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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI
CASE NO. 17-CV-23429-MGC

**MICHAEL LAVIGNE, JENNIFER
LAVIGNE, CODY PYLE, JENNIFER
RIBALTA, JEFF RODGERS, IZAAR
VALDEZ, AND FELIX VALDEZ,**
Plaintiffs

August 22, 2018

vs.

**HERBALIFE LTD, HERBALIFE
INTERNATIONAL INC, HERBALIFE
INTERNATIONAL OF AMERICA INC,
ET AL.,**
Defendants.

MOTIONS HEARING

BEFORE THE HONORABLE **MARCIA G. COOKE,**
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S

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FOR THE DEFENDANT:
HERBALIFE LTD,
HERBALIFE
INTERNATIONAL INC,
HERBALIFE
INTERNATIONAL OF
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P R O C E E D I N G S

(The following proceedings were held in open court.)

THE COURT: We're on the record in Rodgers vs. Herbalife.

05:13 **MR. MARK:** Etan Mark from the law firm Mark Migdal Hayden. I'm here with my co-counsel, Jason Jones, and my partner, Lara Grillo.

THE COURT: Thank you. And appearing on behalf of the defendants?

05:14 **MR. LEVIN:** Good afternoon, Your Honor. On behalf of the defendants, Herbalife LTD,, Herbalife International, Inc., and Herbalife International of America, Inc., Todd Levin and Erin Bohannon from the law firm of Kluger Kaplan, and our co-counsel pro hac vice Mark Dooks from the law firm of Bird Marella.

MR. CATLETT: Good afternoon, Your Honor. My name is Mike Catlett. I'm from the law firm of Quarles Brady. I hope it suffices to say that I represent 44 individual defendants in the case.

05:14 **THE COURT:** I'll take your word for it. You don't have to announce each one of them on the record.

MR. CATLETT: I'm here with my colleague, Zac Foster, who is with our Tampa office, and he's local counsel for our clients in this case.

05:14 **THE COURT:** All right. There are two motions. One is

1 docket entry number 62; the other is docket entry number 63.

2 There's defendant's motion to compel arbitration and
3 motion to transfer venue, and they are the two combined
4 motions.

05:15 5 So counsel, are the defendants, are you going
6 separately? Together? Which defendants are going to speak on
7 what topics? Plaintiffs, you may have a seat.

8 **MR. DROOKS:** Your Honor, I'm going to speak to
9 questions 2, 3 and 4, in your order. And then Mr. Catlett will
05:15 10 address question 1 which relates primarily to the individual
11 defendants and then any other issues relating to them. And
12 we'll argue those issues as to both motions at once.

13 **THE COURT:** All right. Go right ahead please.

14 **MR. DROOKS:** Thank you, Your Honor. May I use the
05:15 15 lectern?

16 **THE COURT:** Right.

17 **MR. DROOKS:** Thank you. Your Honor, as I said a
18 moment ago, I plan to address the last three questions in your
19 order setting oral argument and leave for Mr. Catlett the first
05:16 20 question relating to the agency relationship. But I'm prepared
21 to answer any and all questions you may have.

22 So to, in essence, cut to the chase to directly answer
23 the questions that you had asked in your order, the defendant's
24 position is that four of the defendants who executed
05:16 25 distributorship agreements between January 2010 and August

1 2013, are subject to the forum selection clause in the
2 distributor agreement and they are indicated here, Patricia and
3 Jeff Rodgers, Izaar Valdez and Jennifer Ribalta. Four of the
4 defendants are subject to an arbitration clause in their
05:17 5 distributorship agreement. Jennifer Lavigne, Michael Lavigne
6 by virtue of being Jennifer's husband and Cody Pyle executed
7 agreements after August 2013. And those agreements contained
8 distributorship -- excuse me, contained arbitration agreements,
9 and also contain a class action waiver. Felix Valdez had
05:17 10 executed an agreement in 2008. And his agreement also contains
11 an arbitration clause and a class action waiver.

12 Our position is that irrespective of the contents of
13 the agreements, all of the plaintiffs are subject to the
14 arbitration clause and class action waiver in the rules.

05:17 15 In addition, with respect to the question relating to
16 the Bostick settlement, Patricia Rodgers, Jeff Rodgers, Izaar
17 Valdez and Felix Valdez are all Bostick class members and are
18 all members of the Bostick class subject to the Bostick
19 release.

05:18 20 Let me see if I can explain how we get to this which,
21 I assume, is what interests the Court. I put on a timeline the
22 membership dates for each of the respective plaintiffs. Izaar
23 Valdez, as you can see, was terminated in June 2011, and signed
24 up again in June of 2013, and was again terminated in June of
05:18 25 2016. So the relevant dates for Izaar Valdez are 2013, not

1 2008.

2 So beginning at the beginning, so to speak, Felix
3 Valdez executed a membership agreement on June 15th, 2008, or
4 as of June 15th, 2008, which contains an arbitration clause in
05:19 5 it. The arbitration clause is shown here, it's part of Roman's
6 declaration, Exhibit M, and it contains, although I failed to
7 highlight it, about two-thirds of the way down, a separate
8 class action waiver which reads, "Herbalife and I agree that no
9 claim shall be adjudicated in an arbitration or in any judicial
05:19 10 proceeding as a class action, and that no arbitration or other
11 proceeding conducted pursuant to this agreement shall allow
12 class claims or consolidation to a joinder of other claims or
13 parties. It is a very broad arbitration clause relating to any
14 claim or dispute arising out of or relating to my
05:20 15 distributorship including," and it goes on.

