UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Civil Action No.: 17-cv-23429-MGC

JEFF RODGERS, PATRICIA RODGERS, MICHAEL LAVIGNE, JENNIFER LAVIGNE, CODY PYLE, JENNIFER RIBALTA, IZAAR VALDEZ, FELIX VALDEZ, individually and on behalf of all others similarly situated.

Plaintiffs,

v.

HERBALIFE, LTD., et al.,

Defendants.

_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO STAY AND FOR PROTECTIVE ORDER

Plaintiffs, JEFF RODGERS, PATRICIA RODGERS, MICHAEL LAVIGNE, JENNIFER LAVIGNE, CODY PYLE, JENNIFER RIBALTA, IZAAR VALDEZ, FELIX VALDEZ, individually and on behalf of all others similarly situated, by and through undersigned counsel, pursuant to the Federal Rules of Civil Procedure, file this Response in Opposition to Defendants' Joint Motion to Stay Discovery, Pretrial Disclosures, and Other Deadlines, and for Protective Order, Pending Ruling on Defendants' Joint Motion to Compel Arbitration and Their Alternative Motions to Transfer Venue and to Dismiss (with Incorporated Memorandum of Law) [D.E. 65], and in support of their Response state:

INTRODUCTION

Defendants' request for a stay of all discovery "and all other deadlines" in this case should be denied. None of the matters raised in Defendants' motions are case dispositive, and absent such a showing, a stay is rarely granted.

The Motion to Compel should be completely denied on several grounds, all of which will be raised in Plaintiffs' Response to that motion after discovery on the issue of arbitrability has been completed. In any event, Defendants have admitted in a prior proceeding that the

arbitration clause does not apply to at least four of the Plaintiffs, so there is no viable contention that the Motion to Compel is "case dispositive."

Defendants also fail to show that discovery should be stayed pending their Motion to Dismiss the complaint or Motion to Transfer venue. The Motion to Transfer is not case dispositive. Apart from the fact that Plaintiffs will be opposing that motion on its merits, Defendants concede that their argument concerning the release of claims pursuant to the *Bostick* matter applies only to certain Plaintiffs. The Motion to Dismiss will also be opposed on the merits, and is not case dispositive because even if granted, Plaintiffs should have an opportunity to amend their Complaint.

It is also premature to seek a stay pending the Motion to Dismiss and Motion to Transfer because they were purportedly filed in the alternative to the Motion to Compel Arbitration without waiving any right to arbitrate. Yet Defendants ask the Court to consider the merits of dismissal and transfer in connection with this stay request. Defendants cannot have it both ways. They cannot simultaneously invoke the merits of their motions, requiring the Court and the Plaintiffs to address those issues prior to resolving the question of arbitration, and at the same time claim that this dispute is arbitrable. Such litigation on the merits runs directly contrary to Defendants' request to arbitrate.

The parties, moreover, have agreed to an extended briefing schedule, which means that the stay Defendants seek is not simply a matter of 30, or even 60 days. The stay would span a significant time period while Defendants' pending motions are briefed and resolved. Defendants have not demonstrated a need for such a sweeping stay order, particularly considering that the only discovery currently pending is narrowly tailored to the question of arbitrability. Defendants have not provided grounds for a protective order regarding those limited discovery requests, as they fail to defend their objections to the discovery or address any specific request made.

For all these reasons and those stated herein, the Motion to Stay and for Protective Order should be denied.

BACKGROUND

On September 18, 2017, Plaintiffs filed a Class Action Complaint against the Defendants [D.E. 1] asserting claims for violations of RICO, deceptive and unfair trade practices, unjust enrichment, and negligent misrepresentation in connection with Defendants'

deceptive event system scheme designed to lure Plaintiffs, and others similarly situated, under false pretenses for Defendants' sole financial benefit.

On November 14, 2017, Plaintiffs served their First Request for Production of Documents on the corporate Defendants, and separately, their First Request for Production on the individual Defendants. *See* Def. Mot. to Transfer Exhibits "A" and "B". The request on the corporate Defendants consisted of nine requests tailored to the question of arbitrability, and the request on the individual Defendants consisted of a single request relating to arbitrability.

In lieu of responding to any discovery, on December 14, 2017, Defendants filed the instant Motion to Stay and for Protective Order [D.E. 65], along with their Joint Motion to Compel Arbitration [D.E. 62] and Joint Motion to Transfer Venue [D.E. 63]. The Motions to Compel and to Transfer Venue each attach declarations in support of the motions. The Court has not yet entered a scheduling order, however, the parties have agreed that Plaintiffs' responses to the Motions to Compel and to Transfer will be due on February 12, 2018. Plaintiffs have filed an unopposed Motion for Extension of Time in connection with those agreed deadlines.

On December 22, 2017, Defendants produced some documents in response to the discovery requests, but also asserted numerous objections to Plaintiffs' narrow requests and indicated that responsive documents were being withheld. *See* **Exhibit A** hereto. Also on December 22, Defendants filed Motions to Dismiss Plaintiffs' Complaint for failure to state a claim. [D.E. 68, 70]. Pursuant to the agreed Motion for Extension of Time, Plaintiffs' Responses to the Motions to Dismiss will be due on February 20, 2018.

MEMORANDUM OF LAW

a. Defendants have not shown they are entitled to a stay of fact discovery pending a ruling on their Motion to Compel Arbitration.

1. The pending Motion to Compel Arbitration lacks merit.

Plaintiffs contend, and will set forth as grounds in their opposition to the Motion to Compel, that the contracts Defendants rely upon to compel arbitration do not govern this dispute and their claims are therefore not subject to arbitration. Contrary to their arguments in the Motion to Compel, Defendants have previously admitted that the claims of four of the eight named Plaintiffs are not arbitrable. Specifically, Defendants argued in a prior proceeding

in California that the arbitration agreement does not apply to members who joined Herbalife or signed the agreement prior to September 2013:

> Herbalife does not take, and has never taken, the position that the arbitration agreement applies to members who joined before Herbalife introduced the arbitration agreement in September 2013. The arbitration agreement, and the related provision in the Second Amendment to the Stipulation of Settlement, do not affect preexisting members who simply remained members after September.

See Defendants' Reply Memorandum of Points and Authorities in Support of Joinder in Motion for Final Approval of Class Action Settlement, attached as **Exhibit B**. Four of the named Plaintiffs joined prior to September 2013, and two other Plaintiffs, Mr. Rodgers and Mr. LaVigne, did not sign any agreement. Accordingly, none of these Plaintiffs is subject to arbitration by Defendants' own admission.[1]

Second, although Plaintiffs are in the midst of preparing their responses, to the extent any of the Plaintiffs are alleged to have agreed to arbitration, the agreement fails for lack of mutuality, unconscionability, and ambiguities within the various contracts that purportedly apply to the Plaintiffs. As discussed in more detail below, Plaintiffs are entitled to discovery on the issue of arbitrability and are in the process of seeking discovery with respect to these defenses.

