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**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

**ORDER (1) GRANTING
PLAINTIFFS' MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT; (2) GRANTING
PLAINTIFFS' MOTION FOR
ATTORNEYS' FEES, EXPENSES,
AND INCENTIVE AWARDS; AND (3)
FINAL ORDER OF DISMISSAL**

[Docs. No. 239, 240]

1 Pending before the Court are Plaintiffs’ Motion for Final Approval of Class
2 Action Settlement (doc. no. 240) and Plaintiffs’ Motion for Attorneys’ Fees,
3 Expenses, and Incentive Award (doc. no. 239). The Court has received no opposition
4 or objection to the motions. The motions were heard at the Final Approval Hearing on
5 October 29, 2020, notice of the Final Approval Hearing having been duly given in
6 accordance with the Order Granting Plaintiffs’ Renewed Motion for Preliminary
7 Approval of Class Action Settlement (doc. no. 235, “Preliminary Approval Order”).
8 Having considered all matters submitted at the Final Approval Hearing and otherwise,
9 based on the findings and conclusions in the Preliminary Approval Order, which are
10 incorporated by reference herein, and for the reasons stated below, the motions are
11 granted.

12 **Factual and Procedural Background**

13 Defendant manufactures and markets the Muscle Milk branded protein shakes
14 sold in powder and liquid forms (“Powder Products” and “Shake Products”). During
15 the class period, Defendant labeled its Powder Products with a number of claims,
16 including claims that they contained a specific amount of “lean protein” and that they
17 contained “lean lipids.” Plaintiffs alleged that the “lean” claims were misleading and
18 illegal under federal law and that the products contained less protein than stated on the
19 product labels. Plaintiffs also challenged L-Glutamine statements on product labels;
20 however, this claim was not certified for class treatment and Plaintiffs are no longer
21 pursuing it.

22 On behalf of a national class, Plaintiffs asserted causes of action for violation of
23 California Unfair Competition Law and False Advertising Law. Plaintiffs also
24 claimed, on behalf of classes of purchasers in California, Michigan, and Florida, that
25 the advertisements violated their respective state’s consumer protection statutes,
26 warranty laws, and the Magnuson–Moss Warranty Act.

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1 The case was heavily contested. Defendants moved to dismiss and filed a
2 motion for judgment on the pleadings. The motion to dismiss was denied and the
3 motion for judgment on the pleadings was granted in part.

4 The parties engaged in extensive discovery, including voluminous document
5 discovery, discovery of Defendant's sales data, several depositions, including
6 depositions of each Plaintiff, and expert discovery.

7 Defendant moved for summary judgment, and Plaintiffs moved for class
8 certification. Defendant's opposition to class certification included *Daubert*
9 challenges to Plaintiffs' experts. Both motions were granted in part and denied in
10 part. The summary judgment motion was granted with respect to Plaintiffs' claims
11 alleging breach of express warranty, violation of the Magnuson–Moss Warranty Act,
12 and violation of some provisions of the Michigan Consumer Protection Act. The
13 Court certified a nationwide class for violations of California Unfair Competition and
14 False Advertising laws as to certain products, as well as California, Florida and
15 Michigan subclasses for violations of their respective consumer protections laws.

16 Defendant petitioned the Ninth Circuit for interlocutory appeal of the class
17 certification order under Rule 23(f). The petition was granted and the parties were
18 preparing to brief the appeal when they settled the case.

19 The summary judgment and class certification rulings spurred further settlement
20 discussions. The parties had previously tried at least twice, but were unsuccessful in
21 settling. After the motion rulings, they engaged a private mediator and, over time,
22 agreed on a settlement. The settlement was reached after nearly four years of
23 litigation.

24 **Proposed Settlement Terms**

25 Defendant will contribute \$12 million to a non-reversionary Settlement Fund to
26 be paid to Class Members after payment of Class Counsel's attorneys' fees, costs,
27 litigation expenses, and class representatives' incentive awards. The net Settlement
28 Fund available for distribution will be, approximately, at least \$7.8 mil. In addition,

1 Defendant will separately pay the costs of notice and claims administration, which is
2 estimated to cost approximately \$500,000. The monetary benefit of the settlement is
3 approximately 9-30% of the total estimated damages if Plaintiffs prevailed at trial.

4 The Settlement Fund is to be distributed to the Settlement Class by check on a
5 claims-made basis, according to the number of Shake and Powder Products purchased
6 during the Class Period. To receive a cash payment, Class Members must file a
7 timely claim. For Shake Products, Class Members with proof of purchase may submit
8 claims for \$1 per purchased shake, with no limit on the number of shakes that may be
9 claimed. For Powder Products, Class Members with proof of purchase may submit
10 claims for \$3 or \$5 for each purchase, depending on the product size. In either
11 instance, Class Members with no proof of purchase may submit claims capped at \$25.
12 If the funds claimed are less than the net Settlement Fund, each Class Member
13 receives a pro rata share of any remaining funds.

