

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JOSEPH GREGORIO, individually and on behalf of all
others similarly situated,

Plaintiff,

v.

PREMIER NUTRITION CORPORATION,

Defendant.

Civil Action No. 17-cv-05987-AT

FIRST AMENDED CLASS ACTION SETTLEMENT AGREEMENT

This Agreement (“Agreement” or “Settlement Agreement”) is entered into by and among (i) Plaintiff, Joseph Gregorio (“Plaintiff”); (ii) the Settlement Class (as defined herein); and (iii) Defendant, Premier Nutrition Corporation (“Defendant” or “Premier”). The Settlement Class and Plaintiff are collectively referred to as the “Plaintiffs” unless otherwise noted. The Plaintiff and the Defendant are collectively referred to herein as the “Parties.” This Agreement is intended by the Parties to fully, finally, and forever resolve, discharge, and settle the Released Claims (as defined herein), upon and subject to the terms and conditions of this Agreement, and subject to the final approval of the Court.

RECITALS

A. This putative class action was filed on August 8, 2017 in the United States District Court for the Southern District of New York, and brought claims for violations of the consumer protection laws of various states, New York’s General Business Laws §§ 349 & 350, breach of express warranty, unjust enrichment, and violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.* (Dkt. 1).

B. In response to the complaint and pursuant to the Court's Individual Practices, on September 27, 2017, Defendant's counsel served a letter on Plaintiffs' counsel outlining its bases for a motion to dismiss under Rules 12(b)(1), 12(b)(2), and 12(b)(6), arguing, *inter alia*, that Plaintiffs lacked Article III standing, that the Court lacked personal jurisdiction over some of Plaintiffs' claims, and that Plaintiffs failed to state a claim upon which relief could be granted.

C. On October 5, 2017, the Court held an initial scheduling conference pursuant to Fed. R. Civ. P. 16 and thereafter entered a scheduling Order. (Dkt. 27). The Parties have since exchanged written discovery on the merits of the case and commenced document discovery. The Parties also held several meet and confer conferences to resolve discovery issues, including in connection with electronically stored information.

D. On October 16, 2017, Defendant filed a letter requesting a pre-motion conference on its motion to dismiss. (Dkt. 28). After the Court granted Defendant permission to file its motion, on November 27, 2017, Defendant filed its motion to dismiss under Rules 12(b)(1), 12(b)(2), and 12(b)(6). (Dkt. 33).

E. On December 10, 2017, Plaintiff filed his Amended Class Action Complaint as of right. (Dkt. 35).

F. On January 2, 2018, Defendant filed a motion to dismiss Plaintiff's Amended Class Action Complaint under Rules 12(b)(1), 12(b)(2), and 12(b)(6). (Dkt. 36). Plaintiff filed his opposition brief on January 15, 2018 (Dkt. 38), and Defendant filed its reply brief on January 22, 2018 (Dkt. 40).

G. On April 5, 2018, Plaintiff filed a Second Amended Class Action Complaint. (Dkt. 57).

H. From the outset of the case, and including during the pendency of the motion to dismiss, the Parties engaged in direct communications, and as part of their obligations under Fed.

R. Civ. P. 26, discussed the prospect of an early resolution. Those discussions eventually led to an agreement between the Parties to engage in early mediation, which the Parties agreed would take place before Martin Quinn, Esq., who is a neutral affiliated with JAMS San Francisco.

I. As part of the mediation, and in order to competently assess their relative negotiating positions, the Parties exchanged informal discovery, including on issues such as the size and scope of the putative class. This information, together with the formal discovery the Parties had already conducted, was sufficient to assess the strengths and weakness of the claims and defenses.

J. The mediation took place on January 22, 2018 at JAMS's offices in San Francisco and lasted approximately nine hours. The Parties engaged in good faith negotiations, which at all times were at arms' length. Towards the end of the mediation, Mr. Quinn made a mediator's proposal to settle the case, which the Parties accepted.

K. Thereafter, the Parties memorialized their agreement into a Class Action Settlement Agreement, and, on April 2, 2018, Plaintiff moved for preliminary approval of the Class Action Settlement Agreement. (Dkt. 51).

L. On May 14, 2018, the Court granted Plaintiff's motion for preliminary approval. (Dkt. 62).

M. Thereafter, the Parties worked with the Settlement Administrator on effectuating class notice. In that process, the Parties renegotiated some of the terms of their Class Action Settlement and agreed to enter into the foregoing First Amended Class Action Settlement Agreement.

N. At all times, Defendant has denied and continues to deny any wrongdoing whatsoever and has denied and continues to deny that it committed, or threatened or attempted to commit, any wrongful act or violation of law or duty alleged in the Action. Defendant believes

that the claims asserted in the Action do not have merit and that Defendant would have prevailed at summary judgment or trial. Nonetheless, taking into account the uncertainty and risks inherent in any litigation, Defendant has concluded it is desirable and beneficial that the Action be fully and finally settled and terminated in the manner and upon the terms and conditions set forth in this Agreement. This Agreement is a compromise, and the Agreement, any related documents, and any negotiations resulting in it will not be construed as or deemed to be evidence of or an admission or concession of liability or wrongdoing on the part of Defendant, or any of the Released Parties (defined below), with respect to any claim of any fault or liability or wrongdoing or damage whatsoever or with respect to the certifiability of a litigation class.