Third, as will be explained in Plaintiffs' responses, Plaintiffs' claims are unrelated to the distributor agreements containing the arbitration provisions Defendants seek to enforce. The class of Plaintiffs defined in the complaint, and the claims asserted therein, are not limited to persons who signed distributorship agreements or acted as Herbalife distributors. Plaintiffs' claims do not arise from or relate to the distributor relationship, nor do Plaintiffs assert claims for breach of any distributorship contracts. The claims do not concern the purchase and distribution of Herbalife products. This case involves Defendants' separate fraudulent event system scheme through which they coerced and manipulated the Plaintiffs, and a multitude of others similarly situated, into paying for and attending Herbalife events on the false promise that the events would bring them financial success. Defendants did this for their own financial

[1] Plaintiffs have requested that Defendants withdraw the Motion to Compel arbitration against those Plaintiffs on these grounds, but have not yet been provided a response.

gain, reaping profits at the expense of the Plaintiffs, all the while knowing that the events would not bring Plaintiffs the promised success.

Accordingly, because the Motion to Compel Arbitration lacks merit, a stay of all discovery pending the Court's resolution of that Motion is not warranted based on an agreement that ultimately does not govern this controversy.[2]

2. At minimum, Plaintiffs are entitled to discovery on the issue of arbitrability.

Regardless of the "merits" of Defendants' claims, Plaintiffs are still entitled to discovery on the question of arbitrability. A party is generally entitled to limited discovery on the question of arbitrability pending a Motion to Compel Arbitration. *See*, *e.g.*, *Miller v. Parkwood Nursing & Rehabilitation Center, Inc.*, No. 1:09-CV-1497-RLV, 2009 WL 10669942 (N.D. Ga. Sept. 22, 2009) (plaintiffs raised the issue of capacity to sign the arbitration agreement and thus were allowed to conduct limited discovery on the issue of agency and authority to sign the arbitration agreement); *Morat v. Cingular Wireless LLC*, No. 3:07-CV-1057-J-20JRK, 2008 WL 11336388, at *2 (M.D. Fla. Feb. 14, 2008) (plaintiffs entitled to limited discovery on the question of enforceability); *Sundial Partners, Inc. v. Atl. St. Capital Mgmt. LLC*, No. 8:15-CV-861-T-23JSS, 2015 WL 6157105, at *2 (M.D. Fla. Oct. 19, 2015) (plaintiffs entitled to depose witnesses expected to testify at evidentiary hearing on arbitrability).

Plaintiffs served limited discovery tailored to that purpose, and although Defendants have produced some responsive documents, they also have indicated that they are withholding responsive documents they deem "irrelevant" to arbitrability, and have interposed numerous objections to the limited requests. *See* Ex. A. A stay of discovery on the question of arbitrability while that very issue is pending before the Court, and while Defendants have not fully responded to Plaintiffs' initial discovery requests concerning the arbitration issue, is not justified.

3. The delegation provision in the arbitration clause of the distributorship agreement does not support a stay.

The question of arbitrability is decided by the court absent clear and unmistakable language to the contrary. *Bibb Cty. Sch. Dist. v. Dallemand*, No. 5:16-CV-549 (MTT), 2017 WL

[2] With respect to the individual Defendants, the arguments in support of arbitration are even more attenuated, as none of the individual Defendants are parties to the subject arbitration agreements. Defendants' argument in support of arbitrating those claims is based largely upon an equitable estoppel theory.

4126996, at *3 (M.D. Ga. Sept. 18, 2017) (contract did not clearly and unmistakably delegate question of arbitrability to arbitrator). Although Defendants acknowledge that discovery concerning the issue of arbitrability is permissible, they claim that it should not be allowed in this case because "all issues" have been delegated to an arbitrator pursuant to the arbitration clause in the distributorship agreement.

However, the delegation provision within the arbitration clause only applies to the extent the arbitration clause does. Thus, it fails for the same reasons summarized above and which will be further articulated in Plaintiffs' opposition to the Motion to Compel. Moreover, although the cited distributorship contract – which again, does not apply to this controversy – purports to delegate the question of arbitrability to the arbitrator (i.e. which claims does the arbitrator have jurisdiction to decide), it does not, and in certain regards cannot, contain a clear and unequivocal delegation of the question of this Court's jurisdiction. *See Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771 (2012) (contract language did not evince "a clear and unmistakable intent to submit to an arbitrator a claim that the arbitration provision itself was unconscionable"); *Miller*, 2009 WL 10669942, at *3 (limited discovery on arbitrability was warranted where threshold issue regarding whether a party had the ability or authority to sign the arbitration agreements in question would ultimately decide whether the court had subject matter jurisdiction over the suit); *Caputo-Conyers v. Berkshire Realty Holdings, LP,* No. 6:05CV341ORL31KRS, 2005 WL 1862697, at *5 n.15 (M.D. Fla. Aug. 2, 2005) (parties cannot confer or waive subject matter jurisdiction by contract); *JMP Sec. LLP v. Altair Nanotechnologies Inc.*, No. 11-4498 SC, 2012 WL 892157, at *4 n.1 (N.D. Cal. Mar. 14, 2012) (parties cannot contract around federal conflict-of-law rules insofar as that choice is jurisdictional in nature). Accordingly, Plaintiffs are, at minimum, entitled to limited discovery on those issues concerning whether any arbitration clause applies to any Plaintiff, even if the Court were to ultimately rule that the question of which claims are arbitrable under the agreement is for the arbitrator. In any event, certainly those Plaintiffs which Defendants have admitted are not subject to arbitration should not be subject to a stay of discovery pending the Motion to Compel.

4. Defendants seek a protective order without challenging a single discovery request or defending a single objection to the pending limited discovery.

Defendants conflate their request for a stay of all discovery based on pending motions with their request for a stay or protective order as to the limited discovery on arbitrability that is already pending.[3] They do not reference the specific requests or their objections to those requests. Before a protective order may issue, "the movant must show good cause why justice requires an order to protect a party or person from 'annoyance, embarrassment, oppression, or undue burden or expense.'" *Trinos v. Quality Staffing Servs. Corp.*, 250 F.R.D. 696, 698–99 (S.D. Fla. 2008) (citing Fed. R. Civ. P. 26(c) (2008)). The movant has the burden of showing the injury ***with specificity***. *Id*. (citing *Pearson v. Miller,* 211 F.3d 57, 72 (3d Cir. 2000)). Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Id*. (citations omitted) (requiring "a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements"). The alleged harm must be significant, and courts should only limit discovery based on evidence of the burden involved rather than mere statements that it is burdensome. *Id*. (citations omitted).

