

ORIGINAL

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

7 Attorneys for Plaintiff
8 Claire Delacruz individually, and
9 on behalf of other members of
the public similarly situated

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

JCS

12 CLAIRE DELACRUZ, individually, and
13 on behalf of other members of the general
14 public similarly situated,

Case Number: 11 3532

15 Plaintiff,

16 vs.

17 CYTOSPORT, INC., a California
18 Corporation,

19 Defendant.
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CLASS ACTION COMPLAINT FOR:

- (1) Violation of the Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750 *et seq.*);
- (2) Violation of Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq.*);
- (3) Violation of False Advertising Law (Cal. Bus. & Prof. Code §§ 17500 *et seq.*);
- (4) Fraud;
- (5) Negligent Misrepresentation; and
- (6) Unjust Enrichment

Jury Trial Demanded

1 Plaintiff CLAIRE DELACRUZ (“Plaintiff”), individually and on behalf of all
2 other members of the public similarly situated, alleges as follows:

3 NATURE OF THE ACTION

4 1. This is a consumer class action regarding Defendant Cytosport, Inc.’s unfair,
5 unlawful, deceptive, and misleading practices conducted in violation of California state
6 and common law. This action involves “Muscle Milk® Ready-To-Drink (RTD)” and
7 “Muscle Milk® Bars” products (the “Products”) that are manufactured and marketed by
8 Defendant Cytosport, Inc. (“Defendant” or “Cytosport”).

9 2. In connection with its marketing of the Products, Cytosport makes
10 representations and omissions that are intended to mislead consumers to believe that the
11 Products are healthy, and nutritious, and should be regularly consumed to help them live a
12 healthy lifestyle.

13 3. Contrary to Defendant’s representations and omissions, with almost 50% of
14 their caloric content coming from fats, the Products are equivalent to fat-laden junk food.
15 Defendant tells consumers “there’s no question you’re getting a nutritious snack,” and that
16 the Products “take[] the guesswork out of high performance nutrition,” yet a standard-
17 sized container of Cytosport’s “Muscle Milk® Ready-To-Drink (RTD)” contains the same
18 number of calories and almost as much total fat and saturated fat as a “Glazed Kreme
19 Filling” Krispy Kreme® doughnut, and *more* fat and saturated fat than other varieties of
20 Krispy Kreme® doughnuts. Similarly, Cytosport’s 73 gram “Muscle Milk® Bars”
21 contain more calories, more saturated fat, and the same amount of total fat as a roughly
22 equal-sized 72 gram “Chocolate Iced Glazed” Krispy Kreme® doughnut.

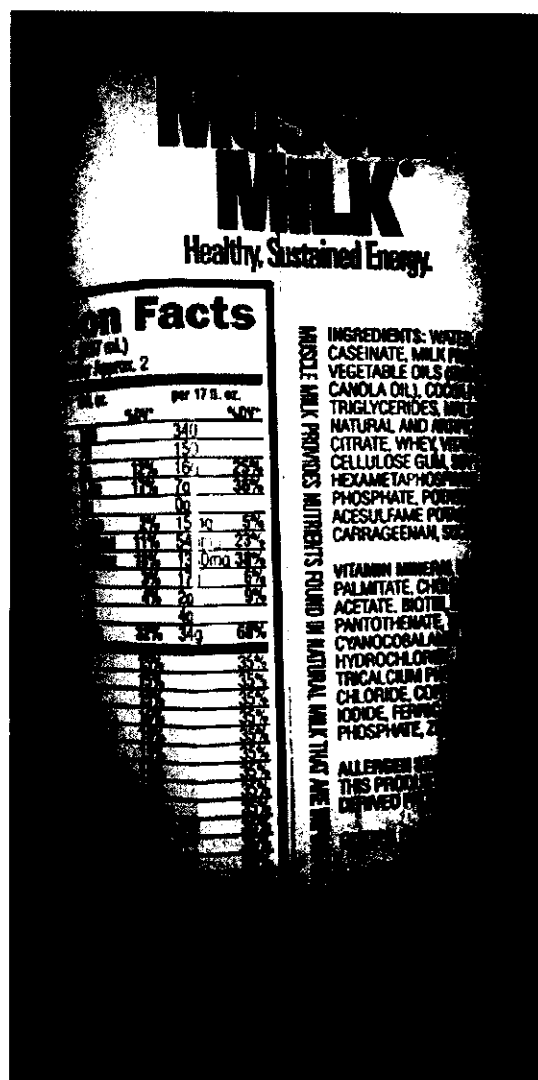
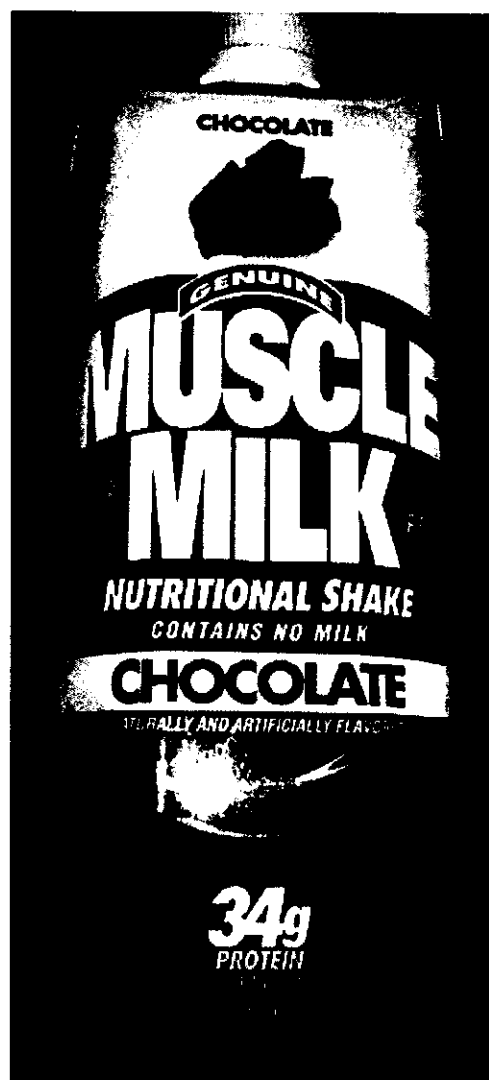
23 4. Defendant expressly represents that the Products are “premium,” “healthy,”
24 “nutritional” products that should be consumed as part of a “healthy lifestyle,” before
25 workouts, after workouts, and as a “meal replacement” to provide “healthy sustained
26 energy.” Defendant also unlawfully suggests that these fat-filled Products will help
27 people lose weight, telling consumers, among other things, that the Products will help
28 people “Go from cover it up to take it off.”