16 In January 2010, the membership agreement,
17 distributorship agreement was amended and, indeed, the
18 arbitration clause was taken out and a forum selection clause
19 was placed in the agreement. Between January 2010 and August
05:20 20 of 2013, plaintiffs Patricia Rodgers and, indirectly, her
21 husband Jeff, Jennifer Ribalta and Izaar Valdez all executed
22 that form of agreement. That form of agreement which, as I
23 said, does not contain an arbitration clause, contains this
24 clause which provides that any claim shall be resolved
05:21 25 exclusively in a judicial proceeding in either the Superior

1 Court or the United States District Court, both located in Los
2 Angeles, California.

3 Now, Your Honor's question actually did not
4 specifically relate to which plaintiffs but which claims, and
05:21 5 the case law is quite clear that this agreement which at first
6 said any claim encompasses all of the claims at issue in this
7 case. Those cases are cited in our moving papers and, again,
8 in our reply papers. I'm happy to discuss them at length. But
9 they are American Residential Equities and the PODS case, cited
05:21 10 at page 10 of our moving papers.

11 That's when things get interesting, Your Honor. The
12 Bostick class action complaint is filed in April 2013, and as
13 you can see, Mr. Valdez, Patricia Rodgers, Jennifer Ribalta and
14 Izaar Valdez were all already members and were within the scope
05:22 15 of the putative class in Bostick.

16 In August 2013, after the Bostick complaint had been
17 filed and motion practice had proceeded in that case, Herbalife
18 began to incorporate in its arbitration -- in its
19 distributorship agreement, arbitration clauses and a class
05:22 20 action waiver directly into the agreement. In July 2014 and
21 December 2014, Mr. Pyle in July 2014, Jennifer Lavigne in
22 December 2014, executed that agreement which directly contains
23 in the agreement a broad form arbitration clause to which they
24 are subject.

05:23 25 At the same time, Herbalife added an arbitration

1 clause and class action waiver to its rules. The rules are
2 directly referred to and incorporated into the agreement
3 itself, for example, in Ms. Rodgers' agreement, the agreement
4 reads, "Those documents and such other rules and procedures as
05:23 5 Herbalife has published or in the future may publish together
6 with such modifications and amendments as Herbalife shall make
7 from time to time in its sole and absolute discretion.

8 Collectively, the rules are each hereby incorporated into this
9 agreement of distributorship, each in its most recently
05:24 10 published form."

11 So the incorporation of the rules which were first
12 incorporated in August 2013 and made available through the
13 website in October 2013 and, thereafter, sent by direct notice
14 to each of Herbalife's members in February 2014, place Felix
05:24 15 Valdez, Patricia Rodgers, Jennifer Ribalta and Izaar Valdez
16 within the scope of the arbitration agreement.

17 The agreement, as the Court will see from reviewing
18 Romans' declaration entered today, contains a very clear
19 indication that it was an arbitration agreement, it involves a
05:25 20 waiver of jury trial and a waiver of class action.

21 The Bostick case proceeds. A settlement is reached.
22 And the settlement became effective on September 18th, 2015,
23 which was the last day for an objector to appeal the final
24 judgment in the case.

05:25 25 Now, that settlement agreement covered everyone in the

1 Bostick class with some exceptions, Your Honor, and for our
2 purposes, the Bostick class period and the Bostick settlement
3 reached -- and that is the Bostick release -- reached Felix
4 Valdez, Patricia and Jeffrey Rogers, and Izaar Valdez. It did
05:26 5 not reach Cody Pyle and Jennifer Lavigne because he had
6 executed the new arbitration clause and class action waiver
7 agreements, and there was a specific carve-out for class
8 members who had executed that agreement after, I believe,
9 August or September 2013, to specifically accept them out of
05:26 10 the settlement.

11 It did not reach Jennifer Ribalta because Jennifer
12 Ribalta was one of about 15 hundred members who had achieved
13 what's called, "Get Team" status, one of the more or successful
14 members, and the plaintiffs in the Bostick case wanted the more
05:26 15 successful Herbalife members excluded from the class. So as a
16 "Get Team" member, Jennifer Ribalta is excluded from the scope
17 of the Bostick release.

18 Now, an issue has been raised as to whether or not
19 Herbalife had ever taken the position that the arbitration
05:27 20 agreement entered into and -- entered into the rules in August
21 2013 operated to retroactively strip Mr. Valdez, Patricia and
22 Jeff Rodgers and Izaar Valdez of their ability to proceed in
23 the -- to proceed as members of the Bostick settlement class.
24 That issue was raised and Herbalife clearly took the position
05:27 25 that having had a complaint filed those claims asserted prior

1 to the arbitration agreement being incorporated into the rules,
2 and having Herbalife actively litigate the case before any such
3 arbitration clause was included in the rules, Herbalife made
4 clear that it was not taking the position that it was
05:28 5 attempting to retroactively impose the arbitration clause on
6 those defendants for claims that had already been asserted in
7 the Bostick litigation.

8 In any event, Your Honor, that brings us to the chart
9 that I began with and it explains the development of that
05:28 10 chart.

11 The forum selection clause became effective in January
12 of 2010 and covers a period through August 2013. And,
13 therefore, covers the four plaintiffs I mentioned, Felix
14 Valdez, Jennifer and Michael Lavigne and Cody Pyle.

05:29 15 In August 2013, the class action agreement -- I mean
16 the class action waiver and arbitration clause was incorporated
17 into the agreement. Which Jennifer Lavigne, Michael Lavigne
18 indirectly and Cody Pyle became subject to. Felix Valdez, we
19 have to go back to 2008 to find the class action waiver and
05:29 20 arbitration clause in his agreement.

21 There we see the forum selection clause, and as I
22 indicated, all of these individuals, by virtue of having
23 continued as members for approximately four years after the
24 arbitration clause and class action waiver was incorporated
05:29 25 into the rules, that is between August 2013 and September 2017

1 when the complaint in this action was filed, are subject to
2 those rules by incorporation into the agreement as is in the
3 explicit terms of each agreement.