Defendants fail to show why the pending limited discovery is so burdensome, harassing, annoying, oppressive, or expensive that a protective order is warranted as a departure from the general discovery rules. Plaintiffs served nine narrow requests for production on the corporate Defendants, all related to the question of arbitrability, and a single document request on the individual Defendants. Defendants' only argument relating to a protective order for those requests is their unsupported statement that Plaintiffs "will not be prejudiced" because in Defendants' estimation, Plaintiffs have everything they need and "do not require discovery related to the issue of arbitrability." *See* Def. Mot. to Stay at 7. Defendants therefore fail to satisfy their burden of showing good cause for entry of a protective order because they do not set forth evidence or articulate reasoning in support of their request.

b. Defendants have not shown they are entitled to a stay of discovery or protective order pending a ruling on their Motion to Transfer and Motion to Dismiss.

Defendants argue that a stay pending their Motion to Transfer and Motion to Dismiss is appropriate because the motions will likely dispose of the entire case. *See* Def. Mot. to Stay

[3] In filing a Motion for Protective Order with this Motion to Stay, Defendants have violated this Court's Order Referring Case to Magistrate Judge [D.E. 31] and Magistrate Judge Goodman's Discovery Procedures Order attached thereto.

at 4-5, 8. In support, Defendants' cite cases granting a stay of merits discovery pending resolution of a meritorious, case-dispositive motion to dismiss in the face of exceptional harm shown should the merits discovery not be stayed. *See id*. (citing, e.g., *United States v. Med-Care Diabetic & Med. Supplies, Inc.*, 10-81634-CIV, 2014 WL 12284078, at *1 (S.D. Fla. June 17, 2014); *Dayem v. Chavez*, 2014 WL 12588513, *1 (S.D. Fla. 2014)). Those same cases emphasize, and Defendants acknowledge, that "[a] request to stay discovery pending a resolution of a motion is rarely appropriate unless resolution of the motion will dispose of the entire case." *See* Def. Mot. to Stay at 4 (citing *Dayem, 2014 WL 12588513 at *1*, quoting *McCabe v. Foley*, 233 F.R.D. 683, 685 (M.D. Fla. 2006)).

Here, neither the Motion to Dismiss nor the Motion to Transfer is case dispositive. Even if the *Bostick* release does apply, such release applies only to certain Plaintiffs by Defendants' own admission. *See* Herbalife's Motion to Dismiss [D.E. 70] at 3-9 (arguing that the *Bostick* release only applies to four of the eight named Plaintiffs).

With respect to the remaining arguments for dismissal, even assuming the motion were granted, it would not dispose of the case because the Plaintiffs should be permitted to amend their Complaint.[4]

Finally, it is also contrary to the concept of arbitration, and to Defendants' statement that the transfer and dismissal motions were to be dealt with after the arbitration issue, to request that the Court and the parties now consider the merits of the two pending motions in connection with the stay request.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' Motion to Stay and for Protective order be denied.

[4] Plaintiffs will respond to the pending motions to dismiss in due course, and assert that the Complaint does state a cause of action.

Dated: December 28, 2017

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th 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 on all Defendants in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF, by process server or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: *s/ Etan Mark*
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:17-cv-23429-MGC-JG

JEFF RODGERS, *et al.*,

Plaintiffs,

vs.

HERBALIFE LTD., *et al.*,

Defendants.
_____/

HERBALIFE'S RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION

I. PRELIMINARY STATEMENT

On December 14, 2017, Defendants Herbalife Ltd., Herbalife International, Inc., and Herbalife International of America, Inc. (collectively, "Herbalife") moved to compel arbitration of Plaintiffs' claims; transfer venue to the Central District of California; and stay discovery and initial disclosures pending the resolution of these motions and Herbalife's motion to dismiss. On December 22, 2017, Herbalife is filing a Motion to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. Proc. 12(b)(6). Herbalife and Plaintiffs have stipulated that Herbalife will respond to Plaintiffs' First Set of Requests for Production (the "RFP") only to the extent the Requests therein implicate Herbalife's Motion to Compel Arbitration, and on the conditions that (1) the deadline to submit initial disclosures are stayed pending resolution of the aforementioned motions, and (2) these responses are made subject to and without waiver of any arguments raised in those motions. Herbalife has endeavored to produce documents responsive to Plaintiffs' Requests, but it reserves the right to supplement its production if and to the extent it discovers the existence of other documents relevant to its Motion to Compel Arbitration and responsive to Plaintiffs' Requests.

II. RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

Each version of any and all Agreements between You and any Plaintiff in this Matter.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Herbalife objects to this Request to the extent it seeks materials not relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims. *See, e.g., Morat v. Cingular Wireless LLC*, 3:07-CV-1057-J-20JRK, 2008 WL 11336388, at *2 (M.D. Fla. Feb. 14, 2008). Herbalife also objects to this Request because it is entitled to a stay of all discovery pursuant to Defendants' Joint Motion to Compel Arbitration (ECF No. 62) and/or Defendants' Joint Motion to Stay Discovery, Pretrial Disclosures, and Other Deadlines, and for Protective Order (ECF No. 65), which motions are expressly incorporated herein by this reference. Further, Herbalife objects to this Request as it seeks documents that are already in Plaintiffs' possession, and which are equally available to Plaintiffs as they are to Herbalife. Moreover, documents that are responsive to this Request were filed along with Defendants' Joint Motion to Compel Arbitration [ECF No. 62-2]. Herbalife will produce copies of the signed Distributorship Agreements in their possession, custody or control that were entered into by Plaintiffs, and the English versions of any such agreements that are written in Spanish. Herbalife will also produce its Rules of Conduct ("Rule") in force after August 2013, when Herbalife amended its Rules and Distributorship Agreements to include an arbitration provision. Herbalife has produced or will produce all documents relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims.

REQUEST FOR PRODUCTION NO. 2:

All amendments, supplements or addenda to any and all Agreements between You and any Plaintiff.

RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

Herbalife objects to this Request to the extent it seeks materials not relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims. *See, e.g., Morat v. Cingular Wireless LLC*, 3:07-CV-1057-J-20JRK, 2008 WL 11336388, at *2 (M.D. Fla. Feb. 14, 2008). Herbalife also objects to this Request because it is entitled to a stay of all discovery pursuant to Defendants' Joint Motion to Compel Arbitration (ECF No. 62) and/or Defendants' Joint Motion to Stay Discovery, Pretrial Disclosures, and Other Deadlines, and for Protective Order (ECF No. 65), which motions are expressly incorporated herein by this reference. Further, Herbalife objects to this Request as it seeks documents that are already in Plaintiffs' possession, and which are equally available to Plaintiffs as they are to Herbalife. Moreover, documents that are responsive to this Request were filed along with Defendants' Joint Motion to Compel Arbitration [ECF No. 62-2]. Herbalife will produce copies of the signed Distributorship Agreements in their possession, custody or control that were entered into by Plaintiffs, and the English versions of any such agreements that are written in Spanish. Herbalife will also produce its Rules of Conduct ("Rule") in force after August 2013, when Herbalife amended its Rules and Distributorship Agreements to include an arbitration provision. Herbalife has produced or will produce all documents relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims.