1 **FACTUAL BACKGROUND**

2 **Muscle Milk® Ready-To-Drink (RTD)**

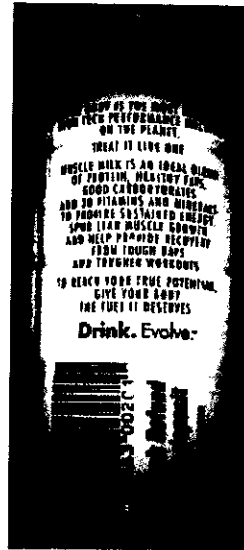
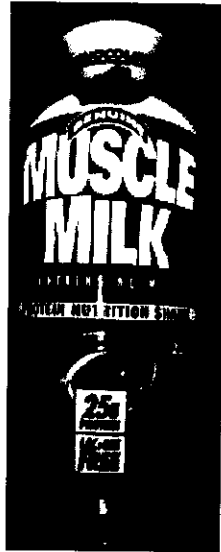
3 10. Cytosport sells “Muscle Milk® Ready-To-Drink (RTD).” Cytosport claims
4 that the product is “Nutritional” and that it provides “Healthy, Sustained Energy.”
5 Furthermore, although the package for “Muscle Milk® Ready-To-Drink (RTD)” states
6 that it “CONTAINS NO MILK,” Cytosport claims that the product “provides nutrients
7 found in natural milk that are important for building muscles and bones.”

8 11. The packaging of Cytosport’s “Muscle Milk® Ready-To-Drink (RTD)”
9 product appears as follows:



1 12. Cytosport also sells "Muscle Milk® Ready-To-Drink (RTD)" in a 14-oz.
2 size.

3 13. The packaging of Cytosport's "Muscle Milk® Ready-To-Drink (RTD)" 14-
4 oz. size product appears as follows:



14 14. Among other things, the packaging of the 14-oz. size contains the following
15 statement:

16 YOUR BODY IS THE MOST AMAZING
17 HIGH TECH PERFORMANCE MACHINE
18 ON THE PLANET.

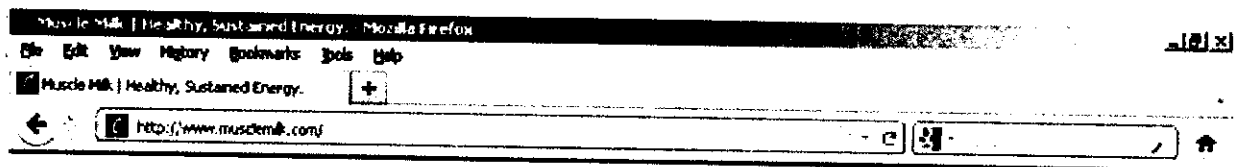
19 TREAT IT LIKE ONE.

20 MUSCLE MILK IS AN IDEAL BLEND
21 OF PROTEIN, HEALTHY FATS,
22 GOOD CARBOHYDRATES
23 AND 20 VITAMINS AND MINERALS
24 TO PROVIDE SUSTAINED ENERGY,
25 SPUR LEAN MUSCLE GROWTH
26 AND HELP PROVIDE RECOVERY
27 FROM TOUGH DAYS
28 AND TOUGHER WORKOUTS.

TO REACH YOUR TRUE POTENTIAL,
GIVE YOUR BODY THE FUEL IT DESERVES.

