

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

**CLASS ACTION**

**ORDER GRANTING CLASS  
PLAINTIFFS' RENEWED MOTION  
FOR PRELIMINARY APPROVAL  
OF CLASS ACTION SETTLEMENT**

(Doc. no. 232)

1 Pending before the Court is Class Plaintiffs’ motion for preliminary approval  
2 of the proposed class action settlement of *Clay et al. v. CytoSport, Inc.*, Civ. No 3:15-  
3 cv-00165 (S.D. Cal.) (the “Litigation”). The Amended Complaint was filed in this  
4 Court by Plaintiffs Chayla Clay, Erica Erlichman, Chris Roman, and Logan Reichert  
5 on behalf of themselves and all others similarly situated against CytoSport, Inc.  
6 (“CytoSport”). Based on this Court’s review of the Parties’ Amended Settlement  
7 Agreement and Release (the “Agreement” or “Settlement Agreement”), Class  
8 Plaintiffs’ Motion for Preliminary Approval of Settlement, and the arguments of  
9 counsel, THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:

- 10 1. Settlement Terms. Unless otherwise defined herein, all terms in this  
11 Order shall have the meanings ascribed to them in the Agreement.
- 12 2. Jurisdiction. The Court has jurisdiction over the subject matter of the  
13 Litigation, the Parties, and all Settlement Class Members.
- 14 3. Scope of Settlement. The Agreement resolves all claims alleged in the  
15 Amended Complaint filed in the Southern District of California on March 15, 2017.  
16 *See Clay et al. v. CytoSport, Inc.*, Civ. No 3:15-cv-00165 (doc. no. 156).
- 17 4. Preliminary Approval of Proposed Settlement Agreement. The Court  
18 has conducted a preliminary evaluation of the Settlement as set forth in the  
19 Agreement for fairness, adequacy, and reasonableness. Based on this preliminary  
20 evaluation, the Court finds that: (i) the Agreement is fair, reasonable, and adequate,  
21 and within the range of possible approval considering the possible damages at issue  
22 and defenses to overcome; (ii) the Agreement has been negotiated in good faith at  
23 arm’s length between experienced attorneys familiar with the legal and factual  
24 issues of this case, and utilizing the assistance of a mediator; and (iii) with respect  
25 to the forms of notice of the material terms of the Agreement to Settlement Class  
26 Members (Ex. B to the Agreement), that notice is appropriate and warranted.  
27 Therefore, the Court grants preliminary approval of the Settlement.

28 ///

1           5.     Class Certification for Settlement Purposes Only. The Court, pursuant  
2 to Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure,  
3 conditionally certifies, for purposes of this Settlement only, the following  
4 Settlement Classes:

5           (a)     A “Shake Class”

6  
7           *All consumers in the United States (including its states, districts*  
8 *or territories) who purchased CytoSport Whey Isolate Protein*  
9 *Drink; Monster Milk: Protein Power Shake; Genuine Muscle*  
10 *Milk: Protein Nutrition Shake; and Muscle Milk Pro Series 40:*  
11 *Mega Protein Shake from January 23, 2011 to the date of entry*  
12 *of this Order. For members of the Michigan subclass only, the*  
13 *starting date of the class period will be January 23, 2009.*  
14 *Excluded from the Settlement Class are Defendant and any*  
15 *affiliate or subsidiary of Defendant, and any entities in which*  
16 *Defendant has a controlling interest, as well as all persons who*  
17 *validly exclude themselves from the Settlement Class.*

18           (b)     A “Powder Class”

19  
20           *All consumers in the United States (including its states, districts,*  
21 *or territories) who purchased Muscle Milk: Lean Muscle Protein*  
22 *Powder; Muscle Milk Light: Lean Muscle Protein Powder;*  
23 *Muscle Milk Naturals: Nature’s Ultimate Lean Muscle Protein;*  
24 *Muscle Milk Gainer; High Protein Gainer Powder Drink Mix;*  
25 *Muscle Milk Pro Series 50: Lean Muscle Mega Protein Powder;*  
26 *and Monster Milk: Lean Muscle Protein Supplement that had the*  
27 *phrase “lean lipids,” “lean protein,” “lean muscle protein,” or*  
28 *“new leaner formula” on the label from January 23, 2011 to*  
*December 31, 2018. Excluded from the Settlement Class are*  
*Defendant and any affiliate or subsidiary of Defendant, and any*  
*entities in which Defendant has a controlling interest, as well as*  
*all persons who validly exclude themselves from the Settlement*  
*Class.*