REQUEST FOR PRODUCTION NO. 3:

All communications between you and any Plaintiff relating to any amendments to any Agreement between you and any Plaintiff.

RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

Herbalife objects to this Request to the extent it seeks materials not relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims. *See, e.g., Morat v. Cingular Wireless LLC*, 3:07-CV-1057-J-20JRK, 2008 WL 11336388, at *2 (M.D. Fla. Feb. 14, 2008). Herbalife also objects to this Request because it is entitled to a stay of all discovery pursuant to Defendants' Joint Motion to Compel Arbitration (ECF No. 62) and/or Defendants' Joint Motion to Stay Discovery, Pretrial Disclosures, and Other Deadlines, and for Protective Order (ECF No. 65), which motions are expressly incorporated herein by this reference. Further, Herbalife objects to this Request as it seeks documents that are already in Plaintiffs' possession, and which are equally available to Plaintiffs as they are to Herbalife. Moreover, documents that are responsive to this Request were filed along with Defendants' Joint Motion to Compel Arbitration [ECF No. 62-2]. Herbalife will produce the announcements in Herbalife's possession, custody or control that were transmitted to all distributors pertaining to the arbitration provision that was included in its Rules and Distributorship Agreements beginning in August 2013. After conducting a reasonably diligent search, Herbalife is not aware of any communications solely between Herbalife and any of the Plaintiffs regarding the arbitration provision, but to the extent any such communications occurred, Plaintiffs would be in possession, custody or control of them and/or in the best position to identify them. Herbalife has produced or will produce all documents relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims.

REQUEST FOR PRODUCTION NO. 4:

All signature pages by or on behalf of any Plaintiff relating to any Agreement.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

Herbalife objects to this Request to the extent it seeks materials not relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims. *See, e.g., Morat v. Cingular Wireless LLC*, 3:07-CV-1057-J-20JRK, 2008 WL 11336388, at *2 (M.D. Fla. Feb. 14, 2008). Herbalife also objects to this Request because it is entitled to a stay of all discovery pursuant to Defendants' Joint Motion to Compel Arbitration (ECF No. 62) and/or Defendants' Joint Motion to Stay Discovery, Pretrial Disclosures, and Other Deadlines, and for Protective Order (ECF No. 65), which motions are expressly incorporated herein by this reference. Further, Herbalife objects to this Request as it seeks documents that are already in Plaintiffs' possession, and which are equally available to Plaintiffs as they are to Herbalife. Moreover, documents that are responsive to this Request were filed along with Defendants' Joint Motion to Compel Arbitration [ECF No. 62-2]. Herbalife will produce copies of the signed Distributorship Agreements in Herbalife's possession, custody or control that were entered into by Plaintiffs. Herbalife is not withholding documents from production as a result of these objections.

REQUEST FOR PRODUCTION NO. 5:

All records referencing or relating to any communications to the Plaintiffs concerning any amendments to any Agreement.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

Herbalife objects to this Request to the extent it seeks materials not relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims. *See, e.g., Morat v. Cingular Wireless LLC*, 3:07-CV-1057-J-20JRK, 2008 WL 11336388, at *2 (M.D. Fla. Feb. 14,

2008). Herbalife also objects to this Request because it is entitled to a stay of all discovery pursuant to Defendants' Joint Motion to Compel Arbitration (ECF No. 62) and/or Defendants' Joint Motion to Stay Discovery, Pretrial Disclosures, and Other Deadlines, and for Protective Order (ECF No. 65), which motions are expressly incorporated herein by this reference. Further, Herbalife objects to this Request as it seeks documents that are already in Plaintiffs' possession, and which are equally available to Plaintiffs as they are to Herbalife. Moreover, documents that are responsive to this Request were filed along with Defendants' Joint Motion to Compel Arbitration [ECF No. 62-2]. Herbalife will produce the announcements in Herbalife's possession, custody or control that were transmitted to all distributors pertaining to the arbitration provision that was included in its Rules and Distributorship Agreements beginning in August 2013. After conducting a reasonably diligent search, Herbalife is not aware of any communications solely between Herbalife and any of the Plaintiffs regarding the arbitration provision, but to the extent any such communications occurred, Plaintiffs would be in possession, custody or control of them and/or in the best position to identify them. Herbalife has produced or will produce all documents relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims.

REQUEST FOR PRODUCTION NO. 6:

Each version of any and all Agreements involving any party in this Matter supporting Your claim that any party is required to, or should arbitrate this Matter.

RESPONSE TO REQUEST FOR PRODUCTION NO. 6:

Herbalife objects to this Request because it is entitled to a stay of all discovery pursuant to Defendants' Joint Motion to Compel Arbitration (ECF No. 62) and/or Defendants' Joint Motion to Stay Discovery, Pretrial Disclosures, and Other Deadlines, and for Protective Order (ECF No. 65), which motions are expressly incorporated herein by this reference. Further, Herbalife

objects to this Request as it seeks documents that are already in Plaintiffs' possession, and which are equally available to Plaintiffs as they are to Herbalife. Moreover, documents that are responsive to this Request were filed along with Defendants' Joint Motion to Compel Arbitration [ECF No. 62-2]. Herbalife will produce copies of the signed Distributorship Agreements in Herbalife's possession, custody or control that were entered into by Plaintiffs, and the English versions of any such agreements that are written in Spanish. Also subject to and without waiving this objection, Herbalife will produce its Rules in force after August 2013, when Herbalife amended its Rules and Distributorship Agreements to include an arbitration provision. Herbalife has produced or will produce all documents relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims.