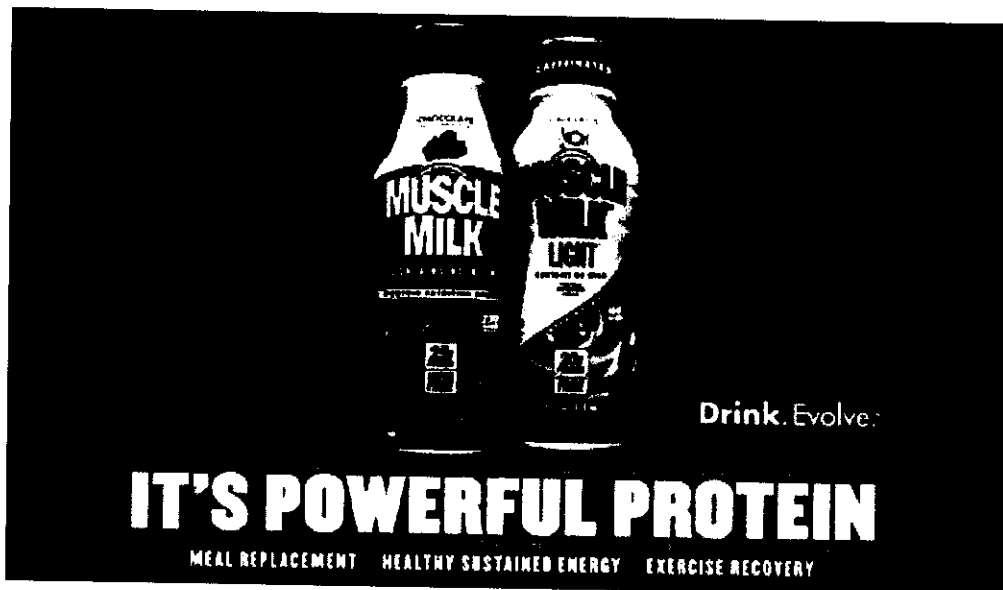
1 15. By using such false and misleading terms as “healthy fats,” “good
2 carbohydrates,” and telling consumers that consuming “Muscle Milk® Ready-To-Drink
3 (RTD)” will help “reach your true potential,” Cytosport misleads and unlawfully
4 represents to consumers that these products are healthy, nutritious, and should be
5 regularly consumed throughout the day as part of a “healthy” lifestyle.

6 16. Cytosport’s misrepresentations concerning “Muscle Milk® Ready-To-Drink
7 (RTD)” are compounded by the representations it makes on its website. The header of
8 Cytosport’s website prominently features its “Healthy, Sustained Energy” claim.



12 Additionally, on the website, Cytosport makes such misleading statements as “No matter
13 if you are a performance athlete, exercise enthusiast, or just trying to live a healthy
14 lifestyle, Muscle Milk is an ideal [product] for your nutritional needs.” Cytosport claims
15 that “Muscle Milk® Ready-To-Drink (RTD)” is a “functional beverage that promotes
16 recovery from exercise, lean muscle growth, and healthy, sustained energy.”

17 17. Other relevant portions of Cytosport’s website are appear follows:



1 18. As part of its efforts to mislead consumers and conceal the truth about its
2 products, and in an effort to encourage consumers to ignore the fact that “Muscle Milk®
3 Ready-To-Drink (RTD)” is loaded with as much, if not more, total fat and saturated fat as
4 a doughnut, Cytosport claims that the Products contain “functional fats,” and suggests that
5 consumers should trust the company because its “Muscle Milk® Ready-To-Drink (RTD)”
6 product “takes the guesswork out of high performance nutrition.”

7 19. Consistent with Defendant’s strategy to conceal information and mislead
8 consumers, Cytosport’s advertising campaigns, like its transit media campaign, include
9 statements to suggest that “Muscle Milk® Ready-To-Drink (RTD)” is healthy and will
10 help people lose weight, claiming that drinking the product will help people “[g]o from
11 cover it up to take it off,” go “from invisible to OMG!,” or “from frumpy to fabulous.”



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23 20. To increase sales and profits from these misrepresentations, Cytosport also
24 instructs consumers on “How to use Muscle Milk,” telling them to use it to meet their
25 “nutritional goals” and to use it multiple times a day, including “1.5 – 2 hours prior to
26 training,” “30-45 minutes after workouts,” as a “meal replacement,” and “in between
27 meals as a protein-enhanced snack,” or even “in conjunction with meals.”
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1 21. Cytosport also fails to disclose the amounts of polyunsaturated and
2 monounsaturated fats present in its “Muscle Milk® Ready-To-Drink (RTD)” product.

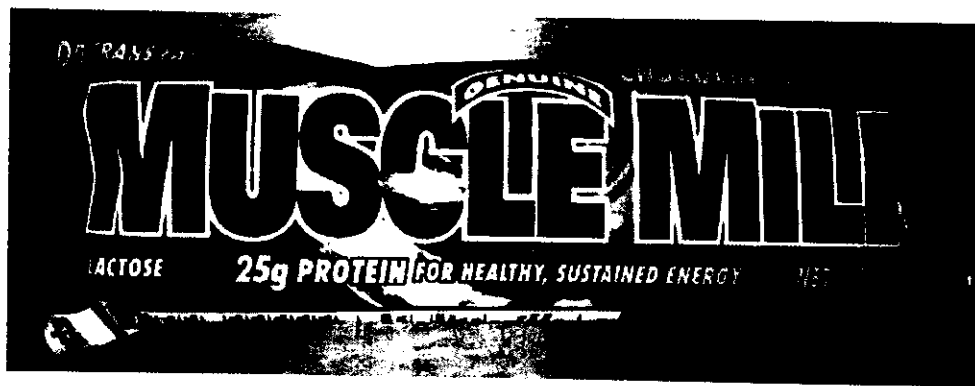
3 **Muscle Milk® Bars**

4 22. Cytosport also sells “Muscle Milk® Bars.” Prominently stated on the
5 packaging of its “Muscle Milk® Bars” product, Cytosport claims that the product
6 provides “Healthy, Sustained Energy.”