6.     In connection with this conditional certification, and based on the facts outlined in the brief and declarations filed with the motion for preliminary approval, in this Court’s prior order granting certification of litigation classes (doc. no. 210), and in this Court’s prior order denying preliminary approval of settlement (doc. no. 229), the Court makes the following preliminary findings:

1 (a) The Settlement Classes appear to be so numerous that joinder of  
2 all members is impracticable;

3 (b) There appear to be questions of law or fact common to the  
4 Settlement Classes for purposes of determining whether the Settlement should be  
5 approved;

6 (c) Class Plaintiffs' claims appear to be typical of the claims being  
7 resolved through the Settlement;

8 (d) Class Plaintiffs appear to be capable of fairly and adequately  
9 protecting the interests of all members of the Settlement Classes in connection with  
10 the Settlement;

11 (e) For purposes of determining whether the Settlement Agreement is  
12 fair, reasonable, and adequate, common questions of law and fact appear to  
13 predominate over questions affecting only individual persons in the Settlement  
14 Classes. Accordingly, the Settlement Classes appear to be sufficiently cohesive to  
15 warrant settlement by representation; and

16 (f) For purposes of settlement, certification of the Settlement Classes  
17 appears to be superior to other available methods for the fair and efficient settlement  
18 of the claims of the Settlement Classes.

19 7. Class Representatives. The Court appoints Chayla Clay, Erica  
20 Erlichman, Chris Roman, and Logan Reichert as Representatives of the Settlement  
21 Classes pursuant to Rule 23 of the Federal Rules of Civil Procedure.

22 8. Class Counsel. The Court appoints Jason J. Thompson and Trenton R.  
23 Kashima of Sommers Schwartz P.C., and Nick Suciu III of Barbat Mansour &  
24 Suciu PLLC as Class Counsel (collectively "Class Counsel") pursuant to Rule 23 of  
25 the Federal Rules of Civil Procedure.

26 9. Final Approval Hearing. At 10:30 a.m. on October 19, 2020, in  
27 courtroom 5B of the United States Courthouse, 221 West Broadway, San Diego,  
28 California 92101, or at such other date and time later set by Court Order, this Court

1 will hold a Final Approval Hearing on the fairness, adequacy, and reasonableness of  
2 the Agreement and to determine whether (i) final approval of the Settlement  
3 embodied by the Agreement should be granted, and (ii) Class Counsel’s application  
4 for attorneys’ fees and expenses, and incentive awards to Class Representatives  
5 should be granted, and in what amount. No later than September 2, 2020, Class  
6 Plaintiffs shall file their motion in support of Class Counsel’s application for  
7 attorneys’ fees and expenses and the incentive awards to the Class Representatives.  
8 No later than October 1, 2020, Class Plaintiffs shall file their motion in support of  
9 final approval of the Settlement and respond to any written objections. In addition  
10 to the required and customary filings, the motion papers shall include any  
11 communications received from any putative Settlement Class Member or any  
12 government official in response to notice under 28 U.S.C. § 1715. To the extent any  
13 modifications have been made to the Class Notice, the Class Counsel or the Claims  
14 Administrator must explain them in an affidavit. Defendant may (but is not required  
15 to) file a response to the Class Plaintiffs’ motion in support of final approval of the  
16 Settlement no later than October 5, 2020.

17 10. Settlement Claims Administrator. Pursuant to the Agreement, Angeion  
18 Group is hereby appointed as Claims Administrator and shall be required to perform  
19 all the duties of the Claims Administrator as set forth in the Agreement and this  
20 Order.

21 11. Class Notice. The Court approves the proposed Notice Plan for giving  
22 notice to the Settlement Class through publication, both print and digital, and  
23 through the establishment of a Settlement Website, as more fully described in the  
24 Agreement and the Claims Administrator’s affidavits (docs. no. 222-9, 224, 224-1,  
25 and 232-3 through 232-6). The Notice Plan, in form, method, and content, complies  
26 with the requirements of Rule 23 and due process, and constitutes the best notice  
27 practicable under the circumstances. The Court hereby directs the Parties and the  
28