05:30 4 And Ms. Rodgers and each of the Valdezes, Izaar and
5 Felix, are within the scope of the Bostick settlement.

6 Now, Your Honor, if the question is which claims are
7 subject to each of these provisions, that is, has Patricia
8 Rodgers asserted any claims, that would not be subject to the
9 forum selection clause. Our answer is all of her claims,
05:30 10 because all of her claims reasonably arise from her distributor
11 relationship with Herbalife, and the case law is very clear
12 that forum selection clauses ought to be read liberally to
13 encompass, not just contractual claims, but tort claims related
14 to the relationship.

05:31 15 The arbitration clauses are equally broad and include
16 not only claims arising from the distributor relationships, but
17 claims relating to relationships with other distributors.

18 So to the extent that Herbalife is being sued in
19 connection with the plaintiffs' claims for conduct of other
05:31 20 distributors, that is the individual defendants, those are
21 specifically included as well. The class action waiver speaks
22 for itself as does the same language in the rules, and the
23 Bostick settlement is an extremely broad settlement that
24 reaches claims, known and unknown, as of the effective date of
05:32 25 the settlement.

1 So any claims, known or unknown, that existed as of
2 September 2015, fall within the scope of that release. I think
3 there is the possibility that one more individual plaintiff
4 might try it take the position that a claim asserted here did
05:32 5 not arise until after that date. I would suggest to you that
6 is a very tough road to hoe because they were all members for
7 years before, or at least substantial periods of time. I think
8 up to about at least 18 months prior to the effective date of
9 the settlement, and actually all of the people subject to
05:32 10 Bostick settlements were members for over two years, and allege
11 that they attended these meetings and conferences before the
12 effective date of the Bostick settlement.

13 As I said, I think we have attempted to answer
14 questions 2, 3 and 4 in your order. I understand that Your
05:33 15 Honor may have other questions or have questions as a result of
16 this presentation and this argument.

17 **THE COURT:** I'm fine. Can I hear from your co-counsel
18 at this point?

19 **MR. DROOKS:** Thank you, Your Honor.

05:33 20 **THE COURT:** Thank you.

21 **MR. DROOKS:** Your Honor, we have a hard copy of the
22 presentation that we can provide at the end of the argument and
23 give a copy to our co-counsel.

24 **THE COURT:** Thank you, Counsel.

05:33 25 **MR. CATLETT:** Thank you, Your Honor. As I mentioned

1 at the outset, we represent the 44 individual defendants that
2 have been named in this case, plaintiffs' claim here that our
3 clients engaged in a racketeering enterprise with each other
4 and with Herbalife, and committed mail and wire fraud and also
05:34 5 engaged in a conspiracy to violate the racketeering statute.
6 Now I know we're not here to talk about the merits of those
7 claims or about the plaintiffs' allegations, but I would like
8 to note that our clients take these allegations very seriously
9 and they deny them emphatically.

05:34 10 What we are here to talk about today, though, is why
11 the Southern District of Florida is the wrong forum for the
12 plaintiffs' claims. Our clients join in and fully support the
13 arguments that Mr. Dooks and Herbalife have made this
14 afternoon. Our clients have similarly moved with Herbalife to
05:34 15 compel arbitration or, in the alternative, to transfer the case
16 to the Central District of California.

17 I want to talk about specifically this afternoon why
18 my clients can benefit or enforce the arbitration provision
19 that is contained in the rules and the agreements between
05:35 20 Herbalife and the named plaintiffs.

21 There's three reasons why they can do that.

22 First) they expressly agreed to -- named plaintiffs'
23 expressly agreed to arbitrate the claims they assert in this
24 case. Second) the plaintiff should be estopped from denying
05:35 25 that their claims are subject to arbitration. And third) their

1 claims are based on a theory that the individual defendants are
2 agents of Herbalife and that agency argument will address
3 question 1 in the Court's notice setting hearing.

4 First, with respect to the express agreement, each of
05:35 5 the named plaintiffs expressly agreed to arbitrate claims
6 arising out of disputes with other members in Herbalife,
7 including their claims in this case. Plaintiffs did not
8 address this argument that we made in our opening brief at all
9 in their response brief.

10 The 2016 version of Herbalife's rules that Mr. Dooks
11 referred to earlier provides, in relevant part, that, quote,
12 Herbalife and distributor agree to arbitrate all disputes and
13 claims between them including, without limitation, disputes or
14 claims arising out of or relating to relationships with other
05:36 15 distributors.

16 My clients are similarly bound by those 2016 rules.
17 And so we think it's wrong to even refer with respect to my
18 clients to them as being non-signatories to the arbitration
19 provision. My clients are bound by the arbitration provision
05:36 20 just as the named plaintiffs are bound by the arbitration
21 provision, and that arbitration provision clearly encompasses
22 claims arising out of or relating to relationships with other
23 distributors.

24 Count 1 of the complaint and Count 2 both are based on
05:37 25 plaintiffs' alleged relationship with the individual

1 defendants, who plaintiffs' claim misrepresented that attending
2 Herbalife events would result in greater compensation under the
3 Herbalife compensation claim. Because those claims are
4 centered on plaintiffs' relationships with other distributors,
05:37 5 my clients are entitled to enforce the arbitration provision
6 which was intended to cover claims against them such as those
7 the plaintiffs' bring here.

8 We think this case is no different than the Griggs
9 versus SGE Management case that was cited in our papers. It's
05:37 10 at 2015 Westlaw 11423656. In that case, the plaintiffs'
11 brought a putative RICO class action against the direct sales
12 company, called S G E, and several of its hired distributors.
13 And that company happened to refer to its distributors as
14 independent associates, or IAs.