O. Plaintiff believes that the claims asserted in the Action against Defendant have merit and that he would have prevailed at summary judgment and/or trial. Nonetheless, Plaintiff and Class Counsel recognize that Defendant has raised factual and legal defenses that present a risk that Plaintiff may not prevail. Plaintiff and Class Counsel also recognize the expense and delay associated with continued prosecution of the Action against Defendant through class certification, summary judgment, trial, and any subsequent appeals. Plaintiff and Class Counsel also have taken into account the uncertain outcome and risks of litigation, especially in complex class actions, as well as the difficulties inherent in such litigation. Therefore, Plaintiff believes it is desirable that the Released Claims be fully and finally compromised, settled, and resolved with prejudice. Based on its evaluation, Class Counsel has concluded that the terms and conditions of this Agreement are fair, reasonable, and adequate to the Settlement Class, and that it is in the best interests of the Settlement Class to settle the claims raised in the Action pursuant to the terms and provisions of this Agreement.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among Plaintiff, the Settlement Class, and each of them, and Defendant, by and through its undersigned

counsel that, subject to final approval of the Court after a hearing or hearings as provided for in this Settlement Agreement, in consideration of the benefits flowing to the Parties from the Agreement set forth herein, that the Action and the Released Claims will be finally and fully compromised, settled, and released, and the Action will be dismissed with prejudice, upon and subject to the terms and conditions of this Agreement.

AGREEMENT

1. DEFINITIONS.

As used in this Settlement Agreement, the following terms have the meanings specified below:

1.1 “Action” means *Gregorio v. Premier Nutrition Corp.*, Case No. 1:17-cv-05987-AT, pending in the United States District Court for the Southern District of New York.

1.2 “Approved Claim” means a Claim Form submitted by a Settlement Class Member that: (a) is submitted timely and in accordance with the directions on the Claim Form and the provisions of the Settlement Agreement; (b) is fully and truthfully completed by a Settlement Class Member with all of the information requested in the Claim Form; (c) is signed by the Settlement Class Member, physically or electronically; and (d) is approved by the Settlement Administrator pursuant to the provisions of this Agreement.

1.3 “Claim Form” means the document to be submitted by Settlement Class Members seeking a cash payment pursuant to this Settlement Agreement. The Claim Form will be available online at the Settlement Website (defined at paragraph 1.34 below) and the contents of the Claim Form will be substantially in the form attached hereto as Exhibit A, approved by the Court.

1.4 “Claimant” means a Settlement Class Member who submits a claim for cash payment as described in Section 2 of this Settlement Agreement.

1.5 “Claims Deadline” means the date by which all Claim Forms must be postmarked or received to be considered timely and will be set as a date no later than forty-five (45) days after entry of the Settlement Approval Order and Final Judgment. The Claims Deadline will be clearly set forth in the Preliminary Approval Order as well as in the Notice and the Claim Form.

1.6 “Class Counsel” means the law firms of Bursor & Fisher, P.A. and Barbat, Mansour & Suciu, PLLC.

1.7 “Class Notice” means the Court-approved “Notice of Class Action Settlement.”

1.8 “Class Representative” means the named Plaintiff in this Action, Joseph Gregorio.

1.9 “Court” means the United States District Court for the Southern District of New York, the Honorable Analisa Torres presiding, or any judge who will succeed her as the Judge in this Action.

1.10 “Defendant” means Premier Nutrition Corporation.

1.11 “Defendant’s Counsel” means the law firms of Faegre Baker Daniels, LLP and Leader & Berkon, LLP.

1.12 “Fee Award” means the amount of attorneys’ fees and reimbursement of expenses and costs awarded by the Court to Class Counsel, which will be paid out of the Settlement Fund.

1.13 “Final Approval Hearing” means the hearing before the Court where the Parties will request the Settlement Approval Order and Final Judgment to be entered by the Court approving the Settlement Agreement and Plaintiff will request the Court to approve the Fee Award and the Incentive Award to the Class Representative.

1.14 “Final Settlement Approval Date” means one business day following the latest of the following events: (i) the date upon which the time expires for filing or noticing any appeal

of the Court's Settlement Approval Order and Final Judgment approving the Settlement Agreement, if no appeal has been filed; (ii) if there is an appeal or appeals, other than an appeal or appeals solely with respect to the Fee Award, the date of completion, in a manner that finally affirms and leaves in place the Final Judgment without any material modification, of all proceedings arising out of the appeal or appeals (including, but not limited to, the expiration of all deadlines for motions for reconsideration or petitions for review and/or *certiorari*, all proceedings ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following decisions on remand); or (iii) the date of final dismissal of any appeal or the final dismissal of any proceeding on *certiorari*.

1.15 “Incentive Award” means any award approved by the Court that is payable to the Plaintiff from the Settlement Fund.

1.16 “Media Plan” means the Settlement Administrator's plan to disseminate Class Notice to Settlement Class Members. The Media Plan will include an email notice, a postcard notice, a long form notice that will be available on the Settlement Website, internet banner notice, and a press release. *See also* Paragraph 4.

1.17 “Notice and Other Administrative Costs” means all costs and expenses actually incurred by the Settlement Administrator in the publication of Class Notice, establishment of the Settlement Website, providing CAFA notice, the processing, handling, reviewing, and paying of claims made by Claimants, paying taxes and tax expenses related to the Settlement Fund (including all federal, state, or local taxes of any kind and interest or penalties thereon, as well as expenses incurred in connection with determining the amount of and paying any taxes owed and expenses related to any tax attorneys and accountants).