1 Claims Administrator to commence all aspects of the Notice Plan no later than July  
2 3, 2020.

3 12. The Claims Administrator shall file with the Court no later than  
4 October 1, 2020, proof that Class Notice was provided in accordance with the  
5 Agreement and this Order, as well as proof that notice was provided to the  
6 appropriate state and federal officials pursuant to the Class Action Fairness Act, 28  
7 U.S.C. § 1715. In addition, the Claims Administrator shall file an affidavit with a  
8 detailed report of the reach achieved by each component of the Notice Plan, copies  
9 of the Class Notice provided pursuant to each component of the Notice Plan, the  
10 number of Settlement Class Members submitting claims, Objections or Requests for  
11 Exclusion (including any untimely or disputed claims, Objections and Requests for  
12 Exclusion), the number of Settlement Class Members to whom a payment will be  
13 made, calculation of the average payment, the Claims Administrator's itemized  
14 invoice (with an estimate to conclude settlement administration), and the amount of  
15 the invoice that is expected to be paid from the Settlement Fund.

16 13. Objection and Exclusion Deadline. Settlement Class Members who  
17 wish either to object to the Settlement or to exclude themselves from the Settlement  
18 must do so by the Objection Deadline and Exclusion Deadline of September 16,  
19 2020. The Objection Deadline and Exclusion Deadline may be extended by up to  
20 fifteen (15) calendar days, by agreement of the Parties or order of the Court.  
21 Settlement Class Members may not both object to and exclude themselves from the  
22 Settlement. If a Settlement Class Member submits both a Request for Exclusion and  
23 an Objection, the Request for Exclusion will be controlling.

24 14. Exclusion from the Settlement Class. To submit a Request for  
25 Exclusion, Settlement Class Members must follow the directions in the Class Notice  
26 and send a compliant request to the Claims Administrator at the address designated  
27 in the Class Notice by the Exclusion Deadline. To be valid, the Request for  
28 Exclusion must (a) be made in writing and mailed or submitted online; (b) contain

1 the full name and address of the Settlement Class Member; (c) state that the  
2 Settlement Class Member wishes to be excluded from the Settlement; and (d) be  
3 signed individually by the Settlement Class Member. No Settlement Class Member,  
4 or any person acting on behalf of or in concert or participation with that Settlement  
5 Class Member, may exclude any other Settlement Class Member from the  
6 Settlement Class.

7 15. If a timely and valid Request for Exclusion is made by a Settlement  
8 Class Member, then that person will not be a Settlement Class Member, and the  
9 Agreement and any determinations and judgments concerning it will not bind the  
10 excluded person.

11 16. All Settlement Class Members who do not exclude themselves from  
12 the Settlement by submitting a Request for Exclusion by September 16, 2020, in  
13 accordance with the terms set forth in the Agreement will be bound by all orders  
14 and judgments concerning the Agreement.

15 17. Objections to the Settlement. To object to the Settlement, Settlement  
16 Class Members are encouraged follow the directions in the Class Notice and file a  
17 written Objection by the Objection Deadline. In the written Objection, the  
18 Settlement Class Member should state (a) the Settlement Class Member's full name  
19 and address; (b) the class product(s) that the Settlement Class Member purchased  
20 and the approximate date(s) of purchase; (c) the specific reasons for the Settlement  
21 Class Member's Objection, and whether they apply only to the objector, to a  
22 specific subset of a Settlement Class, or to an entire Settlement Class, as required by  
23 Fed. R. Civ. P. 23(e)(5)(A); (d) the objector's signature; and (e) the signature of the  
24 objector's counsel, if any. Any documents supporting the Objection should also be  
25 attached to the Objection. Upon filing of a proper motion, the Parties may have the  
26 right to depose any objector to assess whether the objector has standing.

27 18. If a Settlement Class Member does not submit a written Objection to  
28 the proposed Settlement or the application of Class Counsel for attorneys' fees and

1 expenses or the incentive awards in accordance with the deadline and procedure set  
2 forth in the Class Notice and this Order, but the Settlement Class Member wishes to  
3 appear and be heard at the Final Approval Hearing, the Settlement Class Member  
4 may do so provided the Objector satisfies the requirements of Fed. R. Civ. P.  
5 23(e)(5)(A) at the Fairness Hearing.

6 19. All members of the Settlement Classes, except those members of the  
7 Settlement Classes who submit timely Requests for Exclusion, will be bound by all  
8 orders and judgments in the Litigation, whether favorable or unfavorable to the  
9 Settlement Classes.