7 23. With 11 grams of total fat (one third of the total caloric content), 8 grams of
8 saturated fat and almost no vitamins and minerals, contrary to Cytosport’s “healthy”
9 claim, “Muscle Milk® Bars” are equivalent to fat-laden junk food. Indeed, Cytosport’s
10 73 gram “Muscle Milk® Bars” contain more calories, more saturated fat, and the same
11 amount of total fat as a roughly equal-sized 72 gram “Chocolate Iced Glazed” Krispy
12 Kreme® doughnut.

13 24. Moreover, by highlighting the claim that “Muscle Milk® Bars” have “0g
14 Trans Fat,” yet failing to disclose the amounts of polyunsaturated or monounsaturated
15 fats, Cytosport further misleads consumers and conceals material information. Cytosport
16 also fails to disclose that the product contains no milk.

17 25. The packaging of Cytosport’s “Muscle Milk® Bars” product appears as
18 follows:



25 26. As is the case with the company’s “Muscle Milk® Ready-To-Drink (RTD)”
26 product, Cytosport’s misrepresentations and omissions concerning its “Muscle Milk®
27 Bars” are compounded by the representations it makes on its website. The header of
28 Cytosport’s website prominently features its “Healthy, Sustained Energy” claim.

1 Cytosport also claims that when their customers consume “Muscle Milk® Bars,” “there’s
2 no question [they are] getting a nutritious snack,” and that “Muscle Milk Bars deliver . . .
3 healthy sustained energy.”

4 **PLAINTIFF’S CLAIMS AGAINST CYTOSPORT**

5 27. Plaintiff Delacruz is a resident of Los Angeles, California.

6 28. For the past approximately six months before the filing of this Complaint,
7 Plaintiff regularly purchased and consumed Cytosport’s “Muscle Milk® Ready-To-Drink
8 (RTD)” and “Muscle Milk® Bars” products.

9 29. Consistent with Cytosport’s suggestions on “how to use muscle milk,”
10 Plaintiff consumed the Products before workouts, after workouts, in between meals as a
11 snack, and sometimes as a meal replacement.

12 30. Plaintiff purchased the Products as a result of the aforementioned
13 representations Cytosport made concerning the Products, and in reliance on those
14 representations, believed the Products to be healthy, nutritious foods that she could eat to
15 help her live an active lifestyle, meet her nutritional goals, and lose weight. But for
16 Defendant’s misrepresentations and omissions, Plaintiff would not have purchased and
17 consumed the Products.

18 **CLASS ACTION ALLEGATIONS**

19 31. Plaintiff brings this action, on behalf of herself and all others similarly
20 situated, as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

21 32. The class Plaintiff seeks to represent (the “Class”) is defined as follows:

22 All residents of the United States of America who purchased
23 Cytosport’s “Muscle Milk® Ready-To-Drink (RTD)” and/or
24 “Muscle Milk® Bars” products during the period of July 18,
25 2007 continuing through the date of final disposition of this
26 action.

27 33. Plaintiff reserves the right to amend the Class definition if discovery and
28 further investigation reveals that the Class should be expanded or otherwise modified.

1 34. Plaintiff reserves the right to establish sub-classes as appropriate.

2 35. This action is brought and properly may be maintained as a class action
3 under the provisions of Federal Rules of Civil Procedure 23(a)(1)-(4) and 23(b)(1), (b)(2)
4 or (b)(3), and satisfies the requirements thereof. As used herein, the term "Class
5 Members" shall mean and refer to the members of the Class.

6 36. Community of Interest: There is a well-defined community of interest
7 among members of the Class, and the disposition of the claims of these members of the
8 Class in a single action will provide substantial benefits to all parties and to the Court.

9 37. Numerosity: While the exact number of members of the Class is unknown to
10 Plaintiff at this time and can only be determined by appropriate discovery, membership in
11 the Class is ascertainable based upon the records maintained by Defendant. At this time,
12 Plaintiff is informed and believes that the Class includes thousands of members.
13 Therefore, the Class is sufficiently numerous that joinder of all members of the Class in a
14 single action is impracticable under Federal Rule of Civil Procedure Rule 23(a)(1), and
15 the resolution of their claims through the procedure of a class action will be of benefit to
16 the parties and the Court.

17 38. Ascertainability: Names and addresses of members of the Class are available
18 from Defendant's records. Notice can be provided to the members of the Class through
19 direct mailing, publication, or otherwise using techniques and a form of notice similar to
20 those customarily used in consumer class actions arising under California state law and
21 federal law.