REQUEST FOR PRODUCTION NO. 7:

All documents and communications not responsive to any other request supporting Your claim that any Agreement requires arbitration of this Matter.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

Herbalife objects to this Request as overly broad as it seeks "all documents and communications not responsive to any other request" without providing any other parameters. Herbalife also objects to this Request because it is entitled to a stay of all discovery pursuant to Defendants' Joint Motion to Compel Arbitration (ECF No. 62) and/or Defendants' Joint Motion to Stay Discovery, Pretrial Disclosures, and Other Deadlines, and for Protective Order (ECF No. 65), which motions are expressly incorporated herein by this reference. Further, Herbalife objects to this Request as it seeks documents that are already in Plaintiffs' possession, and which are equally available to Plaintiffs as they are to Herbalife. Moreover, documents that are responsive to this Request were filed along with Defendants' Joint Motion to Compel Arbitration

[ECF No. 62-2]. Herbalife will produce copies of the signed Distributorship Agreements in its possession, custody or control that were entered into by Plaintiffs, and the English versions of any such agreements that are written in Spanish. Herbalife will also produce its Rules in force after August 2013, when Herbalife amended its Rules and Distributorship Agreements to include an arbitration provision. There are no other materials that Herbalife contends support its Motion to Compel Arbitration, and Herbalife is not withholding documents from production as a result of these objections.

REQUEST FOR PRODUCTION NO. 8:

All documents and communications that you contend support transferring the venue of this Matter.

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

Herbalife objects to this Request to the extent it seeks materials not relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims. *See, e.g.*, *Morat v. Cingular Wireless LLC*, 3:07-CV-1057-J-20JRK, 2008 WL 11336388, at *2 (M.D. Fla. Feb. 14, 2008). Herbalife also objects to this Request because it is entitled to a stay of all discovery pursuant to Defendants' Joint Motion to Compel Arbitration (ECF No. 62) and/or Defendants' Joint Motion to Stay Discovery, Pretrial Disclosures, and Other Deadlines, and for Protective Order (ECF No. 65), which motions are expressly incorporated herein by this reference. Further, Herbalife objects to this Request as it seeks documents that are already in Plaintiffs' possession, and which are equally available to Plaintiffs as they are to Herbalife. In addition, Herbalife objects to this Request because it is outside the scope of the parties' stipulation that Herbalife would respond to Requests and produce only materials relevant to the Motion to Compel

Arbitration. In any event, Herbalife has attached to its Motion to Transfer Venue and Requests for Judicial Notice all materials in support of that motion. [ECF Nos. 61, 63].

REQUEST FOR PRODUCTION NO. 9:

All non-privileged documents relating to any effort in which You sought to compel arbitration or transfer venue based on provisions of any Agreement.

RESPONSE TO REQUEST FOR PRODUCTION NO. 9:

Herbalife objects to this Request to the extent it seeks materials not relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims in this case. *See, e.g.*, *Morat v. Cingular Wireless LLC*, 3:07-CV-1057-J-20JRK, 2008 WL 11336388, at *2 (M.D. Fla. Feb. 14, 2008). Herbalife also objects to this Request because it is entitled to a stay of all discovery pursuant to Defendants' Joint Motion to Compel Arbitration (ECF No. 62) and/or Defendants' Joint Motion to Stay Discovery, Pretrial Disclosures, and Other Deadlines, and for Protective Order (ECF No. 65), which motions are expressly incorporated herein by this reference. In addition, Herbalife objects to this Request because it is outside the scope of the parties' stipulation that Herbalife would respond to Requests and produce only materials relevant to the Motion to Compel Arbitration. Further, Herbalife objects to this Request as vague, overly broad, and unduly burdensome. Specifically, this Request is not limited to the allegations or claims in this case, or to the parties or agreements involved in this case. Moreover, the time frame contained in the RFP (January 1, 2009 to the present) is excessive, and this Request seeks information that is not relevant to any party's claim or defense and is disproportional to the needs of the case. Herbalife also objects to this Request because to the extent Herbalife has sought to compel arbitration against a distributor in the past, such documents are in the public domain and are equally available to

Plaintiffs as they are to Herbalife. Herbalife has produced or will produce all documents relevant to the limited issue of whether Plaintiffs should be compelled to arbitrate their claims in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December **22**, 2017, a true and correct copy of the foregoing was filed with the Clerk of the Court using CM/ECF and served on Etan Mark, Esq., Donald J. Hayden, Esq., and Lara O'Donnell Grillo, Esq. *Attorneys for Plaintiffs*, MARK MIGDAL & HAYDEN, 80 S.W. 8th Street, Suite 1999, Miami, FL, 33130 via transmission of Notices of Electronic Filing generated by CM/ECF.

By: */s/ Todd A. Levine*_____
Todd A. Levine, Esq.

[Counsel listed on the following page.]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

DANA BOSTICK, a California resident; ANITA VASKO, a Pennsylvania resident; JUDI TROTTER, a Washington resident; BEVERLY MOLNAR, a Pennsylvania resident; CHESTER COTE, a Vermont resident, on behalf of themselves and all others similarly situated, and on behalf of the general public,

Plaintiffs,

vs.

HERBALIFE INTERNATIONAL OF AMERICA, INC., a Nevada Corporation; HERBALIFE INTERNATIONAL, INC., a Nevada corporation; and HERBALIFE, LTD., a Cayman Island Corporation,

Defendants.

CASE NO. 2:13-cv-02488-BRO-RZ

DEFENDANTS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINDER IN MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

[*Declaration of Joseph F. Kroetsch filed concurrently*]

Date: May 11, 2015
Time: 1:30 P.M.
Courtroom: 14

Assigned to Hon. Beverly Reid O'Connell

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I.

INTRODUCTION

In their initial filings, the Brooks Objectors predicted disaster for the settlement, arguing that the total value of all claims made would dwarf the settlement funds by a factor of 100 to 1. They were wrong; the settlement funds proved more than adequate to satisfy all claims. Faced with the settlement's manifest fairness and success, the Brooks Objectors conveniently shift their attack to the notice process, asserting a sort of *res ipsa loquitur* argument that because the settlement funds were adequate, notice must not have been. But this inverted reasoning cannot conceal the complete lack of evidence that the notice process was flawed.

In this regard, it is important to note what the Brooks Objectors do not argue:

- They do not dispute the Settlement Administrator's sworn statement that approximately 93% of the class received notice of the Settlement.
- They do not attack the Settlement's flexible and permissive claims process.
- They do not criticize the generous awards that claimants are receiving under the Settlement.
- They do not dispute that by permitting class members to return products for a full refund, the settlement addresses the purported injury at the heart of the Amended Complaint.
- They do not dispute that the settlement funds have proven sufficient to satisfy all claims actually made.

The Brooks Objectors' objection ("Objection") is premised on their unproven assumption that Herbalife is an endless chain scheme; yet given a further opportunity to support this claim with admissible evidence, the Brooks Objectors' April 20, 2015 opposition papers ("Opposition") (Dkt. 134) are silent on the issue. Indeed, this settlement is itself profound evidence debunking the Brooks Objectors'

core allegation. That is because no actual endless chain scheme could have agreed to this settlement. Were there merit to the Brooks Objectors' claims, Herbalife would have seen nearly all of the products it sells returned for a 100% refund because the essential characteristic of an endless chain scheme is that there is no genuine demand for the products.[1] Moreover, with the permissive claims process adopted in the settlement, any member who no longer had the products could write down the amount he or she allegedly lost and receive a check for up to 75% of his or her total purchases. Yet as the Brooks Objectors oddly lament, the settlement has proven sufficient to satisfy all claims.