14 In addition to the cash payment, Defendant has removed the challenged “lean”
15 references from Powder Product labels, and has agreed to review its manufacturing to
16 minimize variability of the protein content in their Shake Products.

17 Preliminary approval of the settlement was initially denied because Plaintiffs
18 amended the class definitions after the class certification order. As amended, the
19 classes could potentially include businesses in addition to consumers, which would
20 exceed the scope of the class certification order. The Class Members’ release of
21 claims was too broadly stated. There was an inadequate explanation of the class
22 notice program. The procedures for objections and exclusions as described in the
23 proposed notice were too onerous.

24 The parties amended the settlement agreement to address these issues. The
25 Court approved the amended settlement agreement on a preliminary basis.

26 **Class Notice**

27 The class notice was disseminated through targeted online ads, in print (Sports
28 Illustrated and People), press releases, and sponsored notice on two class action

1 websites. The Claim Administrator created a dedicated website with a toll-free line
2 where class members could access the full-length notice, other information about the
3 case, as well as the claim and exclusion forms. Class members were able to file their
4 claims and requests for exclusion on the website. Collectively, the notice program is
5 estimated to have reached approximately 79% of the class of approximately 3 million
6 members with an average frequency of approximately 3.4 views per person.

7 **Claims and Exclusions**

8 167,394 claims were filed, which constitutes a response rate of approximately
9 5.6% of the class. It is not unusual to see a low participation rate in a consumer class
10 action. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1130 (9th Cir. 2017).
11 Because the total claims do not exhaust the net Settlement Fund, the class members
12 will receive an additional pro-rata distribution increasing their individual claims by
13 approximately 40%. This will result in an average individual class member payment
14 of approximately \$47, which is more than expected recovery if Plaintiffs prevailed at
15 trial. No objections to the settlement were received. 227 members (approx. 0.0076%
16 of the class) requested exclusion.

17 **Conclusions and Order**

18 1. The Amended Settlement Agreement and Release dated January 28,
19 2020, including the definitions of words and terms contained therein and exhibits
20 attached thereto (doc. no. 232-8, the “Settlement Agreement”), and the terms of the
21 Preliminary Approval Order are incorporated herein by reference.

22 2. This Court has jurisdiction over the subject matter of the Litigation and
23 over the Parties, including all members of the following Settlement Classes certified
24 for settlement purposes in this Court’s Preliminary Approval Order:

25 **The Shake Class:** All consumers in the United States (including its states,
26 districts or territories) who purchased Cytosport Whey Isolate Protein Drink; Monster
27 Milk: Protein Power Shake; Genuine Muscle Milk: Protein Nutrition Shake; and
28 Muscle Milk Pro Series 40: Mega Protein Shake from January 23, 2011 to the date of

1 entry of the Preliminary Approval Order. For members of the Michigan subclass only,
2 the starting date of the class period will be January 23, 2009. Excluded from the
3 Settlement Class are Defendant and any affiliate or subsidiary of Defendant, and any
4 entities in which Defendant has a controlling interest, as well as all persons who
5 validly exclude themselves from the Settlement Class.

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

17 3. The Court hereby finds that the Class Representatives and Class Counsel
18 have adequately represented the Settlement Classes. *See* Fed. R. Civ. P. 23(e)(2)(A).

19 4. The Court hereby finds that the Settlement Agreement is the product of
20 arm’s-length settlement negotiations between the Plaintiffs and Class Counsel, and
21 Defendant and its counsel. *See* Fed. R. Civ. P. 23(e)(2)(B).

22 5. The Court hereby finds and concludes that Class Notice was disseminated
23 to the Settlement Class Members in accordance with the terms set forth in Section 8 of
24 the Settlement Agreement, and that Class Notice and its dissemination were in
25 compliance with the Preliminary Approval Order.

26 6. The Court further finds and concludes that the Class Notice and claims
27 submission procedures as reported to the Court in the Declaration of Steven Weisbrot,
28 Claims Administrator and attached exhibits (docs. no. 240-3 through 15) satisfy Rule

1 23 of the Federal Rules of Civil Procedure and the requirements of due process, were
2 the best notice practicable under the circumstances, provided individual notice to all
3 Settlement Class Members who could be identified through reasonable effort, and
4 support the Court's exercise of jurisdiction over the Settlement Classes as
5 contemplated in the Settlement Agreement and this Order. *See* Fed. R. Civ. P. 24
6 23(e)(2)(C)(ii).

7 7. This Court finds and concludes that the notice provided by the Claims
8 Administrator to the appropriate State and federal officials pursuant to 28 U.S.C. §
9 1715 satisfied the requirements of that statute.