1.18 “Notice Date” means the date of publication of notice pursuant to Paragraph 4 of this Agreement.

1.19 “Objection/Exclusion Deadline” means the date to be set by the Court as the deadline for Settlement Class Members to submit objections and requests for exclusion.

1.20 “Person” will mean, without limitation, any individual, corporation, partnership, limited partnership, limited liability company, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity and their spouses, heirs, predecessors, successors, representatives, or assigns. “Person” is not intended to include any governmental agencies or governmental actors, including, without limitation, any state Attorney General office.

1.21 “Plaintiff” means Joseph Gregorio.

1.22 “Preliminary Approval” means the Court’s entry of an order preliminarily approving the terms and conditions of this Settlement Agreement, including the manner of providing, and content of, the notice to Settlement Class Members.

1.23 “Preliminary Approval Date” means the date on which the Court enters an order granting Preliminary Approval.

1.24 “Preliminary Approval Order” means the order preliminarily approving the Settlement Agreement, certifying the Settlement Class for settlement purposes, and directing notice thereof to the Settlement Class, which will be agreed upon by the Parties and submitted to the Court in conjunction with Plaintiffs’ motion for preliminary approval of the Agreement.

1.25 “Premier Protein Shake Products” means all individual and multi-pack Premier Protein-branded Ready-To-Drink Shake Products at issue in the Action: Vanilla, Chocolate, Strawberries & Cream, Bananas & Cream, Peaches & Cream, Cookies & Cream, Mixed Berry, Organic Chocolate, Organic Vanilla and Caramel flavors.

1.26 “Released Claims” means the claims released pursuant to paragraph 6.1 of this Agreement.

1.27 “Released Parties” means Premier Nutrition Corporation, as well as any and all of its respective present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parent companies, subsidiaries, licensors, licensees, associates, affiliates, employers, agents, consultants, independent contractors, insurers, and customers, including without limitation employees of the foregoing, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, underwriters, shareholders, lenders, auditors, investment advisors, legal representatives, successors in interest, assigns and companies, firms, trusts, and corporations.

1.28 “Releasing Parties” means Plaintiff, those Settlement Class Members who do not timely opt out of the Settlement Class, and all of their respective present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parent companies, subsidiaries, associates, affiliates, employers, employees, agents, consultants, independent contractors, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, underwriters, shareholders, lenders, auditors, investment advisors, legal representatives, successors in interest, assigns and companies, firms, trusts, and corporations.

1.29 “Settlement Administrator” means a reputable administration company that has been selected jointly by the Parties and approved by the Court to perform the duties set forth in this Agreement.

1.30 “Settlement Class Members” or “Settlement Class” means:

All persons in the United States (including its states, districts, or territories) who purchased Premier Protein Ready-To-Drink Protein Shakes from August 8, 2011 to the Notice Date. Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this Action and members of their families; (2) the Defendant, Defendant’s subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parents have a controlling interest and their current or former

officers, directors, agents, attorneys, and employees; (3) persons who properly execute and file a timely request for exclusion from the class; and (4) the legal representatives, successors, or assigns of any such excluded persons.

1.31 “Settlement Class Period” means the period of time from August 8, 2011 to the Notice Date.

1.32 “Settlement Fund” means the non-reversionary total cash commitment of Defendant for purposes of this settlement, as described in Section 2 of this Settlement Agreement with a total value of \$9 million (\$9,000,000.00 USD). The Settlement Fund represents the total extent of Defendant’s monetary obligations under this Agreement. The payment of the Settlement Amount by Defendant fully discharges the Defendant’s and the other Released Parties’ financial obligations (if any) in connection with the Settlement.

1.33 “Settlement Approval Order and Final Judgment” means an order and judgment issued and entered by the Court, approving the Settlement Agreement as binding upon the Parties and the Settlement Class Members, dismissing the Action with prejudice, and setting the amount for an award of attorneys’ fees, costs, and expenses not to exceed one-third of the total \$9 million value of the Settlement Fund to Class Counsel by the Court. The Settlement Approval Order and Final Judgment will constitute a final judgment within the meaning and for purposes of Rule 54 of the Federal Rules of Civil Procedure.

1.34 “Settlement Website” means a website to be established, operated, and maintained by the Settlement Administrator for purposes of providing notice and otherwise making available to the Settlement Class Members the documents, information, and online claims submission process referenced in paragraphs 2.4 through 2.6, below.

1.35 “Short Form Notice” means the Court-approved form of notice for publication to Settlement Class Members, pursuant to the Media Plan.

1.36 “Supporting Counsel” means the Consumer Law Group, PC.

1.37 “Unknown Claims” means claims that could have been raised in the Action and that any or all of the Releasing Parties do not know or suspect to exist, which, if known by him or her, might affect his or her agreement to release the Released Parties or the Released Claims or might affect his or her decision to agree, object, or not to object to the Settlement. Upon the Final Settlement Approval Date, the Releasing Parties will be deemed to have, and will have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits of § 1542 of the California Civil Code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Upon the Final Settlement Approval Date, the Releasing Parties also will be deemed to have, and will have, waived any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States, or principle of common law, or the law of any jurisdiction outside of the United States, which is similar, comparable, or equivalent to § 1542 of the California Civil Code. The Releasing Parties acknowledge that they may discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of this release, but that it is their intention to finally and forever settle and release the Released Claims, notwithstanding any Unknown Claims they may have, as that term is defined in this Paragraph.