22 39. Typicality: Plaintiff's claims are typical of the claims of the other members
23 of the Class which she seeks to represent under Federal Rule of Civil Procedure 23(a)(3)
24 because Plaintiff and each member of the Class has been subjected to the same deceptive
25 and improper practices and has been damaged in the same manner thereby.

26 40. Adequacy: Plaintiff will fairly and adequately represent and protect the
27 interests of the Class as required by Federal Rule of Civil Procedure Rule 23(a)(4).
28 Plaintiff is an adequate representative of the Class, because she has no interests which are

1 adverse to the interests of the members of the Class. Plaintiff is committed to the
2 vigorous prosecution of this action and, to that end, Plaintiff has retained counsel who are
3 competent and experienced in handling class action litigation on behalf of consumers.

4 41. Superiority: A class action is superior to all other available methods of the
5 fair and efficient adjudication of the claims asserted in this action under Federal Rule of
6 Civil Procedure 23(b)(3) because:

- 7 (a) The expense and burden of individual litigation make it economically
8 unfeasible for members of the Class to seek to redress their “negative
9 value” claims other than through the procedure of a class action.
10 (b) If separate actions were brought by individual members of the Class,
11 the resulting duplicity of lawsuits would cause members to seek to
12 redress their “negative value” claims other than through the procedure
13 of a class action; and
14 (c) Absent a class action, Defendant likely would retain the benefits of its
15 wrongdoing, and there would be a failure of justice.

16 42. Common questions of law and fact exist as to the members of the Class, as
17 required by Federal Rule of Civil Procedure 23(a)(2), and predominate over any questions
18 which affect individual members of the Class within the meaning of Federal Rule of Civil
19 Procedure 23(b)(3).

20 43. The common questions of fact include, but are not limited to, the following:

- 21 (a) Whether Defendant’s practice of misleading consumers who purchase
22 Cytosport’s “Muscle Milk® Ready-To-Drink (RTD)” and “Muscle
23 Milk® Bars” products violates one or more provisions of the CLRA;
24 (b) Whether Defendant engaged in unlawful, unfair, misleading, or
25 deceptive business acts or practices;
26 (c) Whether Defendant engaged in consumer fraud, deceptive trade
27 practices, or other unlawful acts;
28 (d) Whether Plaintiff and members of the Class justifiably relied on the

1 representations Defendant made in connection with its “Muscle Milk®
2 Ready-To-Drink (RTD)” and “Muscle Milk® Bars” products;

- 3 (e) Whether Defendant’s conduct was willful or reckless;
4 (f) Whether Plaintiff and members of the Class are entitled to an award of
5 reasonable attorneys’ fees, pre-judgment interest, and costs of this suit;
6 and
7 (g) Whether Defendant engaged in unlawful and unfair business practices
8 in violation of California Business & Professions Code sections 17200
9 *et seq.* and 17500 *et seq.*

10 44. In the alternative, this action is certifiable under the provisions of Federal
11 Rule of Civil Procedure 23(b)(1) and/or 23(b)(2) because:

- 12 (a) The prosecution of separate actions by individual members of the
13 Class would create a risk of inconsistent or varying adjudications with
14 respect to individual members of the Class which would establish
15 incompatible standards of conduct for Defendant.
16 (b) The prosecution of separate actions by individual members of the
17 Class would create a risk of adjudications as to them which would, as a
18 practical matter, be dispositive of the interests of the other members of
19 the Class not parties to the adjudications, or substantially impair or
20 impede their ability to protect their interests; and
21 (c) Defendant has acted or refused to act on grounds generally applicable
22 to the Class, thereby making appropriate final injunctive relief or
23 corresponding declaratory relief with respect to the Class as a whole
24 and necessitating that any such relief be extended to members of the
25 Class on a mandatory, class-wide basis.

26 45. Plaintiff is not aware of any difficulty which will be encountered in the
27 management of this litigation which should preclude its maintenance as a class action.
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FIRST CAUSE OF ACTION
Violation of the Consumers Legal Remedies Act
(Cal. Civil Code §§ 1750 *et seq.*)

46. Plaintiff incorporates by reference in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

47. Plaintiff brings this cause of action on behalf of herself and the other members of the Class.

48. This cause of action is brought under the Consumers Legal Remedies Act, California Civil Code sections 1750 *et seq.* (“CLRA”). Plaintiff and members of the Class are consumers as defined by California Civil Code section 1761(d). The Products are goods within the meaning of California Civil Code section 1761(a).

49. Defendant violated and continues to violate the CLRA by engaging in the following practices proscribed by California Civil Code section 1770(a) in transactions with Plaintiff and members of the Class, which were intended to result in, and did result in, the sale of the Products:

- (5) Representing that [the Product have]... characteristics...[and] uses...which they do not have....
- (7) Representing that [the Product] are of a particular standard...if they are of another.
- (9) Advertising goods...with intent not to sell them as advertised.

50. Defendant violated the CRLA by representing and advertising that the Products, as discussed above, were “healthy,” “nutritional,” and should be consumed by people “just trying to live a healthy lifestyle.” Defendant knew, however, that this was not the case and that in reality, the Products are loaded with fats and have little nutritional or health benefits.