05:38 15 The procedures in that case provided, similar to the
16 rules here, that, quote, any claim between two or more IAs or
17 between any IAs and Ignite, the direct sales company, would be
18 subject to arbitration. And despite that the individual
19 defendants were not technically signatories to any agreement
05:38 20 with the plaintiffs, the Western District of Texas held that
21 the RICO claims against the individual defendants in that case
22 were subject to arbitration under the express terms of the
23 arbitration agreement. The same goes here.

24 Moving on to agency theory and the Court asked the
05:38 25 parties to address in its notice of hearing at question 1

1 whether an agent/principal relationship exists between
2 Herbalife and the individual defendants. And our answer to
3 that question is that at this stage of the proceedings, and
4 based only on the allegations in the complaint, and I want to
05:39 5 make very clear that -- and emphasize that point, that this
6 argument is based on the beginning stage of the proceedings
7 here where all you're faced with is a complaint, and at this
8 point you must assume that the allegations in the complaint are
9 true, our clients disagree with those allegations but at this
05:39 10 point we're stuck with them.

11 The Court -- or those allegations are that Herbalife
12 and the individual defendants are co-conspirators and have
13 engaged in an enterprise or conducted concerted behavior. And
14 California courts, and the rules in this case contain a
05:40 15 California choice of law provision, so the courts or the
16 parties with respect to this motion have focused on California
17 law.

18 The California courts have explained that the
19 essential element of establishing the existence of agency is,
05:40 20 quote, the right of the alleged principals to control the
21 behavior of the alleged agent. And that's in the DeSuza versus
22 Andersack case, which is 63 Cal.App. 3d 694.

23 In the complaint, plaintiffs include allegations that
24 Herbalife exercises control over the individual defendants with
05:40 25 respect to the content, timing, and presentation of the events

1 that are the basis of their claims. And those allegations can
2 be found at paragraphs 118 through 120, 144 through 146, and
3 paragraph 351 of the complaint.

4 For example, paragraph 351 alleges that, quote,
05:41 5 defendant Herbalife controls the event calendar, slotting the
6 local STS events in around its own schedule of larger corporate
7 sponsored events. Herbalife dictates a standardized curriculum
8 for circle of success events, and controls the many trademarks
9 used in those approved presentations. Herbalife lays out a to-
05:41 10 the-minute STS agenda, which is followed rigidly in most areas.

11 Not only do plaintiffs allege that the individual
12 defendants are Herbalife agents which, again, the Court has to
13 assume is true at this point, but their theory of relief
14 against Herbalife depends on there being an agency relationship
05:41 15 between the defendants.

16 In order to violate the racketeering statute, each
17 defendant must commit two or more predicate acts of mail or
18 wire fraud, which the case law refers to as a pattern of
19 racketeering. Plaintiffs must plead the existence of predicate
05:42 20 acts with specificity under Rule 9(b). When the Court reviews
21 the complaint, you will notice that plaintiffs do not allege a
22 single e-mail, letter, or communication that was transmitted by
23 Herbalife or any of its employees or executives in furtherance
24 of the alleged fraudulent scheme. Thus, the only way that
05:42 25 plaintiff can plead that Herbalife engaged in a pattern of

1 racketeering activity is to have the individual defendant
2 statements or advertisements imputed to Herbalife, and the only
3 way they can do that is if the individual defendants are
4 Herbalife's agents.

05:42 5 Again, although Herbalife and the individual
6 defendants will strongly contest that theory of liability, and
7 the allegations of agency, throughout the entirety of this
8 case, it is sufficient for present purposes to allow the
9 individual defendants to enforce the arbitration provision.

05:43 10 Finally, with respect to equitable estoppel under
11 California law equitable estoppel applies where the complaint
12 alleges substantially interdependent and concerted misconduct
13 by the non-signatory and another signatory, and the allegations
14 of interdependent misconduct are founded in or intimately
05:43 15 connected with the obligations of the underlying agreement.
16 That standard is met here.

17 First, you need interdependent and concerted
18 misconduct. At paragraph 349 of the complaint, the plaintiffs
19 allege that, quote, defendants jointly conduct, manage and
05:43 20 control the affairs of the circle of success enterprise.

21 At paragraph 363 of the complaint, plaintiffs allege
22 that defendants have intentionally conspired and agreed to
23 directly and indirectly conduct and participate in the conduct
24 of the affairs of the circle of success enterprise through a
05:44 25 pattern of racketeering activity. Plaintiffs -- so that

1 satisfies the interdependent and concerted misconduct element.

2 Again, we dispute those allegations, but for purposes
3 of this motion, the Court must assume they're true.

4 Plaintiffs claims are also intimately connected to the
05:44 5 obligations of Herbalife distributor agreement, rules and
6 compensation plan. I don't think that plaintiffs' dispute that
7 there's a contractual relationship between Herbalife and its
8 distributors, including the named plaintiffs, or that the
9 contractual relationship is based on the agreement, rules and
05:44 10 compensation plan.

11 I also don't think that the plaintiffs dispute that
12 the amount of money that Herbalife is required to compensate
13 its distributors is governed by the agreement, the rules and
14 the compensation plan.

05:44 15 Plaintiffs' primary allegation is that the defendants
16 misrepresented plaintiffs' future earnings under the contract
17 if they were to attend events. In other words, defendants
18 up-sold the plaintiffs by promising future returns under the
19 contract. The Court will not be able to determine whether any
05:45 20 such misrepresentation occurred, and plaintiffs' claims cannot
21 succeed without a careful analysis of the provisions of the
22 contract, and whether event attendance can contribute to
23 additional payments under the contract.

24 The Court need look no further than the complaint to
05:45 25 confirm that plaintiffs' claims are intimately connected to the

1 contractual documents between them and Herbalife.

2 At pages 69 through 70 of the complaint, the named
3 plaintiffs have set forth what they believe the common issues
4 are appropriate or across the class for purposes of Rule 23.