2. SETTLEMENT RELIEF.

2.1 Payments to Settlement Class Members.

(a) Defendant will pay a total of \$9,000,000 in cash into the Settlement Fund for payment of the following: (i) Approved Claims for cash benefits submitted by Settlement Class Members pursuant to paragraph 2.3 below; (ii) the Notice and Other Administrative Costs actually incurred by the Settlement Administrator as described in paragraph 4.3 below; (iii) the

Fee Award, as described in paragraph 3.1 below; and (iv) any Incentive Award to the Plaintiff, not to exceed \$5,000, as may be ordered by the Court and as described in paragraph 3.3 below.

2.2 Schedule of Payments into Settlement Fund. Defendant will make payments into the Settlement Fund in accordance with the following schedule:

(a) *Notice and Other Administrative Costs.* Amounts for the Notice and Other Administrative Costs, to be paid within thirty (30) days of when such amounts are invoiced to Defendant and become due and owing.

(b) *Fee Award.* An amount equal to the Fee Award to be paid as described at paragraph 3.1, below.

(c) *Incentive Award.* An amount equal to Plaintiff's Incentive Award as ordered by the Court, to be paid as described at paragraph 3.3, below.

(d) *Payment of Valid Cash Claims.* An amount equal to \$9,000,000.00, less the sum of (i) the payments for Notice and Other Administrative Costs, (ii) the Fee Award paid by Defendant, and (iii) any Incentive Award paid by Defendant, which amount is to be paid thirty (30) days after the Claims Deadline or the Final Settlement Approval Date, whichever is later.

2.3 Claims Process. Each Settlement Class Member will be entitled to submit a claim for cash payment, consistent with this paragraph and as determined by the Court.

(a) *Cash Payment.* Each Settlement Class Member may file a claim that will, if valid, entitle him or her to cash payment(s) based on Premier Protein Shake Products purchased during the Settlement Class Period. Settlement Class Members with proof of purchase will be entitled to submit a claim for \$1 per purchased shake of Premier Protein Shake Products up to \$40.00 in cash, subject to *pro rata* adjustment. Settlement Class Members without proof of

purchase will be entitled to submit a claim for \$0.50 per purchased shake of Premier Protein Shake Products up to \$20.00 in cash, subject to *pro rata* adjustment.

(b) *Cash Payment from Fund.* Cash Claims will be paid thirty (30) days after the Claims Deadline or the Final Settlement Approval Date, whichever is later, from the Settlement Fund.

(c) *Pro Rata Adjustment.* If the total value of all Approved Claims either exceeds or falls short of the funds available for distribution to Class Members, then the amounts of the cash payments will be reduced or increased pro rata as necessary to use all of the funds available for distribution to Class Members.

2.4 Proof of Claim. A maximum of one claim, submitted on a single Claim Form, may be submitted by each Settlement Class Member. A Claimant must include information in the Claim Form – completed online or in hard copy mailed to the Settlement Administrator – confirming under penalty of perjury the following: (i) the number and type of Premier Protein Shake Product(s) purchased, and (ii) that the purchase or purchases were made within the Settlement Class Period.

2.5 Review of Claims. The Settlement Administrator will be responsible for reviewing all claims to determine their validity. The Settlement Administrator will reject any claim that does not comply in any material respect with the instructions on the Claim Form or the terms of paragraphs 2.3 and 2.4, above, or is submitted after the Claims Deadline.

2.6 Cash Benefit – Uncleared Checks. Those Settlement Class Members whose cash benefit checks are not cleared within one hundred eighty (180) days after issuance will be ineligible to receive a cash settlement benefit and Defendant will have no further obligation to make any payment pursuant to this Settlement Agreement or otherwise to such Settlement Class Members. Unpaid funds from uncleared checks will in no event revert back to the Defendant.

Any unpaid funds remaining after administration of the Settlement Agreement will be donated as *cy pres* to Feeding America, a non-sectarian, not-for-profit national food bank organization, or another non-sectarian, not-for-profit organization(s) recommended by the parties and approved by the Court.

2.7 Prospective Relief. Prospectively, Premier Nutrition is reevaluating and refreshing its formulations for Premier Protein® Shakes, reviewing its manufacturing specifications and protocols for co-manufacturers producing Premier Protein® Shakes, and working with its co-manufacturers on best practices to implement those specifications and manufacturing protocols in order to minimize the variability of the protein content contained in the Premier Protein® Shakes.

2.8 Notice to Attorneys General. Not later than ten (10) days after the Motion for Preliminary Approval of the Settlement is filed in Court, the Settlement Administrator will in consultation with Defendant's counsel provide notice of the proposed class action settlement to the appropriate state officials as required by 28 U.S.C. § 1715, and the costs of such notice will be paid from the Settlement Fund.

3. CLASS COUNSEL'S ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS AND EXPENSES; INCENTIVE AWARD.

3.1 Class Counsel may receive from the Settlement Fund, subject to Court approval, attorneys' fees, costs, and expenses not to exceed one-third of the Settlement Fund (or three million dollars (\$3,000,000.00)). Class Counsel, with the advice and consent of Supporting Counsel, will petition the Court for an award of such attorneys' fees and Defendant agrees to not object to or otherwise challenge, directly or indirectly, Class Counsel's petition for reasonable attorneys' fees and for reimbursement of costs and expenses if limited to this amount. Class Counsel, in turn, agrees to seek no more than this amount from the Court in attorneys' fees and for reimbursement of costs and expenses. Payment of the Fee Award will be made from the

Settlement Fund and should the Court award less than the amount sought by Class Counsel, the difference in the amount sought and the amount ultimately awarded pursuant to this Paragraph will remain in the Settlement Fund.