10 8. A total of 227 Settlement Class Members submitted timely and proper
11 Requests for Exclusion, as reported in the declaration of the Claims Administrator
12 (docs. no. 240-3 through 5). The Court orders that each of the individuals listed by the
13 Claims Administrator as having submitted a valid Request for Exclusion is excluded
14 from the Settlement Classes. Those individuals will not be bound by the Settlement
15 Agreement, and neither will they be entitled to any of its benefits.

16 9. No Settlement Class Members submitted timely and proper Objections to
17 the Settlement Agreement. Plaintiffs faced serious risks both on the merits of their
18 claims and on the ability to try this matter on a class basis. The relief provided to the
19 Settlement Classes pursuant to the Settlement Agreement is adequate, given the costs,
20 risks, and delay of trial and appeal, and taking into consideration the attorney's fees
21 awarded below. *See* Fed. R. Civ. P. 23(e)(2)(C)(i), (iii).

22 10. Class Counsel request attorneys' fees in the sum of \$3,883,682.34, costs
23 and litigation expenses in the sum of \$265,902.66, and Class Representatives'
24 incentive awards totaling \$40,000.

25 The request for attorneys' fees represents 31.14% of the Settlement benefit to
26 the Settlement Classes and exceeds the 25% benchmark for reasonable attorneys' fees
27 in common fund settlements such as this. *See In re Bluetooth Headset Prod. Liability*
28 *Litig.*, 654 F.3d 935, 942-43 (9th Cir. 2011). The benchmark may be adjusted for

1 special circumstances such as, for example, the results achieved, litigation risk, the
2 skill required and quality of the work, the risk of nonpayment of fees in contingency
3 cases. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002). For
4 the reasons stated in Class Counsel’s brief, which reasons this Court adopts herein,
5 Class Counsel made a sufficient showing to support an upward adjustment of the
6 benchmark percentage. (*See* doc. no. 239-1 at 6-15.)

7 The Court also looks to the lodestar method to cross check the reasonableness
8 of requested fees. *See In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 748
9 (9th Cir. 2017). Class Counsel spent 5,532.6 hours on this case, which the Court finds
10 reasonable in light of the procedural history, including extensive discovery, expert
11 discovery, opposition to a motions to dismiss, for judgment on the pleadings and
12 summary judgment, defense against *Daubert* challenges to their experts, motion for
13 class certification, interlocutory appeal, and extensive settlement negotiations. In light
14 of the complexity of this action, the Court also finds reasonable the average hourly
15 rate of \$502.67. Based on the foregoing, the lodestar is \$2,781,066. Class Counsel’s
16 request applies a 1.4 multiplier to the lodestar. As with the benchmark percentage, the
17 lodestar can be adjusted based on the circumstances of each case in light of the *Kerr*
18 factors. *See Bluetooth*, 654 F.3d at 942 n.7 (quoting *Kerr v. Screen Extras Guild, Inc.*,
19 526 F.3d 67, 70 (9th Cir. 1975)). Because “[m]any of these factors are subsumed
20 within the calculation of hours reasonably expended at a reasonable rate[. . .] the
21 *Kerr* factors only warrant a departure from the lodestar in rare and exceptional cases.”
22 *Id.* (internal quotation marks and citations omitted). Other *Kerr* factors track
23 considerations for departure from the benchmark, such as difficulty of the issues,
24 requisite skill, “undesirability” of the case, experience, reputation and ability of
25 counsel, and results achieved for the class. *Cf. Bluetooth*, 654 F.3d at 942 n.7 &
26 *Vizcaino*, 290 F.3d at 1048-50. Foremost among them are the results achieved for the
27 class. *Bluetooth*, 654 F.3d at 942. For the reasons stated with regard to the
28 adjustment of the benchmark and for excellent results achieved for the Settlement

1 Classes, the Court finds that the request for \$3,883,682.34 in attorneys' fees is
2 reasonable under the circumstances of this case.

3 Class Counsel also request \$265,902.66 for costs and litigation expenses,
4 including expert fees. Upon review of the itemized summary (*see* doc. no. 239-2), the
5 Court finds the request reasonable.

6 Class Representatives request incentive awards of \$10,000 each. Incentive
7 awards "are discretionary and are intended to compensate class representatives for
8 work done on behalf of the class, [and] to make up for financial or reputational risk
9 undertaken in bringing the action . . ." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948,
10 958-59 (9th Cir. 2009). The amount of the award should be related to the actual
11 service or value the class representative provides to the class. *See id.* at 960.
12 Although incentive awards are "fairly typical in class actions," *id.* at 958, they "should
13 not become routine practice," lest the representatives be "tempted to accept
14 suboptimal settlements at the expense of the class members whose interests they are
15 appointed to guard." *Radcliffe v. Experian Information Solutions Inc.*, 715 F.3d 1157,
16 1163 (9th Cir. 2013) (internal quotation marks and citations omitted). Although the
17 requested awards are on the "high end" (doc. no. 239-1 at 24), the Court finds them
18 appropriate in this case. All Class Representatives were deposed in connection with
19 the summary judgment and class certification motions, some of them in a particularly
20 intrusive and contentious manner. Class Representatives also responded to written
21 discovery and were otherwise actively involved in the prosecution of this case for the
22 last five years.