10 20. Submission of Claims. To receive a cash award, Settlement Class  
11 Members must follow the directions in the Class Notice and file a claim with the  
12 Claims Administrator by the Claims Deadline of September 16, 2020. The Claims  
13 Deadline may be extended by up to fifteen (15) calendar days, by agreement of the  
14 Parties or order of the Court. Settlement Class Members who do not submit a claim  
15 will not receive a cash award but will be bound by the Settlement.

16 21. Stay of Other Proceedings. Pending the final determination of whether  
17 the Settlement should be approved, all pre-trial proceedings and briefing schedules  
18 in the Litigation are stayed. If the Settlement is terminated or final approval does  
19 not for any reason occur, the stay will be immediately terminated.

20 22. Pending the final determination of whether the Settlement should be  
21 approved, the Settlement Class Representatives and all Settlement Class Members  
22 are hereby stayed and enjoined from commencing, pursuing, maintaining,  
23 enforcing, or prosecuting, either directly or indirectly, any Released Claims in any  
24 judicial, administrative, arbitral, or other forum, against any of the Released Parties.  
25 Such injunction will remain in force until Final Approval or until such time as the  
26 Parties notify the Court that the Settlement has been terminated. Nothing herein will  
27 prevent any Settlement Class Member, or any person actually or purportedly acting  
28 on behalf of any Settlement Class Member(s), from taking any actions to stay or



1 dismiss any Released Claim(s). This injunction is necessary to protect and  
2 effectuate the Agreement, this Order, and the Court's flexibility and authority to  
3 effectuate the Agreement and enter Judgment when appropriate. It is ordered in aid  
4 of this Court's jurisdiction and to protect its judgments. This injunction does not  
5 apply to any person who files a Request for Exclusion pursuant to Paragraphs 14  
6 and 15 of this Order.

7 23. If the Settlement is not approved or consummated for any reason  
8 whatsoever, the Settlement and all proceedings in connection with the Settlement  
9 will be without prejudice to the right of Defendant or the Class Representatives to  
10 assert any right or position that could have been asserted if the Agreement had  
11 never been reached or proposed to the Court, except insofar as the Agreement  
12 expressly provides to the contrary. In such an event, the Parties will return to the  
13 *status quo ante* in the Litigation and the certification of the Settlement Classes will  
14 be deemed vacated. The certification of the Settlement Classes for settlement  
15 purposes will not be considered as a factor in connection with any subsequent class  
16 certification issues.

17 24. No Admission of Liability. The Agreement and any and all  
18 negotiations, documents, and discussions associated with it, will not be deemed or  
19 construed to be an admission or evidence of any violation of any statute, law, rule,  
20 regulation, or principle of common law or equity, or of any liability or wrongdoing  
21 by Defendant, or the truth of any of the claims. Evidence relating to the Agreement  
22 will not be discoverable or used, directly or indirectly, in any way, whether in the  
23 Litigation or in any other action or proceeding, except for purposes of  
24 demonstrating, describing, implementing, or enforcing the terms and conditions of  
25 the Agreement, this Order, and the Final Order of Dismissal.

26 25. Reasonable Actions to Effectuate the Settlement. Counsel are hereby  
27 authorized to take all reasonable actions in connection with approval and  
28 administration of the Settlement as necessary to comply with this Order or the

1 Agreement, including making, without further approval of the Court, clerical  
 2 changes to the form or content of the Class Notice and Claim Form and other  
 3 exhibits that they jointly agree are reasonable and necessary. The Court reserves the  
 4 right to approve the Agreement with modifications, if any, without further notice to  
 5 the Settlement Class Members, insofar as agreed to by the Parties and not materially  
 6 inconsistent with this Order.

7 26. Schedule of Future Events. Accordingly, the following are the  
 8 deadlines by which certain events must occur:

Date or Number of Days from Event	Event
July 3, 2020	Deadline to provide Class Notice
September 2, 2020	Deadline for Class Plaintiffs' Motion for Attorneys' Fees and Incentive Awards
September 16, 2020	Deadline for Class Members to submit claims
September 16, 2020	Deadline for Class Members to file Objections or submit Requests for Exclusion
October 2, 2020	Deadline for Parties to file the following: (1) list of Settlement Class Members who submitted Requests for Exclusion; (2) proof of Class Notice and notice under 28 U.S.C. § 1715; and (3) Motion for Final Approval, including responses to any Objections.
October 19, 2020	Final Fairness Hearing

21  
 22 **IT IS SO ORDERED.**

23  
 24 Dated: June 17, 2020

25   
 26 Hon. M. James Lorenz  
 27 United States District Judge  
 28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28