragraph 128 and
4 denies that there is any factual or legal basis for class certification.

5 129. Answering Paragraph 129, CytoSport admits that Plaintiffs purport to
6 seek the relief stated. CytoSport denies the factual allegations in Paragraph 129 and
7 denies that there is any factual or legal basis for Plaintiffs' requested relief.

8 **XIII. EIGHTH COUNT**

9 **Breach of Express Warranty**
10 **(On Behalf of the Nationwide Class)**

11 130. Answering Paragraph 130, CytoSport incorporates by reference and
12 repleads all of the admissions, denials, and allegations contained in the paragraphs
13 above.

14 131. Answering Paragraph 131, CytoSport lacks sufficient knowledge or
15 information to form a belief as to the truth of the allegations in Paragraph 131 and,
16 on that basis, denies the allegations therein.

17 132. Answering Paragraph 132, CytoSport lacks sufficient knowledge or
18 information to form a belief as to the truth of the allegations in Paragraph 132 and,
19 on that basis, denies the allegations therein.

20 133. Answering Paragraph 133, CytoSport lacks sufficient knowledge or
21 information to form a belief as to the truth of the allegations in Paragraph 133 and,
22 on that basis, denies the allegations therein.

23 134. CytoSport denies the allegations in Paragraph 134.

24 135. CytoSport denies the allegations in Paragraph 135.

25 **XIV. NINTH COUNT**

26 **Violation of 15 U.S.C. §§ 2301, *et seq.***
27 **Breach of Written Warranty**
28 **(On Behalf of the Nationwide Class)**

1 136. Answering Paragraph 136, CytoSport incorporates by reference and
2 replays all of the admissions, denials, and allegations contained in the paragraphs
3 above.

4 137. Answering Paragraph 137, CytoSport admits that Plaintiffs purport to
5 bring their claim on behalf of themselves and the nationwide Class, but denies that
6 there is any factual or legal basis for class certification.

7 138. To the extent that Paragraph 138 purports to state a summary of
8 applicable federal law, no answer is needed. To the extent an answer is appropriate,
9 CytoSport denies that Paragraph 138 fully states all governing statutes and
10 regulations.

11 139. CytoSport admits the allegations in Paragraph 139.

12 140. Answering Paragraph 140, CytoSport lacks sufficient knowledge or
13 information to form a belief as to the truth of the allegations in Paragraph 140 and,
14 on that basis, denies the allegations therein.

15 141. CytoSport admits the allegations in Paragraph 141.

16 142. Answering Paragraph 142, CytoSport lacks sufficient knowledge or
17 information to form a belief as to the truth of the allegations in Paragraph 142 and,
18 on that basis, denies the allegations therein.

19 143. CytoSport denies the allegations in Paragraph 143.

20 144. CytoSport denies the allegations in Paragraph 144.

21 145. CytoSport denies the allegations in Paragraph 145.

22 146. Answering Paragraph 146, CytoSport admits that Plaintiffs purport to
23 seek the relief stated. CytoSport denies the factual allegations in Paragraph 146 and
24 denies that there is any factual or legal basis for Plaintiffs' requested relief.

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1 **XIV. PRAYER FOR RELIEF**

2 147. CytoSport denies that Plaintiffs are entitled to any of the relief
3 requested.

4 **XV. DEFENSES AND AFFIRMATIVE DEFENSES**

5 148. Without suggesting or conceding that it has the burden of proof on any
6 such defenses, CytoSport alleges the following defenses and/or affirmative defenses
7 to the Complaint. Consistent with the Court's March 16, 2017 Order (ECF No. 163),
8 CytoSport is omitting the arguments the Court said need not be raised as affirmative
9 defenses because they have been adequately preserved in other ways, and is only
10 raising the arguments the Court indicated should be raised as affirmative defenses.

11 **FIRST DEFENSE**

12 (Statutes of Limitations)

13 149. Plaintiffs' claims, and those of the purported class, are barred, in whole
14 or in part, by the applicable statutes of limitations, including, but not limited to, Code
15 of Civil Procedure §§ 337, 338, 339, Business and Professions Code §§ 17200, *et*
16 *seq.* and 17208, Cal. Civil Code § 1783, Fla. Stat. § 501.207(5), M.C.L.
17 §§ 445.910(5), 445.911(7).

18 **SECOND DEFENSE**

19 (Mootness)

20 150. The claims for injunctive relief or other equitable relief asserted by
21 Plaintiffs and the purported class are barred as moot in whole or in part, as the labels
22 that appeared on the Class Products during the Class Period are no longer in use.

23 **THIRD DEFENSE**

24 (Lack of Personal Jurisdiction over Absent Purported Class Members)

25 151. The Complaint, and each of its purported causes of action, is barred, in
26 whole or in part, by the Court's lack of personal jurisdiction over absent purported
27 class members.

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FOURTH DEFENSE

(Lack of Timely Notice of Alleged Breach of Warranty)

152. Plaintiffs’ warranty-based claims, and the claims of the purported class, are barred by their failure to give proper or timely notice of any alleged breach of warranty.

FIFTH DEFENSE

(Settlement and Res Judicata)

153. Plaintiffs’ claims, and those of the purported class, are barred, in whole or in part, by their settlement and release of those claims in the court-approved class settlement in *Delacruz v. CytoSport, Inc.*, No. 4:11-cv-03532 (N.D. Cal.). Any claims released by the *Delacruz* settlement and order are precluded by res judicata.

PRAYER FOR RELIEF

- 1. Wherefore, CytoSport prays for judgment as follows:
 - a. That Plaintiffs and the purported class take nothing and that the Complaint be dismissed with prejudice and that the Court enter judgment consistent therewith;
 - b. That no class be certified;
 - c. That Plaintiffs’ requests for declaratory judgment, injunctive relief (including a corrective advertising campaign), restitution, disgorgement, statutory and punitive damages, other damages, attorneys’ fees and costs be denied;
 - d. That CytoSport be awarded its attorneys’ fees and costs of suit in this matter; and

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e. For such other and further relief as this Court may deem necessary, just and proper.

TUCKER ELLIS LLP

DATED: March 31, 2017 By: s/ Matthew I. Kaplan
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DATED: March 31, 2017 FAEGRE BAKER DANIELS LLP

By: s/ Sarah L. Brew
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SIGNATURE CERTIFICATION

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I hereby certify that the content of this document is acceptable to Sarah L. Brew, counsel for Defendant, and that I have obtained Ms. Brew’s authorization to affix her electronic signatures to this document.

DATED: March 31, 2017 By: s/ Matthew I. Kaplan
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