23 For the foregoing reasons, the Court approves Class Counsel's application for
24 \$3,883,682.34 in attorneys' fees, \$265,902.66 in costs and litigation expenses, and a
25 \$10,000 incentive award to each Settlement Class Representative.

26 11. The Court finally approves the Settlement and finds it fair, reasonable,
27 and adequate as to all Settlement Class Members in accordance with Rule 23 of the

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1 Federal Rules of Civil Procedure and directs its consummation pursuant to the terms
2 and conditions of the Settlement Agreement.

3 12. This Court dismisses, with prejudice, without costs to any party, except as
4 expressly provided for in the Settlement Agreement, the Litigation, as defined in the
5 Settlement Agreement.

6 13. Upon Final Approval (including, without limitation, the exhaustion of
7 any judicial review, or requests for judicial review, from this Order), the Plaintiffs and
8 each and every one of the Settlement Class Members unconditionally, fully, and
9 finally releases and forever discharges the Released Parties from the Released Claims
10 as provided in the Settlement Agreement.

11 14. Each and every Settlement Class Member, and any person actually or
12 purportedly acting on behalf of any Settlement Class Member(s), is hereby
13 permanently barred and enjoined from commencing, instituting, continuing, pursuing,
14 maintaining, prosecuting, or enforcing any Released Claims (including, without
15 limitation, in any individual, class or putative class, representative or other action or
16 proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other
17 forum, against the Released Parties. This permanent bar and injunction are necessary
18 to protect and effectuate the Settlement Agreement, this Order, and this Court's
19 authority to effectuate the Settlement Agreement, and is ordered in aid of this Court's
20 jurisdiction and to protect its judgments.

21 15. The Settlement Agreement (including, without limitation, its exhibits),
22 and any and all negotiations, documents, and discussions associated with it, shall not
23 be deemed or construed to be an admission or evidence of any violation of any statute,
24 law, rule, regulation or principle of common law or equity, of any liability or
25 wrongdoing, by Defendant, or of the truth of any of the claims asserted by Plaintiffs in
26 the Litigation, and evidence relating to the Settlement Agreement shall not be
27 discoverable or used, directly or indirectly, in any way, whether in the Litigation or in
28 any other action or proceeding, except for purposes of enforcing the terms and

1 conditions of the Settlement Agreement, the Preliminary Approval Order, or this
2 Order.

3 16. If for any reason the Settlement terminates or Final Approval, as defined
4 in the Settlement Agreement, does not occur, then certification of the Settlement
5 Classes shall be deemed vacated. In such an event, the certification of the Settlement
6 Classes for settlement purposes shall not be considered as a factor in connection with
7 any subsequent class certification issues, and the Parties shall return to the status quo
8 ante in the Litigation, without prejudice to the right of any of the Parties to assert any
9 right or position that could have been asserted if the Settlement had never been
10 reached or proposed to the Court.

11 17. The parties agree that in the event that any provision of the Settlement or
12 this Order is asserted by Defendant as a defense in whole or in part to any Claim, or
13 otherwise asserted (including, without limitation, as a basis for a stay) in any other
14 suit, action, or proceeding brought by a Settlement Class Member or any person
15 actually or purportedly acting on behalf of any Settlement Class Member(s), that suit,
16 action or other proceeding shall be immediately stayed and enjoined until this Court or
17 the court or tribunal in which the claim is pending has determined any issues related to
18 such defense or assertion. Solely for purposes of such suit, action, or other proceeding,
19 to the fullest extent they may effectively do so under applicable law, the Parties
20 irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise,
21 any claim or objection to the jurisdiction of the Court, or that the Court is, in any way,
22 an improper venue or an inconvenient forum. These provisions are necessary to
23 protect the Settlement Agreement, this Order and this Court's authority to effectuate
24 the Settlement and are ordered in aid of this Court's jurisdiction and to protect its
25 judgment.

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2 18. By incorporating by reference the terms of the Settlement Agreement
3 (doc. no. 232-8) herein, the Court determines that this Order complies with Federal
4 Rule of Civil Procedure 65(d)(1).

5 **IT IS SO ORDERED.**

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8 Dated: October 29, 2020

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11 Hon. M. James Lorenz
12 United States District Judge
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