

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-23429-Civ-COOKE/GOODMAN

MICHAEL LAVIGNE, JENNIFER LAVIGNE,
CODY PYLE, JENNIFER RIBALTA, JEFF
RODGERS, PATRICIA RODGERS, et al.,

Plaintiffs,

vs.

HERBALIFE, LTD., HERBALIFE
INTERNATIONAL, INC., et al.,

Defendants.

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JOINT SCHEDULING REPORT

Plaintiffs, JEFF RODGERS, PATRICIA RODGERS, MICHAEL LAVIGNE, JENNIFER LAVIGNE, CODY PYLE, JENNIFER RIBALTA, IZAAR VALDEZ, and FELIX VALDEZ (collectively, “**Plaintiffs**”), and Defendants, HERBALIFE, LTD., HERBALIFE INTERNATIONAL, INC., HERBALIFE INTERNATIONAL OF AMERICA, INC. (collectively, the “**Herbalife Defendants**”), MARK ADDY, JILLIAN ADDY, DENNIS DOWDELL, GARRAIN S. JONES, CODY MORROW, CHRISTOPHER REESE, GABRIEL SANDOVAL, EMMA SANDOVAL, JOHN TARTOL, LESLIE R. STANFORD, FERNANDO RANCEL, LORI BAKER, MANUEL COSTA, MARK DAVIS, JENNY DAVIS, DANIELLE EDWARDS, GRAEME EDWARDS, THOMAS P. GIOIOSA, SANDRA GIOIOSA, ALCIDES MEJIA, MIRIAM MEJIA, PAULINA RIVEROS, RON ROSENAU, CAROL ROSENAU, AMBER WICK, JASON WICK, JORGE DE LA CONCEPCION, DISNEY DE LA CONCEPCION, JENNIFER MICHELI, GUILLERMO RASCH, CLAUDIA RASCH, SAMUEL

HENDRICKS, AMY HENDRICKS, BRADLEY HARRIS, PAYMI ROMERO, RYAN BAKER, KRISTOPHER BICKERSTAFF, MARK MATIKA, ENRIQUE CARILLO, DANIEL J. WALDRON, SUSAN PETERSON, MICHAEL KATZ, and DEBI KATZ¹ (the “**Individual Defendants**” and collectively with the Herbalife Defendants, “**Defendants**”) (and collectively with Plaintiffs, the “**Parties**”), through their undersigned counsel and pursuant to Federal Rule of Civil Procedure 26(f), Local Rule 16.1, and this Court’s October 23, 2017 Order (D.E. 32), hereby file the following Joint Scheduling Report:²

¹ Counsel for the Individual Defendants accepted service for Mr. Arquimedes Valencia on October 12, 2017. On November 14, 2017, counsel for the Individual Defendants informed Plaintiffs’ counsel that it was revoking that acceptance of service because, despite repeated and diligent efforts to contact Mr. Valencia, he has been totally unresponsive. On November 17, 2017, counsel for the Individual Defendants entered notices of appearance for all of the individual defendants except Mr. Valencia. Given the lack of communication with him, as well as the fact that Mr. Valencia has never engaged counsel for the Individual Defendants to represent him in this lawsuit, counsel for the Individual Defendants contend that they cannot appear, and have not appeared, on his behalf in this matter. Counsel for the Individual Defendants further contend that (a) Plaintiffs have never properly served Mr. Valencia; and (b) Mr. Valencia is currently unrepresented in this matter (he did not participate in the preparation of this Joint Scheduling Report). Counsel for the Individual Defendants will be providing to Plaintiffs’ counsel, by separate letter, a more detailed explanation for why they had a good faith belief that they were authorized to accept service for Mr. Valencia in the first instance. Plaintiffs’ counsel has requested additional information concerning Mr. Valencia and his representation in this matter. Upon receiving that information, Plaintiffs’ counsel will inform the Individual Defendants’ counsel of their position. Counsel will continue to discuss the issue.

² Defendants intend to file Motions seeking to compel arbitration, to transfer venue of this action to the Central District of California, and to dismiss this action under Fed. R. Civ. P. 12(b)(6). Moreover, Defendants intend to move to stay discovery and the deadline to file initial disclosures, and object to the conducting of discovery and the making of initial disclosures until the Court has ruled on their preliminary motions. Plaintiffs do not agree that a stay of discovery or a postponement of the deadline to serve initial disclosures is appropriate.