05:45 5 On page 70, and this is at paragraph 333 of the
6 complaint, subsection 7, the plaintiffs indicate that one
7 common issue is, quote, whether defendants intentionally
8 withheld material information about the likelihood and ability
9 of plaintiffs obtaining the promised results and monetary
05:46 10 returns from pursuing the Herbalife business opportunity.

11 The only way you can figure out or determine what
12 those promised results were, and what monetary returns
13 plaintiffs might have been pursuing under the Herbalife
14 business opportunity, is by referring to the Herbalife
05:46 15 agreements, rules and compensation plan.

16 Similarly, at subsection 8, they say a common issue is
17 whether defendants failed to disclose that President Team
18 members built their downlines by using now banned methods. The
19 only way to determine what those banned methods are is by
05:47 20 referring to Herbalife's rules, agreements and compensation
21 plan.

22 Subsection 12 they saw common issues whether
23 distributors stacked their downlines with empty proxies to
24 facilitate their top down manipulation of the compensation
05:47 25 scheme. The only way for the Court to know what the

1 compensation scheme is, is by referring to the rules,
2 agreements and compensation plan.

3 Finally, at subsection 18, the named plaintiffs say
4 the common issue that will need to be determined in this case
05:47 5 is, quote, whether defendants' disclaimers were legally
6 insufficient given the net impression created by defendants'
7 activities and the explicit intentional disavowal by defendants
8 and/or proxies of the substance of those disclaimers. Those
9 disclaimers are contained within Herbalife's rules, agreements,
05:48 10 and compensation plan.

11 We also, in the alternative, have moved to transfer
12 venue to the Central District of California. I think the
13 parties flushed out those arguments in their briefs. And Mr.
14 Dooks hit on some of them this afternoon, so if Your Honor has
05:48 15 no questions, my clients respectfully request that you compel
16 the claims against them into arbitration or, alternatively,
17 that you transfer the claims against them to the Central
18 District of California. Thank you.

19 **THE COURT:** Let me hear from the plaintiffs.

05:48 20 **MR. MARK:** Thank you, Your Honor.

21 Your Honor, I have a small binder, it's small. I may
22 be referring to it throughout the hearing. Would it be all
23 right if I approach?

24 **THE COURT:** You may.

05:49 25 **MR. MARK:** Good afternoon, Your Honor. I just heard

1 counsel argue that the plaintiffs expressly agreed to arbitrate
2 this dispute by virtue of this 2016 version of the arbitration
3 provision. There is absolutely no evidence in this record that
4 any of the plaintiffs signed, saw, agreed to, checked the box,
05:49 5 assented to this 2016 arbitration provision. None.

6 The entirety of the defendants' case hinges on the
7 fact that Herbalife retained the right in its sole and absolute
8 discretion to amend the rules at any point in time by posting
9 those amendments to the website and then retroactively applying
05:50 10 those amendments to the various distributors. And that's
11 exactly what they claim they did.

12 In 2016, they posted this amendment to the rules that
13 contained this lengthy arbitration provision, and they are
14 contending today that that 2016 amendment that they posted to
05:50 15 the Herbalife website applies to all of the claims in this
16 case.

17 There is no evidence, Your Honor, that they ever
18 provided notice to the plaintiffs with respect to this
19 amendment, and there's no evidence, Your Honor, that the
05:50 20 plaintiffs ever received this notice.

21 Now, the preliminary inquiry here -- and this is their
22 burden -- the preliminary inquiry here, Your Honor, is have the
23 parties mutually agreed to arbitrate this dispute. No one
24 signed the August 2016 agreement that they are seeking to
05:51 25 impose. So in answer to one of your questions which was which

1 claims are covered by the arbitration agreement contained in
2 the distributor agreements, the answer to that is none because
3 the 2016 arbitration provision that they're seeking to impose
4 was not agreed to by any of the plaintiffs in this case.

05:51 5 Second, Your Honor, the arguments that you have heard
6 Herbalife counsel, Herbalife make is the opposite, the absolute
7 opposite of the argument they made in the Bostick case where
8 the same law firm, Your Honor, that's representing Herbalife
9 today, in federal court in California argued that they would
05:51 10 never seek to do something so devious, and that's their word,
11 not mine, Your Honor, as retroactively applied an arbitration
12 provision to a group of people that never signed it.

13 Third, Your Honor, the distributor agreements are
14 illusory. The reason they're illusory is because Herbalife
05:52 15 retains the right in those distributor agreements to amend them
16 unilaterally, and it does so without notice, and it does so
17 without what the Court's have called fairness, and both notice
18 and fairness are requirements in order to save this agreement
19 from being illusory, all of these distributor agreements, Your
05:52 20 Honor.

21 Fourth, Your Honor, the terms of use of the website
22 provide that they supercede any other agreement relating to
23 Herbalife's goods, services, or use of the website. This
24 website is the same website that Herbalife requires its
05:53 25 distributors to go to to stay up-to-date with the rules. And

1 it is the only policy of Herbalife that contains this
2 superseding language, of which I'm aware.

3 And Herbalife's senior director of member
4 administration, I believe is her title, testified in this case,
05:53 5 Your Honor, that those terms of use are incorporated into each
6 and every distributor agreement that is at issue before your
7 court today.

8 And finally, Your Honor, with respect to equitable
9 estoppel, you heard counsel refer to the complaint. This is
05:53 10 about, again, their burden. There's no basis for equitable
11 estoppel here because what equitable estoppel requires in this
12 case is reliance on the provisions of the distributor
13 agreements and the plaintiffs' claims are not bound up with
14 those distributor agreements.