51. Defendant further violated the CRLA by misleading customers to believe that they could lose weight from consuming the Products by claiming that the Products will

1 help people “Go from cover it up to take it off,” go “from invisible to OMG!,” or “from
2 frumpy to fabulous.”

3 52. Defendant also conceals the truth about its products—encouraging
4 consumers to ignore the fact that “Muscle Milk® Ready-To-Drink (RTD)” is loaded with
5 as much, if not more, total fat and saturated fat as a doughnut— by claiming that “Muscle
6 Milk® Ready-To-Drink (RTD)” contains “functional fats,” “healthy fats,” “good
7 carbohydrates,” and suggesting that consumers should trust the company because its
8 “Muscle Milk® Ready-To-Drink (RTD)” product “takes the guesswork out of high
9 performance nutrition.”

10 53. At this time, Plaintiff seeks only injunctive relief under this cause of action.
11 Under Section 1782 of the CLRA, Plaintiff will notify Defendant in writing of the
12 particular violations of Section 1770 of the CLRA and demand that Defendant rectify the
13 problems associated with the behavior detailed above, which acts and practices are in
14 violation of California Civil Code section 1770.

15 54. If Defendant fails to respond adequately to Plaintiff’s above-described
16 demand within 30 days of Plaintiff’s notice, under California Civil Code section 1782(b),
17 Plaintiff will amend the Complaint to request damages and other relief permitted by
18 California Civil Code section 1780.

19 55. Plaintiff also has filed a Declaration of Venue in accordance with Civil Code
20 section 1780(d).

21 56. Under Section 1782(d) of the CLRA, Plaintiff seeks an order enjoining the
22 act and practices described above, restitution of property, and any other relief that the
23 court deems proper.

24 57. Defendant’s conduct is malicious, fraudulent, and wanton, and intentionally
25 misleads and withholds material information from consumers in order to increase the sale
26 of the Products.

27 58. Defendant’s misrepresentations and omissions were material Plaintiff and
28 members of the Class. Plaintiff and members of the Class would not have purchased and

1 consumed the Products had it not been for Defendant's misrepresentations and
2 concealment of material facts. Plaintiff and members of the Class were damaged as a
3 result of Defendant's material misrepresentations and omissions.

4 **SECOND CAUSE OF ACTION**

5 **Violation of Unfair Business Practices Act**

6 **(California Business & Professions Code §§ 17200 *et seq.*)**

7 59. Plaintiff incorporates by reference in this cause of action each and every
8 allegation of the preceding paragraphs, with the same force and effect as though fully set
9 forth herein.

10 60. Plaintiff brings this cause of action on behalf of herself and the other
11 members of the Class.

12 61. California Business and Professions Code section 17200 prohibits "any
13 unlawful, unfair or fraudulent business act or practice." For the reasons described above,
14 Defendant has engaged in unlawful, unfair, and/or fraudulent business acts or practices in
15 violation of California Business and Professions Code section 17200.

16 62. Defendant's misrepresentations and omissions of material facts, as set forth
17 herein, constitute an unlawful practice because they violate California Civil Code sections
18 1572, 1573, 1709, 1710, 1711, and 1770, among others, and the common law.

19 63. Defendant's misrepresentations and omissions of material facts, as set forth
20 herein, also constitute "unfair" business acts and practices within the meaning of
21 California Business and Professions Code sections 17200 *et seq.*, in that Defendant's
22 conduct was injurious to consumers, offended public policy, and was unethical and
23 unscrupulous. Plaintiff also asserts a violation of public policy by withholding material
24 facts from consumers. Defendant's violation of California's consumer protection and
25 unfair competition laws in California resulted in harm to consumers.

26 64. There were reasonable alternatives available to Defendant to further
27 Defendant's legitimate business interests, other than the conduct described herein.

28 65. California Business and Professions Code section 17200 also prohibits any

1 “fraudulent business act or practice.”

2 66. Defendant’s misrepresentations and concealment of material facts, as set
3 forth above, were false, misleading, and/or likely to deceive the public within the meaning
4 of California Business and Professions Code section 17200.

5 67. Defendant’s misrepresentations and concealment were made with knowledge
6 of their effect, and were done to induce Plaintiff and members of the Class to purchase the
7 Products. Plaintiff and members of the Class saw and justifiably relied on Defendant’s
8 misrepresentations when purchasing the Products.

9 68. Defendant’s conduct caused and continues to cause injury to Plaintiff and
10 members of the Class. Plaintiff and members of the Class have suffered injury in fact and
11 have lost money as a result of Defendant’s fraudulent conduct.

12 69. Plaintiff and members of the Class would not have purchased and consumed
13 the Products had it not been for Defendant’s misrepresentations and concealment of
14 material facts. Defendant’s misrepresentations and omissions alleged herein are
15 objectively material to the reasonable consumer. Reliance upon the misrepresentations
16 and omissions discussed herein may therefore be presumed as a matter of law. The
17 materiality of such representations and omissions also establishes causation between
18 Defendant’s conduct and Plaintiff’s and the members of the Class’ injuries

19 70. Defendant has thus engaged in unlawful, unfair, and fraudulent business acts
20 entitling Plaintiff and members of the Class to judgment and equitable relief against
21 Defendants, as set forth in the Prayer for Relief.

