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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

CHAYLA CLAY *et al.*,
Plaintiffs,
v.
CYTOSPORT, INC., a California
corporation,
Defendant.

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

**ORDER REGARDING BRIEFING
PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION AND
DEFENDANT'S SUMMARY
JUDGMENT AND DAUBERT
MOTIONS [Doc. no. 152]**

This order supersedes the order filed November 17, 2016 (doc. no. 137).

In this putative consumer class action, the parties contacted the Court pursuant to Civil Local Rule 7.1 with requests for hearing dates. Plaintiffs intend to file a motion to certify a class action. On March 3, 2017, Defendant filed a motion for partial summary judgment. In addition, Defendant intends to file another summary judgment motion and a *Daubert* motion. They request a briefing schedule to accommodate orderly and efficient briefing.

The pending request warrants a context. Plaintiffs had previously filed a motion for class certification. Shortly thereafter he parties encountered discovery disputes. On September 21, 2016, Defendant filed an *ex parte* application, seeking to extend the time to file its opposition to the class certification motion and

1 continue the class certification schedule because it wanted discovery to respond to
2 expert declarations filed in support of class certification, but the parties could not
3 agree if Defendant was entitled to it. (Doc. no. 121.) The application was
4 vehemently opposed. (Doc. no. 122.) Plaintiffs indicated that if Defendant was
5 permitted to depose Plaintiffs' experts, then they wanted an opportunity to re-file
6 their motion after the depositions. (Opp'n at 5 n.7.) Defendant filed an involved
7 reply. (Doc. no. 123.) The Court referred the discovery dispute to the assigned
8 Magistrate Judge, *see* 28 U.S.C. §636(b)(1)(A) & Civ. Loc. Rule 72.1(b), the
9 hearing date for the class certification motion was vacated, Plaintiffs' class
10 certification motion was denied without prejudice to accommodate their request to
11 re-file after expert depositions, if any, and the parties were ordered to file a status
12 report no later than five days after the Magistrate Judge's disposition of the
13 discovery dispute. (Doc. no. 124.) On October 19, 2016, class certification
14 discovery was reopened to allow Defendant to depose Plaintiffs' experts. (*See* doc.
15 no. 128.) On November 16, 2016, the parties jointly requested a continuance of
16 class certification deadlines and proposed a briefing schedule to allow more time
17 for briefing. (*See* doc. no. 135.) Court largely granted the request, and set March
18 3, 2017 as the due date for Plaintiffs' renewed class certification motion. (*See* doc.
19 no. 137.)

20 As the March 3 due date approached, Defendant expressed the intention to
21 file summary judgment and *Daubert* motions. Defendant's pending summary
22 judgment motion attacks named Plaintiffs' standing and the merits of some, but not
23 all claims alleged. The Defendant intends to file another summary judgment
24 motion relating to the claims asserted by Chris Roman, a putative class
25 representative Plaintiffs intend to join.¹ Mr. Roman has been deposed, but his

26 _____
27 ¹ On December 19, 2016, Plaintiffs filed a motion to intervene seeking to join
28 Chris Roman as a putative class representative. Defendant agreed to not oppose
the motion. (Doc. no. 143.) On January 9, 2017, the Court approved the
stipulation. (Doc. no. 144.) Although the parties had apparently agreed, Plaintiffs

1 transcript has not been signed. Defendant waits for Mr. Roman's signature and any
2 corrections before filing the motion. Finally, Defendant intends to file a *Daubert*
3 motion to attack the experts who provided evidence in support of class
4 certification.

5 Plaintiffs request that their class certification motion and Defendant's
6 summary judgment motions be briefed concurrently rather than consecutively
7 because Defendant's motions, even if granted, would not dispose of all the claims
8 as to which class certification is sought, are relevant to viability of class
9 certification, and are directly relevant to the adequacy and typicality elements of
10 class certification. *See* Fed. R. Civ. Proc. 23. Plaintiffs object to Defendant filing
11 a separate summary judgment motion as to Mr. Roman. They argue that the issues
12 Defendant intends to raise on summary judgment should be raised in opposition to
13 class certification instead.

14 Defendant requests the Court to set a due date for Mr. Roman to sign his
15 deposition transcript with corrections, if any. It seeks leave to file the second
16 summary judgment motion fourteen (14) days after receiving the signed transcript.
17 Defendant offers to consolidate its pending and planned second summary judgment
18 motions in one brief.²

19 In the interests of justice and in furtherance of orderly and efficient briefing
20 of the pending and upcoming motions, **IT IS ORDERED** as follows:

21 1. Plaintiffs shall file their class certification motion, if any, no later than
22 **March 15, 2017**.

23 2. No later than **March 15, 2017**, Plaintiffs shall serve Defendant with
24 Mr. Roman's signed deposition transcript with corrections, as any. In the absence
25 of compliance with this Order, the transcript shall be deemed corrected and signed

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27 to date have not filed an amended complaint naming Mr. Roman.

28 ² Neither party has addressed the issue whether there are any claims asserted
by Mr. Roman at all, as Plaintiffs have not joined him to date.

1 by Mr. Roman in its present condition.

2 2. Defendant shall brief the issues raised in the pending summary
3 judgment motion or planned to be raised in the proposed summary judgment and
4 *Daubert* motions, if any, in the memorandum of points and authorities filed in
5 opposition to Plaintiffs' motion for class certification, if any. The brief may be
6 styled as a combined opposition, motion for summary adjudication, and *Daubert*
7 motion, as appropriate in light of the requested relief. The brief shall not exceed
8 45 pages in length. Defendant's brief shall be filed no later than **April 5, 2017**.

9 3. Defendant's pending summary judgment motion (doc. no. 151) is
10 **DENIED WITHOUT PREJUDICE** to including the same arguments and
11 requests for relief in Defendant's opposition to Plaintiffs' class certification motion
12 as provided herein.

13 4. No later than **April 26, 2017**, Plaintiffs shall file their reply in support
14 of class certification and opposition to any summary judgment and/or *Daubert*
15 motions Defendant joined with its opposition to class certification. The reply and
16 opposition, if any, shall be briefed in one combined memorandum of points and
17 authorities, which shall not exceed 35 pages in length.

18 5. No later than **May 3, 2017**, Defendant shall file a reply in support of
19 its summary adjudication and/or *Daubert* motions. The brief shall not exceed 20
20 pages in length.

21 6. Upon filing the foregoing, the motions will be deemed submitted.
22 There shall be no oral argument unless requested by the Court. *See* Civ. Loc. Rule
23 7.1.d. The parties need not contact chambers to secure hearing dates for the
24 motions addressed by this Order.

25 7. In all other respects, the parties shall comply with the applicable
26 Federal Rules of Civil Procedure, Federal Rules of Evidence, Civil Local Rules of
27 this District and the Standing Order for Civil Cases of this Court, including the
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1 standing orders regarding telephone calls to chambers, motion briefing, and
2 summary judgment briefing.

3 **IT IS SO ORDERED.**

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5 Dated: March 9, 2017

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7 Hon. M. James Lorenz
8 United States District Judge
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