05:54 15 So let's take a step back and remember the standard
16 here, Your Honor. The defendants need to establish that there
17 was an agreement to arbitrate by a preponderance of the
18 evidence, and the defendants have failed to establish that, in
19 fact, the November 2016 arbitration provision that no one
05:54 20 signed or agreed to applies to the plaintiffs' claims here.

21 Now, Your Honor, the question is not do the terms of
22 use conclusively apply. It's not whether the agreements are
23 definitively illusory. That does not need to be definitively
24 decided today, Your Honor. The question is with all reasonable
05:54 25 inferences in the plaintiffs' favor, Your Honor, have the

1 defendants shown, by a preponderance of the evidence again,
2 that an agreement to arbitrate was made.

3 So, let me drill down a little bit more, Your Honor.

4 The agreement to arbitrate the 2016 agreement, no one
05:55 5 acknowledged receipt of it. No one checked a box saying that
6 he or she received it. And Your Honor, if you turn to tab 1 of
7 the binder you'll see a little blue flag. This is the
8 deposition testimony of Roxanne Romans. This is the senior
9 director of member policy administration of Herbalife.

05:55 10 She testified that the plaintiffs when I asked her,
11 "Is it your understanding that the plaintiffs are bound by
12 these rules, regardless of whether or not they received
13 notification?" Her answer to that is, "Yes."

14 When I asked her whether any investigation was done as
05:55 15 to whether the distributors actually received any of these
16 notifications, Your Honor, the answer was, "I don't remember."
17 We are talking about the basic constitutional rights to a jury
18 trial, we are talking about the basic right to be in a
19 courtroom, and, of course, the class waiver, which is the real
05:56 20 basis, the real reason they're filing this motion.

21 Bostick and the Bostick contradiction. You've heard
22 counsel refer to the Bostick case. What Herbalife argued in
23 Bostick, Your Honor, about three years ago, this is textbook
24 judicial estoppel. This is textbook opportunistic flip-
05:56 25 flopping taking one position when it's convenient to take that

1 positions, two-and-a-half years ago, and taking the exact
2 opposite position in court today.

3 Bostick covers a class and damages going from April
4 2009 through December of 2014. That's the general class of
05:56 5 Bostick. When the Bostick settlement was entered into, Your
6 Honor, and I'll draw your attention to tab 3, and all of these
7 documents are on the record, Your Honor. The third page of tab
8 3 provides for the Bostick exclusion that counsel was referring
9 to, 1.13.2. "Also, excluded from the settlement class are all
05:57 10 Herbalife members or distributors who have agreed to be subject
11 to the arbitration provisions of the arbitration agreement."

12 That was contained in the member application revised
13 during or after September of 2013. So there's an exclusion, an
14 express exclusion in the -- out of the class of Bostick that
05:57 15 says we're not going to apply Bostick to anyone that agreed to
16 be bound -- I'm sorry, that agreed to be subject to arbitration
17 provisions.

18 So, Your Honor, at tab 4 you'll see a colloquy between
19 counsel for the objectors of Bostick and counsel for Herbalife.
05:58 20 And in that colloquy, counsel for the objectors pointed out
21 that a sort of bizarre idea: What happens if Herbalife at some
22 point in the future has the audacity to take the position that
23 the arbitration agreement applies retroactively to those
24 members, such as Patti Rodgers, one of the plaintiffs in this
05:58 25 case, that that arbitration agreement would apply retroactively

1 to her, even though she never agreed to arbitration, because
2 Herbalife has a unilateral right to amend their contracts and
3 impose those changes on anybody at any point in time.

4 If they sought to do that, then the theory would be
05:58 5 that the entire Bostick class would be extinguished. So the
6 objectors pointed that out. And at page 12, Your Honor, of tab
7 4, counsel for the objectors stated the way Herbalife functions
8 is that when they implemented it, meaning the arbitration
9 provision in September 2013, that it became part of the deal.
05:59 10 That was the concern raised by the objectors.

11 Counsel for Herbalife, his name is Judd Matz (ph.),
12 he's with the same firm that Herbalife is being represented by
13 today, the bottom of page 15 he states, and again, Your Honor,
14 I'm at tab 4, "It's not fair to characterize what we're doing
05:59 15 in this Court, in any court so publically and so openly as a
16 devious effort to manipulate the record. If we were to do what
17 he is speculating we were to do," meaning counsel for the
18 objectors, "and to bind all of the other people who are not
19 signatories, there would be such an avalanche of adverse
05:59 20 consequences, including from this Court, that I think there's
21 no basis whatsoever to accept his concerns on that front."

22 That was the statement made by counsel for Herbalife.
23 You don't have to worry about that, Judge. We would never do
24 something like that, and at tab 5, Your Honor, you'll see the
06:00 25 minutes from the Court where the Court states at the bottom of

1 tab 5, "To the extent the objectors contend that all current
2 Herbalife members and distributors are subject to the 2013
3 arbitration agreement via this clause, the Court disagrees.
4 The objectors have cited no authority for the proposition that
06:00 5 these members and distributors could be subject to an
6 arbitration provision contained within an agreement they
7 neither agreed to nor signed at the time they joined Herbalife
8 simply because the company retains the right to amend its rules
9 and policies, nor is it clear to the Court that a binding
06:00 10 contract, such as an arbitration agreement, could be included
11 within the definition of a corporate rule or policy, yet, here
12 we are, Your Honor, about three years later, and that's exactly
13 what Herbalife is trying to do.

14 And again, Judge, there are three elements to judicial
06:01 15 estopped. Clearly inconsistent with the prior position, yes.
16 Successful in asserting that position, yes. Deriving an unfair
17 advantage or seeking to derive an unfair advantage, yes, Your
18 Honor. The three criteria are met and judicial estoppel should
19 apply here, Your Honor.