22 71. Additionally, under Business and Professions Code section 17203, Plaintiff
23 and members of the Class seek an order requiring Defendant to immediately cease such
24 acts of unlawful, unfair, and fraudulent business practices, and requiring Defendant to
25 correct its actions.

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THIRD CAUSE OF ACTION
Violation of False Advertising Law

(California Business & Professions Code §§ 17500 *et seq.*)

72. Plaintiff incorporates by reference in this cause of action each and every allegation of the preceding paragraphs, with the same force and effect as though fully set forth herein.

73. California Business and Professions Code section 17500 prohibits “unfair, deceptive, untrue or misleading advertising.”

74. Defendant violated California Business and Professions Code section 17500 by, *inter alia*, (a) misleadingly advertising the healthfulness, nutritious nature, and the purportedly “healthy” and “functional” fats and in the Products in print, on-line and elsewhere; and (b) concealing material information about the true nature of the Products, in that they contain significant amounts of unhealthy fats, should not be regularly consumed, are not healthy, and will not help people lose weight.

75. Defendant’s deceptive practices were specifically designed to induce Plaintiff and members of the Class to purchase the Products over those of its competitors. Defendant’s deceptive practices were carried out in print, on-line, on Defendant’s website, and other broad-based media, in order to induce Plaintiff and members of the Class to purchase the Products.

76. Plaintiff and members of the Class would not have purchased and consumed the Products had it not been for Defendant’s misrepresentations and concealment of material facts.

77. The content of the advertisements, as alleged herein, were of a nature likely to deceive a reasonable consumer.

78. Defendant knew, or in the exercise of reasonable care, should have known, that the representations were untrue or misleading and likely to deceive reasonable consumers.

79. Defendant’s misrepresentations and omissions alleged herein are objectively

1 material to the reasonable consumer, and reliance upon such misrepresentations and
2 omissions may therefore be presumed as a matter of law. The materiality of such
3 representations and omissions also establishes causation between Defendant's conduct
4 and Plaintiff's and the members of the Class' injuries.

5 80. Unless restrained by this Court, Defendant will continue to engage in
6 misleading advertising, as alleged above, in violation of California Business and
7 Professions Code section 17500.

8 81. As a result of the foregoing, Plaintiff and members of the Class have been
9 injured in fact and lost money or property, and they are entitled to restitution and
10 injunctive relief.

11 **FOURTH CAUSE OF ACTION**

12 **Fraud**

13 82. Plaintiff incorporates by reference in this cause of action each and every
14 allegation of the preceding paragraphs, with the same force and effect as though fully set
15 forth herein.

16 83. Plaintiff brings this cause of action on behalf of herself and the members of
17 the Class.

18 84. Defendant has made material misrepresentations about the Products, as
19 discussed above, including that they are "healthy," "nutritional," and are to be consumed
20 by people "trying to live a healthy lifestyle."

21 85. Defendant also conceals material facts about the Products—encouraging
22 consumers to ignore the fact that "Muscle Milk® Ready-To-Drink (RTD)" is loaded with
23 as much, if not more, total fat and saturated fat as a doughnut— by misrepresenting that
24 "Muscle Milk® Ready-To-Drink (RTD)" contains "functional fats," "healthy fats," and
25 "good carbohydrates," and suggesting that consumers should trust the company because
26 its "Muscle Milk® Ready-To-Drink (RTD)" product "takes the guesswork out of high
27 performance nutrition."

28 86. Defendant knew these statements were false and misleading.

1 87. The healthfulness and nutritious nature of the Products was a material feature
2 of the Products. Plaintiff and other members of the Class would not have purchased the
3 Products but for Defendant's false and misleading representations and concealment of
4 material facts.

5 88. Defendant made the misrepresentations and omissions stated above with
6 knowledge of the effect of concealing these material facts. Defendant knew that by
7 misleading consumers, it would sell more units of the Products, which would result in
8 higher profits.

9 89. By misrepresenting and concealing material information about the Products,
10 Defendant intended to induce Plaintiff and members of the Class into purchasing the
11 Products.

12 90. Plaintiff and members of the Class justifiably relied on the representations
13 made about the Products.

14 91. Defendant's representations and omissions regarding the healthfulness,
15 nutritious nature, and the purportedly "healthy" and "functional" fats and in the Products
16 were made with knowledge or with reckless disregard of the laws of California
17 prohibiting false and misleading statements.

18 92. Defendant:

- 19 a. made representations, as facts, which were not true and Defendant did
20 not believe to be true at the time made;
- 21 b. made assertions, as facts, which were not true and Defendant had no
22 reasonable grounds for believing to be true at the times they were
23 made; and/or
- 24 c. suppressed facts, which it was bound to disclose, or gave information
25 of other facts which were likely to mislead for want of
26 communications of the suppressed facts.

27 93. As a result of Defendant's wrongful conduct, Plaintiffs and the members of
28 the Class have suffered and continue to suffer economic losses and other general and

1 specific damages, including but not limited to the monies paid for Cytosport's "Muscle
2 Milk® Ready-To-Drink (RTD)" and "Muscle Milk® Bars," and any interest that would
3 have been accrued on those monies, all in an amount to be determined according to proof
4 at time of trial.