I. DISCOVERY MATTERS REQUIRED BY LOCAL RULE 16.1(b)(2) AND RULE 26(f)(3)

The Parties have agreed to the following pursuant to Local Rule 16.1(b)(2) as required by the Court's Order:

(A) Likelihood of settlement:

The Parties will explore possibilities for settlement and intend to enter good faith settlement discussions after initial motions have been heard and once they have had an opportunity to conduct discovery. The Parties are amenable to mediation at the appropriate time.

(B) Likelihood of appearance of additional parties:

The Parties have not yet conducted discovery. The Parties reserve the right to seek leave to amend their pleadings to name additional parties in the event discovery reveals such a need.

Should the Court enter an order staying discovery or the deadline to serve initial disclosures, Plaintiffs will seek a modification of the deadlines agreed to herein. Defendants' participation in this Joint Scheduling Report and their agreement to any deadlines set forth in Attachment A is expressly subject to and without waiving Defendants' positions that: (i) this case is subject to binding arbitration, (ii) this Court lacks jurisdiction, (iii) this is an improper venue for this action, (iv) Plaintiffs' claims are subject to a prior class action release, (v) Plaintiffs have failed to state claims upon which relief may be granted and (vi) the conducting of any discovery or the making of initial disclosures should not occur until after the Court has ruled on these motions. Rulings on the aforementioned motions could limit or eliminate certain of the Parties and/or the causes of action being asserted. Because the scope of this action may change as a result of the aforementioned motions, the Parties may hereafter seek leave to modify this Joint Scheduling Report and the Schedule set forth in Attachment A.

(C) Proposed limits on time:

The Parties agree that this case should be set on a Complex Track in accordance with Local Rule 16.1(a)(2)(C). The Parties agree to the dates set forth in *Attachment A* hereto.

(D) Proposals for Formulation and Simplification of Issues, including the elimination of frivolous claims or defenses, and the number and timing of motions for summary judgment or partial summary judgment:

The Parties are unable to stipulate to any proposed simplification of issues at this time. The Defendants anticipate filing motions to compel arbitration, to transfer the case to the Central District of California, and to dismiss the claims on other grounds, including (without limitation) that the Plaintiffs released their claims against Defendants in a judgment entered in a prior class action and that the Complaint fails to state a cause of action upon which relief may be granted. Plaintiffs will oppose these motions. The Parties do anticipate stipulating to the authenticity of documents and undisputed facts to the extent possible, and expect to file motions for summary judgment to eliminate or narrow the claims and defenses to be presented at trial. The deadline for filing summary judgment motions is specified in Section I(C) of this Report. The quantity of summary judgment motions has not yet been determined.

(E) Necessity of Amendments to Pleadings:

The amendment of the pleadings may become necessary as discovery progresses. The Parties therefore reserve the right to request amendment of the pleadings as necessary in accordance with information produced in discovery.

(F) Possibility of Obtaining Admissions of Fact and of Documents, Electronically Stored Information or Things, Stipulations Regarding Authenticity of Documents, and the Need for Advance Ruling from the Court on Admissibility of Evidence:

The Parties will attempt, in good faith, to obtain admissions of fact, make appropriate stipulations, and exchange documents to avoid unnecessary proof in this action. The Parties will work to agree on authentication of relevant documents. At this time, there is no need for any advance rulings with respect to admissibility of evidence.

(G) Suggestions for avoidance of unnecessary proof and cumulative evidence:

The Parties will attempt to obtain admissions of fact and documents, stipulations regarding the authenticity of documents, and advance rulings from the Court on the admissibility of evidence in order to avoid unnecessary proof and cumulative evidence at trial. In addition, the Parties will meet prior to trial to pre-admit evidence in a uniform manner.

(H) Suggestions on the advisability of referring matters to a magistrate judge or master:

The Parties consent to the referral to Magistrate Judge Goodman of discovery issues, as well as motions for costs, attorney's fees and sanctions. *See Attachment B* hereto.

(I) A preliminary estimate of the time requested for trial:

The Parties agree that trial in this matter would last approximately 3 to 4 weeks (15 to 20 full trial days). Plaintiffs have demanded a jury trial.

(J) Requested date or dates for conferences before trial, a final pretrial conference, and trial:

The Parties propose the following dates in accordance with the requested Complex Track designation:

Pretrial Conference: **August 2, 2019**
Calendar Call: **August 23, 2019**
Trial: **September 9, 2019**

(K) Any other information that might be helpful to the Court in setting the case for status or pretrial conference.

None at this time.