That the settlement has proven adequate to satisfy all claims is not a basis for criticizing the deal. Rather, it is proof that Plaintiffs were wise to settle a lawsuit that was predicated on the erroneous assumption that, if asked, most Herbalife members would claim to have been harmed through their relationship with Herbalife. The settlement asked this question of more than 1.5 million current and former Herbalife members, and the few who claimed a loss will be adequately compensated. But as Herbalife has long asserted, the vast majority of its current and former members confirmed the integrity of its business model and declined to make a claim.

The settlement is a win for everyone—for class members, for Herbalife, and for an overburdened judiciary. The Objection should be rejected, and the settlement granted final approval.

[1] *F.T.C. v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 531 (S.D.N.Y. 2000) (In a "pyramid scheme, there is no product or service; instead, people are motivated to join by promises of a certain portion of the payments made by those who join later.")

II.

ARGUMENT

A. The Brooks Objectors' Criticism of the Notice Program Is Baseless and Suspect.

The Brooks Objectors initially argued that the settlement funds would be "patently inadequate" and cover only "about 1% to 2%" of the claims the Brooks Objectors predicted would be made. *See* Objection at 3, 7. Other than baseless conjecture (addressed below) that the Latino community was not sufficiently accommodated through the settlement's bilingual notice process, the Objection did not argue that the Notice Program was defective. Indeed, the Notice Program in this case was strikingly similar to the one used in the Brooks Objectors' counsel's *Minton* settlement, which the Brooks Objectors cite as a success. *See* March 24, 2015 Brooks Declaration ("Brooks Decl.") Exh. B (Declaration of the *Minton* settlement administrator) (Dkt. 121-3); Opposition at 8-9. And the Brooks Objectors offered no reason to doubt the veracity of the declaration from the Settlement Administrator, who attested that the Notice Program reached approximately 93% of the class. April 13, 2015 Declaration of Eric Robin ("Robin Decl.") at ¶ 11 (Dkt. 130-5). But now that the Brooks Objectors' prediction of enormous shortfalls was resoundingly disproven by the actual claims made, the Brooks Objectors assume the Notice Program must have been defective.

As explained in the final approval papers, the far more plausible explanation for the sufficiency of the settlement fund is that the vast majority of class members had no reason to make a claim under the settlement because they did not believe they suffered any losses from participating in Herbalife's business opportunity, if they in fact participated at all. That this is not only plausible, but likely, is evident from the final approval papers' descriptions of Herbalife's strong defenses to Plaintiffs' claims and Plaintiffs' counsel's frank discussion of the challenges facing their lawsuit. Dkt. 130 at 19-20. Without any evidentiary or reliable factual

support, the Brooks Objectors' Opposition largely ignores these points and relies on the fallacy that the Notice Program must be to blame.

The Brooks Objectors' only specific criticism of the Notice Program is that it supposedly failed to make special efforts to accommodate Latino class members, despite being conducted entirely in Spanish and English. The Brooks Objectors contend that Latino class members were—in the Brooks Objectors' words—"poor, illiterate and undocumented" and suffer from "fear of the legal system," yet do not include a single declaration from an actual class member to support this assertion. The Brooks Objectors' only supposed evidence consists of a declaration from the head of a local Waukegan, Illinois chapter of the League of Latin American Citizens ("LULAC"), Julie Contreras, who is not a member of the class, and who offers inadmissible testimony that she was told by unnamed persons that there were "rumors" that class members could be deported for filing settlement claims. *See* Brooks Decl. Exh. H, ¶ 8. A declaration from a non-class member that she has been told that people have heard rumors is highly unreliable hearsay on its face and is not a proper or sufficient basis for attacking the Settlement.

Ms. Contreras is a particularly unreliable source in any event. News reports cite Ms. Contreras as "organizing the group objecting to the [*Bostick*] settlement,"[2] an intention that her parent organization announced before the Notice Program even began.[3] Ms. Contreras began criticizing Herbalife shortly after the hedge fund Pershing Square Capital Management ("Pershing Square") and its manager, William Ackman, began publicly attacking the company.[4] It has been widely reported that Pershing Square stands to earn $1 billion or more if its attacks on Herbalife are

[2] April 27, 2015 Declaration of Joseph F. Kroetsch ("Kroetsch Decl.") Exhibit ("Exh.") A.

[3] *Id.* Exh. B.

[4] *Id.* Exh. E.

successful.[5] The New York Times reported that since 2013, Ms. Contreras has been actively engaged in searching for "people who say they were duped by Herbalife," and "her group is urging Illinois residents to call a toll-free number set up as part of Mr. Ackman's campaign."[6] Press releases and news reports show that Ms. Contreras identified certain of the individual Brooks Objectors as early as 2013 and began publicly touting their claimed losses.[7] Ms. Contreras also organized an anti-Herbalife conference with Mr. Ackman in January 2015.[8] The Brooks Objectors' counsel stated that he met with Pershing Square "[o]ver the past several years," to discuss, among other things, "my intention to file this objection." Brooks Decl. ¶ 8. In light of these facts, Ms. Contreras's Declaration, the Brooks Objectors' criticism of the Notice Program, and indeed their entire Objection, should be viewed skeptically.

B. <u>The Settlement Class Includes Current Herbalife Members.</u>

The Second Amendment to the Stipulation of Settlement excluded from the Settlement Class all Herbalife members who signed arbitration agreements starting in September 2013. But that does not mean, as the Brooks Objectors argue, that no current Herbalife members remain in the Settlement Class. Nor does it mean that no class member has standing to represent a class under Fed. R. Civ. Proc. 23(b)(2).

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[5] *Id.* Exhs. C, D, E.

[6] *Id.* Exh. E.

[7] Both Jose G. Garcia and Miguel Calderon appeared with Contreras at an anti-Herbalife press conference in December 2013. *Id.* Exh. F. Calderon was also interviewed with Contreras in July 2014. *Id.* Exh. G. Felipe Colon was cited in a March 2014 article about LULAC's Illinois initiatives. *Id.* Exh. H. Juana Estala was identified as part of a group represented by Contreras in an April 2014 news story. *Id.* Exh. I. Gilberto Melchor Sanchez was discussed in one of Ms. Contreras' press releases republished in a March 2013 New York Times article about Mr. Ackman's lobbying efforts. *Id.* Exh. E.