06:01 20 I want to touch on Herbalife's ability to unilaterally
21 amend this contract in its sole and absolute discretion, which
22 is in every agreement. Tab 6, 7, 8, 9, 10 of the binder I've
23 handed you, those are the various agreements, and they each
24 contain a provision in sum or substance, and I'm looking at now
06:01 25 tab 6, which is Mr. Felix Valdez's application that says that

1 the document and such other rules and policies as Herbalife has
2 published, or in the future may publish, together with such
3 modifications and amendments as Herbalife shall make from time
4 to time in its sole and absolute discretion are hereby
06:02 5 incorporated into this agreement of distributorship in its most
6 recently published form. So what Herbalife does when these
7 people sign these applications is they say, "We are reserving
8 the right to amend this at any point in the future, and then
9 incorporate it into the agreement you signed, even though these
06:02 10 documents don't even exist at the time you're signing this
11 distributor application."

12 So this is, on its face, Judge, an illusory contract.
13 This is an illusory contract. The right to unilaterally amend
14 a contract renders it illusory, unless it is subject to two
06:02 15 things, Your Honor, notice and fairness, and in every case
16 where the unilateral right to amend was upheld, there was a
17 real actual notice provision.

18 In the Harris case, Your Honor, which is cited in
19 everybody's papers, the amendment required 30 days written
06:03 20 notice before it came into effect, and the modification had to
21 be signed and agreed to by both parties. In Peleg, Your Honor,
22 which is 204 Cal.App. 1425, and both Harris and Peleg are in
23 the binder I handed you, Your Honor, the Court found that the
24 contract was not illusory under California law where there was
06:03 25 a provision requiring 30 days written notice.

1 And these are their cases, Your Honor.

2 Now, Roxanne Romans, again, this senior member of
3 policy administration, she's admitted, she doesn't know whether
4 the plaintiffs ever even got the notice. And she has stated
06:04 5 that it doesn't matter whether they did or didn't. And, again,
6 Your Honor, there's no evidence. And I am not aware, Your
7 Honor, of any case that exists where the defendants moved to
8 compel arbitration and provide no evidence that the plaintiffs
9 ever even got notice of the amendment.

06:04 10 So we don't have notice, Your Honor. Notice and
11 fairness are required. There's neither.

12 Fairness. Fairness means you're not going to
13 retroactively apply a change to someone who never affirmatively
14 assented to it. That's exactly what Herbalife is doing.
06:04 15 They're taking the 2016 arbitration provision, which is
16 different from the 2015 arbitration provision, which is
17 different from the 2014 arbitration provision, which is
18 different from the 2013 arbitration provision. They're taking
19 the 2016 arbitration provision and they are seeking to apply it
06:05 20 to all of the conduct and all of the allegations in the
21 complaint, the allegations that occurred in 2014, the
22 allegations that occurred in 2015, the allegations that
23 occurred in 2013, et cetera, Judge. So that's exactly what
24 they're doing. They're retroactively applying it.

06:05 25 The terms of use, Your Honor, this really drives home

1 what a mess Herbalife has made of all of this. It's not -- you
2 don't need to decide whether it's the website terms of use that
3 apply, or whether it's this other provision that may apply,
4 whether it's the 2014 arbitration provision, or the 2008
06:06 5 arbitration provision that Mr. Valdez signed and which is, on
6 its own, substantively unconscionable. The two thousand and --
7 I'm sorry, the website terms of use were last revised in
8 February of 2017. The reasons the terms of use are so
9 important, Your Honor, the website terms of use, is because the
06:06 10 entire -- and I've been practicing this phrase, Your Honor --
11 sine qua non, okay, of the defendant's case is that the
12 plaintiffs are required to stay apprised of these amendments to
13 the rules by going onto the website. That's how they stay
14 apprised. Roxanne Romans testified that the only way the
06:06 15 members could even stay apprised of these rules is by going to
16 that website. The only way that these distributors could
17 conduct business is by going to that website. And the terms of
18 use which are found at tab 2, Your Honor will see they're last
19 revised February 2nd, 2017, and they provide that this
06:07 20 agreement sets forth the legal terms and conditions governing
21 your use of this website which, again, Your Honor, they say you
22 have to use to stay apprised of the rules, and your purchase or
23 use of any Herbalife goods, services, referred to as "the
24 offerings." That is what their own terms of use say, and those
06:07 25 terms of use also provide that they expressly supercede all

1 other prior arrangements, understanding, negotiations and
2 discussions.

3 The terms of use, of course, do not contain an
4 arbitration provision. They provide a clause that requires any
06:08 5 lawsuit to be brought in federal district court. Considering
6 the defendant's burden here, Your Honor, to demonstrate by a
7 preponderance of the evidence that there was an agreement to
8 arbitrate made, we don't believe that they have met that
9 burden.

06:08 10 With respect to equitable estoppel and agency, Your
11 Honor asked a very good question earlier relating to agency.
12 Herbalife's own documents, which are in the rules of conduct
13 that they've attached to their motion to compel arbitration,
14 expressly provide that distributors are not agents. In fact,
06:08 15 the language is significantly broader than that.

16 Rule 3.1.2 of the rules state that, "A distributor is
17 an independent contractor. Distributors conduct their
18 Herbalife businesses as self-employed, independent contractors.
19 A distributor is not an employee, agent, franchisee, securities
06:09 20 holder, joint venturer, fiduciary, or beneficiary of Herbalife
21 or any other distributor. As independent contractors," it
22 continues, "distributors do not have the rights or benefits
23 that employees or agents of Herbalife may have and will not
24 make any claim to the contrary."

06:09 25 So that's Herbalife's own document and that's found at

1 -- the Bates stamp is HLF 000682, that's in version, I believe,
2 33 of their rules of conduct. So we don't have an agency
3 relationship here.