II. ADDITIONAL DISCOVERY AND TRIAL MATTERS

a. The preservation of discoverable information.

The Parties will preserve all relevant discoverable information within the scope of Federal Rule of Civil Procedure 26 that is in their respective possession, custody or control, until the conclusion of this case, or until otherwise stipulated by counsel and approved by the court.

b. Disclosure or discovery of electronically stored information, including the form or forms in which it will be produced.

The Parties are currently uncertain as to the nature and extent of ESI disclosure that is relevant to any Party's claims or defenses and proportional to the needs of the case. Plaintiffs wish to immediately meet and confer on an ESI Protocol or Protective Order. Defendants wish to meet and confer on an ESI Protocol or Protective Order within 30 days from a ruling on Defendants' anticipated motions to stay discovery and initial disclosures, to compel arbitration, transfer venue, and dismiss. The Parties agree to work together and cooperate with each other to produce electronically stored

information in its native format, to the extent that it is reasonable and feasible for the producing Party to produce the information in such format.

c. Prospective claims of privilege or work product protection and the propriety of a confidentiality order

1. *Claims of Privilege.*

As this case is still in its early stages, and the extent of documents that will be responsive to any discovery requests is still unknown, the Parties are uncertain at this time as to the extent of any privilege that will be claimed, including the attorney-client privilege, work-product privilege, trade secrets, or other applicable privilege recognized by Florida or Federal law. The Parties agree, however, that such privilege will be fully available to Plaintiffs and Defendants, and nothing in this Joint Scheduling Report shall be construed as a waiver of any such privilege.

2. *Inadvertent Disclosure.*

Pursuant to the Federal Rules of Civil Procedure 26(b)(5) and the Federal Rule of Evidence 502, the Parties agree that if information is produced in discovery in this matter that is subject to a claim of privilege or protection as trial preparation material, the Party making the claim may notify any Party that received the information of the claim and basis for it within ten (10) days of having discovered that such information was produced. After being notified of the claim, a Party receiving such information must promptly return, sequester or destroy the classified information and any copies and may not use or disclose the information until the claim of privilege is resolved. If the receiving Party disclosed the information before being notified, it must take reasonable steps to retrieve it. If the receiving Party disputes the claim or believes that

protection has been waived, it may present the information to the court under seal within ten days of receiving the notice for a determination of the claim. The parties are obligated to preserve all relevant evidence in their possession, custody or control, including, without limitation, privileged materials.

3. *Confidentiality Agreement.*

The Parties agree to enter into a written Confidentiality Agreement acceptable to all Parties that will govern the production of confidential materials. The Parties agree that the Confidentiality Agreement must be submitted to and ratified by the Court in an order.

d. Expert disclosures and testimony at trial.

The Parties agree that their expert disclosures must be accompanied by a report prepared by each expert containing all opinions on which the expert intends to testify at trial. The Parties agree that expert witness testimony on direct examination and re-direct examination at the trial will be limited to the opinions, basis, reasons, data, and other information disclosed in the written expert witness reports. Failure to disclose such information may result in the exclusion of all or part of the testimony of the expert witness. Any expert witness not included in the Plaintiff's Expert Witness Disclosure or the Defendant's Expert Witness Disclosure will not be allowed to testify without an order of the Court.

e. Service of documents.

Pursuant to Rule 5(b) of the Federal Rules of Civil Procedure, the Parties hereby agree and consent to receive service by electronic mail of any and all documents, disclosure, filings, or other papers that are required to be served between counsel, provided,

however, that for such service to be effective, it must be served on all email addresses registered for this case with the CM/ECF system, including, but not limited to, the following email addresses:

For service on Plaintiffs or any of them:

etan@markmigdal.com
don@markmigdal.com
lara@markmigdal.com
mish@markmigdal.com
eservice@markmigdal.com
jason@jonesatlaw.com

For service on the Herbalife Defendants:

ssilverman@klugerkaplan.com
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mdrooks@birdmarella.com
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For service on the Individual Defendants:

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Kevin.Quigley@quarles.com
Brian.Howie@quarles.com
Michael.Catlett@quarles.com
Douglas.Knox@quarles.com
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CONSENT OF COUNSEL

Pursuant to Rule 3J(3) of the Administrative Procedures of the United States District Court for the Southern District of Florida, the undersigned counsel represents to the Court that opposing counsel has authorized his electronic signature to be affixed to this Joint Scheduling Report.

/s/ Etan Mark, Esq.

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Attorney for Individual Defendants

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on the 1st day of December 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Etan Mark, Esq.