[8] *Id.* Exh. J.

The Brooks Objectors' argument suffers from several fatal flaws:

- Herbalife does not take, and has never taken, the position that the arbitration agreement applies to members who joined before Herbalife introduced the arbitration agreement in September 2013. The arbitration agreement, and the related provision in the Second Amendment to the Stipulation of Settlement, do not affect preexisting members who simply remained members after September 2013.
- If the Brooks Objectors were correct that the arbitration agreement bound all class members who remained Herbalife members after September 2013, that would only render the Settlement *more favorable* for class members who, had the case continued to be litigated, would likely have received no relief. This would include at least one Objector, Susana Perez, who remained an Herbalife member until "around May of 2014,"[9] and who is receiving $30,000 under the Settlement. Robin Decl. at ¶ 16.

Although the Brooks Objectors are wrong that no class members have any interest in the corporate reforms included in the Settlement, their argument highlights the fact that *none of the Brooks Objectors* has any stake in the corporate reforms because none of them is a current Herbalife member. Objectors without any interest in the Settlement's corporate reforms (or indeed, Herbalife's business model) should not be permitted to deny the enormous benefits of the settlement to class members.[10] This is particularly so given that, as described above, the

[9] Objection and Declaration of Susana Perez (Objection Exh. N). Dkt. No. 121-1.

[10] *Rebney v. Wells Fargo Bank*, 220 Cal.App.3d 1117, 1132 (Cal. Ct. App. 1990) (objectors "were not aggrieved by the errors they assert with regard to the expansion of class certification and the fairness of the settlement, and thus they lack standing to assert those errors as a basis for reversal."); *Estrada v. RPS, Inc.*, 125 Cal.App.4th 976, 985 (Cal. Ct. App. 2005) (applying *Rebney*; "a party cannot assert error that

Objection claims class members may be receiving *more* benefits under the settlement than they could purportedly have obtained through litigation. This is an objection for its own sake, and without concern for class members' interests.

C. The Release Is Not Overbroad.

Bashing another straw man, the Brooks Objectors misread the Settlement as releasing claims against Herbalife's current or former directors for actions taken outside of the scope of their roles as Herbalife directors. The law is clear that a release of a corporation's directors is limited to their actions taken in their capacity as directors. *See Jaeger v. LaCroix*, 1996 WL 11321, *2 (Oh. Ct. App. Jan. 11, 1996) (noting that, in settling with a corporation and its officers and directors, "appellant did not release any claims against the officers in their individual capacity."); *Green v. Callahan*, 664 So.2d 21, 23 (Fla. Dist. Ct. App. 1995) ("While the release includes within its terms the officers, directors, employees and agents of the company, it does not include its stockholders, and Green sued Callahan as a stockholder in his individual capacity and not as a director."); *Boswell v. Boswell*, 2005 WL 1020468, *3 (Fla. Cir. Ct. Apr. 13, 2005) ("[T]he releases contained in this Order . . . relate to [certain defendants] only in their corporate capacities as officers, directors, and/or shareholders"); *Borriello v. Loconte,* 42 Misc.3d 1228(a), at *4, 988 N.Y.S.2d 521 (N.Y. Sup. Ct. Fed. 24, 2014) ("[T]he General Release released JLF and the individual defendants in their capacity as JLF officers, directors, and employees . . . However, plaintiff's present claim is not against JLF or its officers, directors, and employees, but is rather against the directors of Caterina, even though the individuals in question happen to be the same people."). When a

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injuriously affected only nonappealing coparties . . . the appellants must show they were, in fact, harmed by the errors asserted."); *Gonzales v. Countrywide Homes Loans, Inc.*,2004 WL 1904280, at *4 (Cal. Ct. Ap. Aug. 26, 2004) ("Since the [objectors] have not shown that the [purported error] harmed them in any manner, they have no standing on appeal to challenge the notice on that basis.").

release is intended to cover directors in their individual capacity, the release typically does so explicitly. *E.g.*, *Ruggiero v. Dynamic Elec. Sys. Inc.*, 2012 WL 3043102, at *9 (E.D.N.Y. July 25, 2012) ("[T]he Release also waived plaintiff's claims against defendants . . . in their individual capacities, for it included claims against Dynamic's "officers, directors . . . *each in their individual and corporate capacities*") (emphasis added). Consistent with this case law, Section 8.1 of the Stipulation of Settlement does not release officers, directors, shareholders, partners, partnerships, joint ventures, employees, agents, servants, and representatives of Herbalife in their individual capacities with respect to any lead generation activities.

The release therefore is not overbroad and the objection should be rejected.

D. <u>The Shipping and Packaging & Handling Claims Were Weak and, In Any Event, Are Part of the Settlement.</u>

The Brooks Objectors lack any basis for their argument that the Shipping fee and Packaging & Handling fee claims were settled for too little; as Plaintiffs conceded, Herbalife has strong legal and factual defenses to these claims. Dkt. 130 at 35-38. In their Amended Complaint, Plaintiffs alleged that Herbalife overcharged its members for the "Shipping" and "Packaging & Handling" fees it charged its customers on product orders. Discovery showed that to be false; Herbalife in fact pays more to ship a substantial portion of its orders than it receives in Shipping fees. Likewise, Herbalife showed Plaintiffs that its costs associated with its Packaging & Handling fees exceeded the fee income. Plaintiffs' speculation that Herbalife overcharged its members for fees was factually wrong, and the Brooks Objectors lack any basis for contending otherwise.[11]

[11] Objectors cite their "back of the envelope" calculation of the value of the fee claims, but unlike Objectors, Plaintiffs had access to robust discovery on this issue. Among other things, Herbalife produced to Plaintiffs a complete database showing all of the individual orders placed during the Class Period, the fees received for each order, and the third-party freight costs spent to ship each order.

Furthermore, Herbalife persuasively argued to Plaintiffs that class members could not have reasonably understood Herbalife's "Shipping" fee to pay for only third-party carrier freight costs, and not for any amount of Herbalife's *own* costs to ship orders. The sole basis for Plaintiffs' contention that a customer would interpret the "Shipping" fee as a dollar-for-dollar pass-through of Herbalife's FedEx charges was a reference in an Herbalife document to products being shipped "Freight Prepaid." Am. Compl. at ¶ 286 (Dkt. 78). But as Herbalife explained to Plaintiffs, the term "freight prepaid" is legally defined as meaning that the shipper, not the recipient, is responsible for paying the carrier; the term has nothing to do with how a shipper chooses to recoup its shipping expenses from its customers. *Sea-Land Serv., Inc. v. Andrew Corp.*, 1992 WL 41344, at *4 (N.D. Ill. Feb. 25, 1992) ("The law is very clear as to the meaning of 'freight prepaid' and its opposite 'freight collect' to consignees. If a bill of lading says 'freight prepaid,' that indicates freight is the shipper's responsibility."). Plaintiffs' interpretation of "freight prepaid" as meaning that Herbalife solely sought reimbursement of freight expenses that the company had literally "pre-paid" for customers is wrong as a matter of law. *Id.* at *4 (holding that a literal interpretation of "freight prepaid" as "pre-paid" would be "ridiculous"). Herbalife furthermore argued that no reasonable customer would assume that the "Shipping" fee, which was based on the dollar amount of an order, is identical to Herbalife's own FedEx costs, which would obviously not be based on the price of goods to be shipped. *See Harmon v. Hilton Group, PLC*, 554 Fed. Appx. 634, 635-636 (9th Cir. Feb. 10, 2014) (Plaintiff fails to "state a plausible UCL claim" where plaintiff "offers no allegations that the disclosure had a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising care and only offered one isolated example of actual deception – himself.") (internal citation omitted).