4 And they've, of course, submitted no evidence to Your
06:10 5 Honor that there is an agency relationship, and they've not
6 argued in their papers that the basis for compelling that --
7 the individual defendants compel arbitration is by virtue of
8 this agency relationship. They've not made that argument.
9 They're trying to hinge their argument on equitable estoppel.

06:10 10 The goal of the KPMG case, which I included in tab 15
11 of the binder, Your Honor, 173 Cal.App. 4209 recites directly
12 on point. The question for the Court is, with respect to these
13 individual defendants, are the claims asserted by the
14 plaintiffs against the non-signatories the 43, 46 individual
06:11 15 defendants, quote, bound up with the contractual obligations of
16 the agreement?

17 The argument that the individual defendants make is
18 exactly the same that the defendant made in the KPMG case, that
19 it's only logical they would have to rely on the distributor
06:11 20 agreement to seek to impose liability on the individual
21 defendants because that formed the predicate of the
22 relationship.

23 The Court expressly rejected that concept, Your Honor,
24 and reiterated that the plaintiffs' allegations must, quote,
06:11 25 rely on the agreement, not simply the fact that the agreement

1 exists, and with respect to it being inextricably intertwined,
2 again, we can look to the KPMG case for guidance.

3 In that case, the defendants argue that there was a
4 tax shelter scheme that could only be accomplished via these
06:11 5 operating agreements that contained an arbitration provision,
6 and the Court still rejected that argument because the
7 complaint was not relying on the relevant agreement. The
8 complaint is not attached to -- I'm sorry, the distributorship
9 agreement is not attached to the complaint, it's not referred
06:12 10 to in the complaint. There is no provision. There was no
11 right. There was no obligation within that distributorship
12 agreement that the plaintiffs are seeking to impose on the
13 individual defendants.

14 So, Your Honor, it's our position that the defendants
06:12 15 have failed to meet their burden. The motion to compel
16 arbitration should be denied.

17 And briefly, Your Honor, on the issue of transfer.
18 The motion to transfer is only really founded on claims brought
19 by four out of seven -- I'm sorry, four out of eight of the
06:12 20 plaintiffs against three out of 47 of the defendants.

21 Of course, the predicate to the forum selection
22 analysis is whether there's a valid forum selection clause in
23 the first instance. I defer that we believe the contract is
24 illusory, is entirely illusory, so we don't think that that
06:13 25 exists.

1 The forum selection clause that they rely on provides
2 for -- it doesn't say any lawsuit arising out of or relating
3 to. It says any claim, doesn't define claim, but there's a
4 capital C so it implies there's definition. There is no
06:13 5 definition in the documents. Any claim should be brought in
6 the Federal District Court in California.

7 Now, the Atlantic Marine case that the defendants rely
8 on, that case provides that where you have a valid forum
9 selection clause, that the parties -- that the Court should
06:13 10 disregard the private interest factors, that is that the
11 plaintiffs' choice of forum and all those other private
12 interest factor and accept that the forum selection clause is
13 going to govern at least with respect to those private interest
14 factors.

06:14 15 That doesn't apply in the case where you have some
16 parties that agreed to a forum, an outside forum, and some
17 parties that did not agree to an outside forum.

18 Here, Your Honor, we do have to consider the private
19 interest factors. We have four plaintiffs that reside in
06:14 20 Florida, more than any other state. We have 20 defendants that
21 reside in Florida, far more than any other state. The
22 complaint is peppered with allegations relating to all of the
23 conduct that occurred in Florida. There are 37 different event
24 flyers that are alleged in the complaint and that are attached
06:14 25 to the complaint. And we're talking about things such as the

1 convenience of the parties. All of that inures to Florida
2 being the appropriate forum.

3 And of course, Judge, the vast majority of the parties
4 in this action never, never agreed to bring this case in
06:15 5 California. There are four out of, again, 50-something parties
6 that did.

7 So, Your Honor, we believe, again, their burden, they
8 have failed to meet their burden. And that the motion to
9 transfer should be denied as well.

06:15 10 If Your Honor wishes me to deal with Bostick, I'm
11 happy to.

12 **THE COURT:** I think I have enough information to rule
13 on the matters before me, Counsel.

14 **MR. MARK:** Thank you very much, Your Honor.

06:15 15 **THE COURT:** All right. I have two docket entries,
16 docket entry 62 and docket entry number 63.

17 Now, there are certain plaintiffs that have signed the
18 distribution agreement that had a valid arbitration provision,
19 and that provision is limited by the implied covenant of good
06:16 20 faith and dealing. I know there's this argument that there
21 ought to be an illusory contract, I don't find that argument
22 convincing.

23 Defendants' motion to compel arbitration is granted as
24 to claims against Herbalife made by plaintiffs Jean Lavigne,
06:16 25 Michael Lavigne, Cody Pyle and Felix Valdez. The motion to

1 compel arbitration is denied in all other respects and to any
2 other plaintiffs because certain plaintiffs signed a
3 distributor agreement with a valid forum selection clause and
4 given the balance of the factors that I need to determine in
06:16 5 their favor. The defendants' motion to transfer venue is
6 granted as to the claims involving Jen Ribalta, Patricia
7 Rodgers, Jeff Rodgers and Izaar Valdez.

8 The motion to transfer venue is denied in all other
9 respects. And the claims against the individual defendants
06:17 10 remain.

11 A written order will issue. Thank you very much,
12 Counsel.

13 **MR. MARK:** Thank you, Your Honor.

14

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16 (Thereupon, the above hearing was concluded.)

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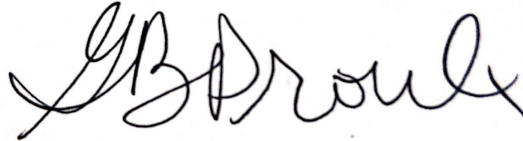
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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.



08/24/2018
DATE COMPLETED

GIZELLA BAAN-PROULX, RPR, FCRR