5 94. The wrongful acts of Defendant were done maliciously, oppressively and
6 with the intent to defraud, and Plaintiffs and members of the Class are entitled to punitive
7 and exemplary damages in an amount to be ascertained according to proof, which is
8 appropriate to punish, deter, and set an example of Defendant

9 95. Defendant acted with malice, oppression, or fraudulent intent.

10 96. As a direct and proximate result of Defendant's misrepresentations and
11 omissions, Plaintiff and each member of the Class has been damaged in an amount
12 according to proof at trial.

13 **FIFTH CAUSE OF ACTION**

14 **Negligent Misrepresentation**

15 97. Plaintiff incorporates by reference in this cause of action each and every
16 allegation of the preceding paragraphs, with the same force and effect as though fully set
17 forth herein.

18 98. Defendant, directly or through its agents and employees, made false
19 representations, concealments, and nondisclosures to Plaintiff and members of the Class.

20 99. In making the representations of fact to Plaintiff and members of the Class
21 described herein, Defendant has failed to fulfill its duties to disclose the material facts set
22 forth above. The direct and proximate cause of said failure to disclose was the negligence
23 and carelessness of Defendant.

24 100. In making the representations and omissions, and in doing the acts alleged
25 above, Defendant acted without any reasonable grounds for believing the representations
26 were true, and intended by said representations to induce the reliance of Plaintiff and
27 members of the Class.

28 101. Plaintiff and members of the Class relied upon these false representations,

1 concealments and nondisclosures by Defendant when purchasing the products at issue
2 herein, which reliance was justified.

3 102. As a result of Defendant's wrongful conduct, Plaintiff and members of the
4 Class have suffered and continue to suffer economic losses and other general and specific
5 damages, including but not limited to the amounts paid for Cytosport's "Muscle Milk®
6 Ready-To-Drink (RTD)" and "Muscle Milk® Bars," and any interest that would have
7 been accrued on those monies, all in an amount to be determined according to proof at
8 time of trial.

9 **SIXTH CAUSE OF ACTION**

10 **Unjust Enrichment**

11 103. Plaintiff incorporates by reference in this cause of action each and every
12 allegation of the preceding paragraphs, with the same force and effect as though fully set
13 forth herein.

14 104. By its wrongful acts and omissions, Defendant was unjustly enriched at the
15 expense of Plaintiff and members of the Class, who did not receive the goods to which
16 they were entitled—namely products that were healthy, nutritious, without significant
17 amounts of unhealthy fats that could be regularly consumed and help people lose
18 weight—for the payments made to Defendant, and thus Plaintiff and members of the
19 Class were unjustly deprived.

20 105. It would be inequitable and unconscionable for Defendant to retain the profit,
21 benefit and other compensation it obtained from its deceptive, misleading, and unlawful
22 conduct alleged herein.

23 106. Plaintiff and members of the Class seek restitution from Defendant, and seek
24 an order of this Court disgorging all profits, benefits, and other compensation obtained by
25 Defendant from its wrongful conduct.

26 **PRAYER FOR RELIEF**

27 Plaintiff, and on behalf of herself and all others similarly situated, requests the
28 Court to enter judgment against Defendant, as follows:

- 1 1. Certifying the Class as requested herein, certifying Plaintiff as the
- 2 representative of the Class, and appointing Plaintiff's counsel as counsel for the Class;
- 3 2. Ordering that Defendant is financially responsible for notifying all members
- 4 of the Class of the alleged misrepresentations and omissions discussed herein;
- 5 3. Awarding Plaintiff and the members of the Class compensatory damages in
- 6 an amount according to proof at trial;
- 7 4. Awarding restitution and disgorgement of Defendant's revenues to Plaintiff
- 8 and members of the Class;
- 9 5. Awarding declaratory and injunctive relief as permitted by law or equity,
- 10 including: enjoining Defendant from continuing the unlawful practices as set forth herein,
- 11 and directing Defendant to identify, with Court supervision, victims of its conduct and pay
- 12 them restitution and disgorgement of all monies acquired by Defendant by means of any
- 13 act or practice declared by this Court to be wrongful;
- 14 6. Awarding to Plaintiff and the Class punitive damages;
- 15 7. Ordering Defendant to engage in corrective advertising;
- 16 8. Awarding interest on the monies wrongfully obtained from the date of
- 17 collection through the date of entry of judgment in this action;
- 18 9. Awarding attorneys' fees, expenses, and recoverable costs reasonably
- 19 incurred in connection with the commencement and prosecution of this action; and
- 20 10. For such other and further relief as the Court deems just and proper.

21 Dated: July 18, 2011

BARON & BUDD, P.C.

22
23 By 

24 Mark P. Pifko

25 Attorneys for Plaintiff
26 Claire Delacruz, individually, and on behalf
27 of other members of the public similarly
28 situated

DEMAND FOR JURY TRIAL

Plaintiff requests trial by jury on all issues so triable.

Respectfully submitted,

Dated: July 19, 2011

BARON & BUDD, P.C.

By: 
Mark P. Pifko

Attorneys for Plaintiff
Claire Delacruz, individually, and on behalf
of other members of the public similarly
situated

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