Herbalife also showed Plaintiffs that the company fully disclosed the nature of its now-discontinued Packaging & Handling fee in a "Frequently Asked

Questions" section of the materials every new member received, which states that the fees are used to recoup the company's "processing, handling and marketing" costs. (Am. Compl. Exh. C [Part 1 of 2] at 31.) Even if Herbalife earned a profit from the fees, these are services that Herbalife provides, and it would not be a violation of the UCL for Herbalife to profit from fees for its services. *E.g.*, *Spiegler v. Home Depot U.S.A., Inc.*, 552 F. Supp. 2d 1036, 1047-48 (C.D. Cal. 2008) (dismissing claim under the UCL alleging that an "Administrative Fee" was a profit center, holding "plaintiffs agreed to pay the contract price irrespective of the components included in that price.").[12] When courts find that profit earned on a fee is misleading, it is because the fee is one that purports on its face to be for third-party services. *E.g., People v. Dollar Rent-A-Car Systems, Inc.*, 211 Cal.App.3d 119, 129-130 (Cal. Ct. App. 1989) (marking-up wholesale repair rate paid to outside repair shops); *McKell v. Wash. Mut., Inc.*, 142 Cal.App.4th 1457, 1472 (Cal. Ct. App. 2006) (mark-up of tax service fees paid to mortgage vendor); *Dean v. United of Omaha Life Ins.*, 2007 WL 7079558, at *14-15 (C.D. Cal. Aug. 27, 2007) (mark-up insurance fees paid to mortgage insurance company). There was no allegation in the Amended Complaint, and the Brooks Objectors do not argue, that class members would expect Herbalife's processing, handling and marketing costs to consist solely of third-party services.

Herbalife also had a strong defense that none of the Plaintiffs could show that any alleged misrepresentation concerning Herbalife's fees was a substantial factor in their decision to purchase Herbalife products. "The UCL requires a plaintiff to have 'lost money or property *as a result of*' the business practice or act at issue. The UCL's 'as a result of' language imposes an 'actual reliance' requirement, thus, to

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[12] *See also Janda v. T-Mobile*, 2009 WL 667206, at *5-*9 (N.D. Cal. Mar. 13, 2009), *aff'd* 378 Fed. Appx. 705 (9th Cir. 2010) (dismissing plaintiff's UCL claim because it was undisputed that T-Mobile disclosed the imposition of general, non-itemized "taxes and surcharges" on its customers).

prevail, a plaintiff must establish that the alleged misrepresentation was an 'immediate cause' or 'substantial factor' in the plaintiff's decision to engage in the injury-producing conduct." *Baghdasarian v. Amazon.com Inc.*, 458 F. App'x 622, 623 (9th Cir. 2011) (*quoting* Cal. Bus. & Prof. Code § 17204) (affirming grant of summary judgment where plaintiff could not show that shipping and handling fees were a significant factor in his decision to make purchases from Amazon) (citations omitted). Notably, *none of the Brooks Objectors even mentions these fees* in their declarations, much less claims to have lost money as a result of the alleged misrepresentations cited in the Amended Complaint. *See* Dkt. 121-1.

Finally, claimants were free to make claims for losses arising from payment of Shipping and Packaging & Handling fees, and many of the payments being made under the Settlement include amounts based on the payment of such fees.

E. Herbalife Had Strong Defenses to Claims for Consequential Damages.

The parties have articulated in their respective briefs in support of final approval the strong arguments Herbalife has for why class members are limited to recovering amounts they paid to Herbalife, i.e., not to third parties. The Brooks Objectors do not address these arguments; they only argue that Plaintiffs *sought* consequential damages in the Amended Complaint, which of course does not dictate what they could actually have successfully obtained through continued litigation. Furthermore, the Brooks Objectors do not dispute that it would have been difficult, if not impossible, to certify a class seeking highly individualized recoveries for consequential damages based on personal purchasing decisions influenced by each class member's unique experiences. For example, a consequential damages claim for rent could be riddled with individualized questions such as the representations relied upon in deciding to rent premises, a determination of whether the rent is paid by the class member or an entity such as an LLC, analysis of whether the premises are used for purposes other than to run an Herbalife business, and whether the business was in fact profitable, among other things. These questions go

not only to the amount of damages, but to the existence of a claim at all.

The Opposition also refers to an appellate brief in which Herbalife argued that its insurance carrier was responsible for covering the settlement of the *Minton* case; in *Minton*, the Brooks Objectors' counsel (who was also counsel in the *Minton* class) argued, as he does here, that class members were entitled to consequential damages. The insurance case was settled before any ruling was made on the appellate briefs, but Herbalife's argument is irrelevant here in any event. As a claim for liability insurance coverage, the relevant consideration was whether the *Minton* plaintiffs had *claimed* they were entitled to consequential damages. Not surprisingly, the Brooks Objectors' counsel alleged he was entitled to such damages. Herbalife's decision to seek insurance coverage for such a claim does not mean that Herbalife endorsed the view that a claim for consequential damages would have prevailed had it been litigated.

III.

CONCLUSION

For all the foregoing reasons and the reasons set forth in Herbalife's opening memorandum, Herbalife respectfully urges the Court to grant the Motion for Final Approval of Class Action Settlement.

DATED: April 27, 2015

Respectfully submitted,

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DATED: April 27, 2015

Respectfully submitted,

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SIGNATURE CERTIFICATION

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, I hereby certify that the content of this document is acceptable to Jonathan D. Schiller of Boies, Schiller & Flexner LLP, co-counsel for Defendants Herbalife International of America, Inc.; Herbalife International, Inc.; and Herbalife Ltd., and that I have obtained Mr. Schiller's authorization to affix his electronic signature to this document.

DATED: April 27, 2015

Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C.

By: */s/ Mark T. Drooks*
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