3.2 The Fee Award will be payable by Defendant within thirty (30) days after entry of the Court's Settlement Approval Order and Final Judgment, subject to Class Counsel executing the Undertaking Regarding Attorneys' Fees and Costs (the "Undertaking") attached hereto as Exhibit G, and providing all payment routing information and tax I.D. numbers for Bursor & Fisher, P.A., as agent for Class Counsel and Supporting Counsel. Payment of the Fee Award will be made from the Settlement Fund by wire transfer to Bursor & Fisher, P.A., as agent for Class Counsel and Supporting Counsel, for distribution to and among counsel for Plaintiff and the Class, in accordance with wire instructions to be provided by Bursor & Fisher, P.A., and completion of necessary forms, including but not limited to W-9 forms. Notwithstanding the foregoing, if for any reason the Settlement Approval Order and Final Judgment is reversed or rendered void as a result of an appeal(s) then Class Counsel will return such funds to the Defendant with interest paid at a rate of 5%, compounded annually.

3.3 Subject to Court approval, the Plaintiff may be paid an incentive award from the Settlement Fund, in addition to any settlement payment as a result of an Approved Claim pursuant to this Agreement, and in recognition of his efforts on behalf of the Settlement Class, in the amount of five thousand dollars (\$5,000.00). Defendant will not object to or otherwise challenge, directly or indirectly, Class Counsel's application for the incentive award to the Class Representative if limited to this amount. Class Counsel, in turn, agrees to seek no more than this amount from the Court as the incentive award for the Class Representative. Should the Court award less than this amount, the difference in the amount sought and the amount ultimately awarded pursuant to this Paragraph will remain in the Settlement Fund. Such award will be paid

from the Settlement Fund (in the form of a check to the Class Representative that is sent care of Class Counsel) thirty (30) days after the Claims Deadline or the Final Settlement Approval Date, whichever is later.

4. NOTICE TO THE CLASS AND ADMINISTRATION OF SETTLEMENT.

4.1 Class Notice. The Class Notice will conform to all applicable requirements of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clauses), and any other applicable law, and will otherwise be in the manner and form approved by the Court.

4.2 Notice Terms. The Class Notice shall consist of the following:

(a) *Settlement Class List.* The records that have been produced by Defendant and by Sam's Club and Costco in response to valid subpoenas will form the "Class List," and have been provided to the Settlement Administrator;

(b) *Direct Notice via Email.* No later than twenty-eight (28) days from the entry of the Preliminary Approval Order, the Settlement Administrator will send Notice via email substantially in the form attached as Exhibit B, along with an electronic link to the Claim Form, to all Settlement Class Members for whom a valid email address is in the Class List. In the event transmission of the email notice results in any "bounce-backs," the Settlement Administrator will, if possible, correct any issues that may have caused the "bounce-back" to occur and make a second attempt to re-send the email notice.

(c) *Direct Notice via U.S. Mail.* No later than twenty-eight (28) days from entry of the Preliminary Approval Order, the Settlement Administrator will send notice substantially in the form attached as Exhibit C to all Settlement Class Members in the Class List who did not receive an email pursuant to Paragraph 4.2(b), above.

(d) *Settlement Website.* Within twenty-eight (28) days from entry of the Preliminary Approval Order, Notice will be provided on a website at an available settlement URL (such as, for example, www.ProteinShakeSettlement.com) which will be obtained, administered, and maintained by the Settlement Administrator and will include the ability to file Claim Forms online, provided that such Claim Forms, if signed electronically, will be binding for purposes of applicable law and contain a statement to that effect. The Notice provided on the Settlement Website will be substantially in the form of Exhibit D hereto.

(e) *Internet Banner Notice.* Within thirty-five (35) days from the entry of the Preliminary Approval Order, Notice will be provided by internet banner advertisements, which will link to the Settlement Website, and will be substantially in the form of Exhibit E hereto.

(f) *Press Release.* Within thirty-five (35) days from the entry of the Preliminary Approval Order, Notice will be provided by a press release, which will be substantially in the form of Exhibit F hereto.

4.3 Responsibilities of Settlement Administrator. The Parties will retain one or more Settlement Administrators (including subcontractors) to help implement the terms of the proposed Settlement Agreement. The Settlement Administrator(s) will be responsible for administrative tasks, including, without limitation, (a) notifying the appropriate state officials about the settlement, (b) arranging, as set forth in the Media Plan, for distribution of Class Notice (in the form approved by the Court) and Claim Forms (in a form approved by the Court) to Settlement Class Members, (c) answering inquiries from Settlement Class Members and/or forwarding such written inquiries to Class Counsel or their designee, (d) receiving and maintaining on behalf of the Court and the Parties any Settlement Class Member correspondence regarding requests for exclusion to the settlement, (e) establishing the Settlement Website that posts notices, Claim Forms, and other related documents by the Notice Date, (f) receiving and

processing claims and distributing payments to Settlement Class Members, (g) causing notice, pursuant to 28 U.S.C. § 1715, to be served not later than ten (10) days after this Agreement is filed with the Court on the Attorneys General of each U.S. State in which Settlement Class members reside, the Attorney General of the United States, and other required government officials, as required by law, and (h) otherwise assisting with implementation and administration of the Settlement Agreement terms.

4.6 Performance Standards of Settlement Administrator. The contract with the Settlement Administrator will obligate the Settlement Administrator to abide by the following performance standards:

(a) The Settlement Administrator will accurately and neutrally describe, and will train and instruct its employees and agents to accurately and objectively describe, the provisions of this Agreement in communications with Settlement Class Members;

(b) The Settlement Administrator will provide prompt, accurate, and objective responses to inquiries from Class Counsel and Defendant's Counsel and will periodically report on claims, objectors, etc.

(c) The Settlement Administrator will seek clarification, instruction, or authorization for performance of its duties and expenditure or disposition of cash from Class Counsel and Defendant's Counsel.

5. CLASS SETTLEMENT PROCEDURES.

5.1 Exclusions and Objections. The Class Notice will advise all Settlement Class Members of their rights to be excluded from the Settlement or to object to the Settlement.

(a) Any person who falls within the definition of the Settlement Class but wishes to be excluded from the Settlement may do so by timely mailing a valid opt-out notice, as described in the Class Notice. Any person who is excluded from the Settlement will not be

bound by this Settlement Agreement, will not be eligible to make a claim for any benefit under the terms of this Settlement Agreement, and will not be permitted to object to the Settlement or to intervene in the Action. At least seven (7) calendar days before the Final Approval Hearing, Class Counsel will prepare or cause the Settlement Administrator to prepare a list of the persons who have excluded themselves in a valid and timely manner from the Settlement Class (the “Opt-Outs”), and Class Counsel will file that list with the Court.

Any person who is a Settlement Class Member and who wishes to object to the agreement must timely serve a written objection on Defense Counsel and Class Counsel by the date specified in the Notice. The objection must contain a caption or title that identifies it as “Objection to Class Settlement in *Gregorio v. Premier Nutrition Corporation*,” contact and address information for the objecting Settlement Class Member, documents sufficient to establish the person’s standing as a Settlement Class Member (either verification under oath of the date and location of a purchase of Premier Protein Shake Products with the Settlement class period or a receipt reflecting such purchase), the facts supporting the objection, and the legal grounds on which the objection is based. If an objecting person chooses to appear at the Final Approval Hearing, a notice of intention to appear must be filed with the Court no later than the Objection/Exclusion Deadline.

5.2 Stay of the Action. The Parties will request that the Court, in connection with Preliminary Approval, issue an immediate stay of the Action.

5.3 Effect If Settlement Not Approved. This Settlement Agreement was entered into only for purposes of settlement, subject to and without waiver of the Parties’ respective rights. If the Court fails to enter the order granting Preliminary Approval or fails to grant final approval, or if the Final Settlement Approval Date does not occur, Class Counsel and Defendant’s Counsel will endeavor, consistent with the Settlement Agreement, to cure any defect

identified by the Court; provided, however, that Defendant will not be obligated to accept such cure if it increases the cost or burden of the Settlement Agreement to Defendant or any of the other Released Parties. In the event that the Settlement Agreement is terminated for any reason, final approval does not occur for any reason, or the Final Settlement Approval Date does not occur, then no term or condition of the Settlement Agreement, or any draft thereof, or any discussion, negotiation, documentation, or other part or aspect of the Parties' settlement discussions will have any effect, nor will any such matter be admissible in evidence for any purpose in the Action, or in any other proceeding, the Parties will be restored to their respective positions immediately preceding execution of this Settlement Agreement. If the Settlement Approval Order and Final Judgment or any part of it is vacated, overturned, reversed, or rendered void as a result of an appeal, or the Settlement Agreement is voided, rescinded, or otherwise terminated for any other reason, then within thirty (30) days, Class Counsel will return to Defendant all attorneys' fees, costs, and other payments received by Class Counsel under the Settlement Agreement, as set forth in paragraph 3.2 above. The Parties agree that all drafts, discussions, negotiations, documentation, or other information prepared in relation to the Settlement Agreement and the Parties' settlement discussions will be treated as strictly confidential and may not be disclosed to any person other than the Parties' counsel, and only for purposes of the Action. Defendant's rights with respect to class certification expressly are reserved and preserved.

5.4 Execution. The Settlement Agreement will have no effect unless and until this Settlement Agreement is fully executed by all Parties.

6. RELEASES.

6.1 Release by Settlement Class Members. Effective as of the Final Settlement Approval Date, each and all of the Settlement Class Members will release and forever discharge

and will be forever barred from asserting, instituting, or maintaining against any or all of the Released Parties, any and all claims, demands, actions, causes of action, lawsuits, arbitrations, damages, costs, attorney fees or liabilities whether legal, equitable, or otherwise, relating in any way to the claims asserted or the factual allegations made in the Second Amended Complaint in this Action, the nutrient content, or the labeling of the Premier Protein Shake Products, including without limitation the marketing, advertising, promotion, or distribution of the Premier Protein Shake Products and the purchase of any of the Premier Protein Shake Products at any time on or after August 8, 2011 to the Notice Date (collectively, the “Claims”).

6.2 Effectuation of Settlement. None of the above releases includes releases of claims to enforce the terms of the Settlement Agreement or affects the rights granted by the Settlement Agreement.

6.3 No Admission of Liability. This Settlement Agreement reflects, among other things, the compromise and settlement of disputed claims among the parties, and neither this Settlement Agreement nor the releases given herein, nor any consideration therefor, nor any actions taken to carry out this Settlement Agreement, are intended to be, nor may they be deemed or construed to be, an admission or concession of liability, or the validity of any claim, defense, or of any point of fact or law on the part of any party. Defendant denies the material allegations of the complaint filed in this Action. Neither this Settlement Agreement, nor the fact of settlement, nor the settlement proceedings, nor the settlement negotiations, nor any related document, will be used as an admission of any fault or omission by any or all of the Released Parties, or be offered or received in evidence as an admission, concession, presumption, or inference of any wrongdoing or liability by any or all of the Released Parties in any proceeding, other than such proceedings as may be necessary to consummate, interpret, or enforce this Settlement Agreement.

7. PRELIMINARY APPROVAL ORDER AND SETTLEMENT APPROVAL ORDER AND FINAL JUDGMENT.

7.1 Promptly after the execution of this Settlement Agreement, Class Counsel will submit this Agreement together with its Exhibit(s) to the Court and will move the Court for Preliminary Approval of the settlement set forth in this Agreement; certification of the Settlement Class for settlement purposes only; appointment of Class Counsel and the Class Representative; and entry of a Preliminary Approval Order, which order will set a Final Approval Hearing date and approve the Media Plan. The Preliminary Approval Order will also authorize the Parties, without further approval from the Court, to agree to and adopt such amendments, modifications, and expansions of the Settlement Agreement and its implementing documents (including all exhibits to this Agreement) so long as they are consistent in all material respects with the terms of the Settlement Agreement and do not limit or impair the rights of the Settlement Class or materially expand the obligations of Defendant.

7.2 At the time of the submission of this Agreement to the Court as described above, Class Counsel will request that, after notice is given, the Court hold a Final Approval Hearing and approve the settlement of the Action as set forth herein.

7.3 After notice is given, and at or before the Final Approval Hearing, the Class Representative will request and seek to obtain from the Court a Settlement Approval Order and Final Judgment, which will (among other things):

(a) approve the Settlement Agreement and the proposed settlement as fair, reasonable, and adequate as to, and in the best interests of, the Settlement Class Members; direct the Parties and their counsel to implement and consummate the Agreement according to its terms and provisions; and declare the Agreement to be binding on, and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiffs and Releasing Parties;

(b) find that the Media Plan implemented pursuant to the Agreement (1) constituted the best practicable notice under the circumstances; (2) constituted notice that was reasonably calculated, under the circumstances, to apprise the Settlement Class of the pendency of the Action, their right to object to or exclude themselves from the proposed Agreement, and to appear at the Final Approval Hearing; (3) was reasonable and constituted due, adequate, and sufficient notice to all persons entitled to receive notice; and (4) met all applicable requirements of the Federal Rules of Civil Procedure, the Due Process Clause of the United States Constitution, and the rules of the Court;

(c) find that the Class Representative and Class Counsel adequately represented the Settlement Class for purposes of entering into and implementing the Agreement;

(d) dismiss the Action (including all individual claims and Settlement Class Claims presented thereby) on the merits and with prejudice, without fees or costs to any party except as provided in the Settlement Agreement;

(e) incorporate the Release set forth above, make the Release effective as of the Final Settlement Approval Date, and forever discharge the Released Parties as set forth herein;

(f) permanently bar and enjoin all Settlement Class Members from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in any lawsuit or other action in any jurisdiction based on the Released Claims;

(g) without affecting the finality of the Settlement Approval Order and Final Judgment for purposes of appeal, retain jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of the Settlement Agreement and the Settlement Approval Order and Final Judgment, and for any other necessary purpose; and

(h) incorporate any other provisions as the Court deems necessary and just.

8. MISCELLANEOUS PROVISIONS.

8.1 Change of Time Periods. The time periods and/or dates described in this Settlement Agreement with respect to the giving of notices and hearings are subject to approval and change by the Court or by the written agreement of Class Counsel and Defendant's Counsel, without notice to Settlement Class Members. The Parties reserve the right, by agreement and subject to the Court's approval, to grant any reasonable extension of time that might be needed to carry out any of the provisions of this Settlement Agreement.

8.2 Time for Compliance. If the date for performance of any act required by or under this Settlement Agreement falls on a Saturday, Sunday, or court holiday, that act may be performed on the next business day with the same effect as if it had been performed on the day or within the period of time specified by or under this Settlement Agreement.

8.3 Governing Law. This Settlement Agreement will be governed by the laws of the State of New York.

8.4 Entire Agreement. The terms and conditions set forth in this Settlement Agreement constitute the complete and exclusive statement of the agreement between the parties relating to the subject matter of this Settlement Agreement, superseding all previous negotiations and understandings, and may not be contradicted by evidence of any prior or contemporaneous agreement. The Parties further intend that this Settlement Agreement constitutes the complete and exclusive statement of its terms as between the parties, and that no extrinsic evidence whatsoever may be introduced in any agency or judicial proceeding, if any, involving this Settlement Agreement. Any modification of the Settlement Agreement must be in writing signed by Class Counsel and Defendant's Counsel.

8.5 Advice of Counsel. The determination of the terms and the drafting of this Settlement Agreement have been by mutual agreement after negotiation, with consideration by and participation of all parties and their counsel.

8.6 Binding Agreement. This Settlement Agreement will be binding upon and inure to the benefit of the respective heirs, successors, and assigns of the Parties, the Settlement Class Members and other Released Parties.

8.7 No Waiver. The waiver by any party of any provision or breach of this Settlement Agreement will not be deemed a waiver of any other provision or breach of this Settlement Agreement.

8.8 Execution in Counterparts. This Settlement Agreement will become effective upon its execution by all of the undersigned. The parties may execute this Settlement Agreement in counterparts, and execution of counterparts will have the same force and effect as if all parties had signed the same instrument. The parties further agree that signatures provided by portable document format (PDF) or other electronic transmission will have the same force and effect as original signatures.

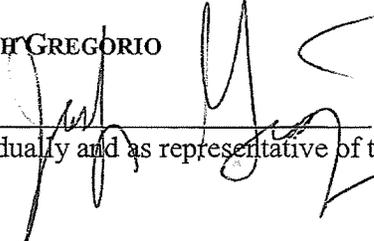
8.9 Enforcement of this Settlement Agreement. The Court will retain jurisdiction, and will have exclusive jurisdiction, to enforce, interpret, and implement this Settlement Agreement and the terms of any order entered pursuant to this Settlement Agreement.

8.10 Notices. All notices to the Parties or counsel required by this Settlement Agreement will be made in writing and communicated by email and mail to the following addresses: Philip L. Fraietta, Bursor & Fisher, P.A., 888 Seventh Avenue, New York, NY 10019, pfraietta@bursor.com; Aaron D. Van Oort, Faegre Baker Daniels, LLP, 2200 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402, aaron.vanoort@faegrebd.com.

IT IS SO AGREED TO BY THE PARTIES:

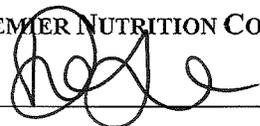
Dated: 9/5, 2018

JOSEPH GREGORIO

By: 
Individually and as representative of the Class

Dated: 9/7, 2018

PREMIER NUTRITION CORPORATION

By: 

Diedre J. Gray
EVP, General Counsel and Chief Administrative
Officer, Post Holdings, Inc.

IT IS SO STIPULATED BY COUNSEL:

Dated: Sept. 5, 2018

BURSOR & FISHER, PA

By: _____

Joseph I. Marchese
jmarshese@bursor.com
Philip L. Fraietta
pfraietta@bursor.com
Alec M. Leslie
aleslie@bursor.com
BURSOR & FISHER, PA
888 Seventh Avenue
New York, New York 10019
Tel: (646) 837-7150

L. Timothy Fisher
ltfisher@bursor.com
Frederick J. Klorczyk III
fklorczyk@bursor.com
BURSOR & FISHER, PA
1990 North California Blvd.
Walnut Creek, CA 94596
Tel: (925) 300-4455

Dated: 9/5/18, 2018

BARBAT, MANSOUR & SUCIU, PLLC

By: _____

Nick Suciu III
nicksuciu@bmslawyers.com
BARBAT, MANSOUR & SUCIU, PLLC
1644 Bracken Road
Bloomfield Hills, Michigan 48302
Tel: (313) 303-3472

Dated: _____, 2018

CONSUMER LAW GROUP, PC

By: _____

Anne Barker
Abarker.consumerlawgroup@gmail.com
CONSUMER LAW GROUP, PC
306 Joy Street
Fort Oglethorpe, Georgia 30742
Tel: (706) 858-0325

Attorneys for Plaintiff and the Settlement Class

IT IS SO STIPULATED BY COUNSEL:

Dated: Sept. 5, 2018

BURSOR & FISHER, PA

By: _____
Joseph I. Marchese
jmarchese@bursor.com
Philip L. Fraietta
pfraietta@bursor.com
Alec M. Leslie
aleslie@bursor.com
BURSOR & FISHER, PA
888 Seventh Avenue
New York, New York 10019
Tel: (646) 837-7150

L. Timothy Fisher
ltfisher@bursor.com
Frederick J. Klorczyk III
fklorczyk@bursor.com
BURSOR & FISHER, PA
1990 North California Blvd.
Walnut Creek, CA 94596
Tel: (925) 300-4455

Dated: 9/5/18, 2018

BARBAT, MANSOUR & SUCIU, PLLC

By: Nick Suciu III
Nick Suciu III
nicksuciu@bmslawyers.com
BARBAT, MANSOUR & SUCIU, PLLC
1644 Bracken Road
Bloomfield Hills, Michigan 48302
Tel: (313) 303-3472

Dated: 9-5, 2018

CONSUMER LAW GROUP, PC

By: Anne Barker
Abarker.consumerlawgroup@gmail.com
CONSUMER LAW GROUP, PC
306 Joy Street
Fort Oglethorpe, Georgia 30742
Tel: (706) 858-0325

Attorneys for Plaintiff and the Settlement Class

Dated: September 7, 2018

FAEGRE BAKER DANIELS, LLP

By: 

Sarah L. Brew

sarah.brew@faegrebd.com

Aaron D. Van Oort

aaron.vanoort@faegrebd.com

FAEGRE BAKER DANIELS, LLP

2200 Wells Fargo Center

90 South Seventh Street

Minneapolis, Minnesota 55402

Tel: (612) 766-7000

*Attorneys for Defendant Premier Nutrition
Corporation*