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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Stella Lemberg, Jeni Laurence, Amandra Bluder, Carissa Stuckart, Dana Apana, Karen Moss Brown, Shannon Carrillo, Samantha Hall, Natalie Lien, Melissa Atkinson, Aki Berry, Cheryl Hayton, Tiffany Scheffer, Lora Haskett, Ashley Healy, Jocelyn Burke-Craig, Brittany Bianchi, Kerry Tighe-Schwegler, Jini Patton, Laura Rocke, Stephenie McGurn, and Peggy Johnson, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

LuLaRoe, LLC d/b/a LuLaRoe, a California limited liability company, LLR, Inc., a Wyoming corporation, Mark Stidham; DeAnne Brady a/k/a DeAnne Stidham; and DOES 1-10, inclusive,

Defendants.

Case No. 5:17-cv-02102-AB-SHK
Hon. André Birotte Jr., Ctrm. 7B
Mag. Judge Shashi H. Kewalramani, Ctrm. 3/4

Notice of Motion and Motion to Confirm Arbitration Award; Memorandum of Points and Authorities in Support Thereof

Date: March 8, 2019
Time: 10:00 a.m.
Ctrm: 7B

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Co-Counsel for Defendants
LuLaRoe, LLC, LLR, Inc.,
Mark Stidham, and DeAnne Brady

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 8, 2019, at 10:00 a.m., or as soon thereafter as counsel may be heard in Department 7B of the above-entitled court, located at 350 West First Street, Los Angeles, California 90012, Defendants LuLaRoe, LLC, LLR, Inc., Mark Stidham, and DeAnne Brady (collectively referred to as "Defendants"; and LuLaRoe, LLC and LLR, Inc. collectively referred to as "LLR"), will, and hereby do, move the court for an order confirming the partial final arbitration award rendered by the Honorable Nancy Wieben Stock (Ret.) on January 2, 2019, in which the arbitrator determined that Plaintiffs' claims must be arbitrated on an individual and not a class basis and that Plaintiffs' class action arbitration demand should be dismissed.

Defendants make this motion under sections 9 and 13 of the Federal Arbitration Act (9 U.S.C. §§ 9, 13) and on the grounds that the Court has already determined that the parties have a valid and enforceable agreement to arbitrate, the arbitrator was properly appointed to decide the issues submitted to her, the arbitrator rendered her award after consideration of the evidence and argument presented, there are no grounds to vacate, modify or correct the award, and good cause otherwise exists to confirm the award.

This motion is made following a conference between counsel pursuant to Local Rule 7-3, which took place on January 15, 2019.

Defendants' motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the concurrently filed Declaration of Elizabeth M. Weldon ("Weldon Decl.") and attached exhibits (including without limitation the arbitration agreements, the partial final award, and the appointment of the arbitrator), the pleadings and papers on file in this action, and on such other and further argument and evidence as the Court may properly receive.

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Dated: January 24, 2019

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By: */s/ William S. O'Hare*
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LuLaRoe, LLC, LLR, Inc., Mark Stidham, and DeAnne Brady

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Memorandum of Points and Authorities

I. INTRODUCTION

On April 17, 2018, this Court granted in part Defendants' motion to compel arbitration and decided that the parties have an enforceable arbitration agreement and that Plaintiffs must arbitrate their claims. The Court declined to decide whether Plaintiffs could arbitrate as a class, reserving that question for the arbitrator. The appointed arbitrator has now answered that question: Plaintiffs must arbitrate their claims individually, and not as a class. [Weldon Decl. Ex. 19 (Partial Final Award at 12).] This motion is brought to confirm the partial final award rendered by the arbitrator.

In our motion to compel arbitration (Dkt. 76), we argued that the Court, and not an arbitrator, should decide whether the parties agreed to class arbitration. Plaintiffs urged the Court to defer that question to the arbitrator, and the Court agreed. Now that the arbitrator has spoken, the award is subject to only limited review, and must be confirmed. As the Supreme Court has instructed, an arbitral award can be vacated "only in very unusual circumstances" involving corruption, fraud, an arbitrator exceeding her powers and other extreme misconduct. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). Where, as here, the arbitrator has conscientiously performed her duties, this Court's inquiry must end, regardless of the Court's view of the merits of Judge Stock's award.

Even if this Court were to consider the merits of this award, the arbitrator's decision is correct and should be confirmed. The legal framework for this issue has been clearly constructed by the Supreme Court: in the absence of an agreement to do so, a party may not be compelled to arbitrate on a class basis.

While the parties' agreement here does not expressly preclude class arbitration, no such provision is needed. Without an agreement to arbitrate class claims, the presumption is that the parties agreed to only individual arbitration. And although silence would be enough to preclude class claims, the arbitration

agreement here affirmatively demonstrates that the parties contemplated only individual arbitration as it speaks in terms of claims between a singular Retailer and LLR and defines the parties to the agreement (and thus any arbitration) accordingly. Other elements of the agreement, including a 5-day limit on the length of the arbitration hearing, a 180-day timeframe to complete the arbitration, strict confidentiality provisions, and a provision that contemplates individual mediation, are totally inconsistent with arbitration on a class or multiple claimant basis.

Whether this Court applies the highly deferential standards applicable to confirmation of arbitration awards, or reviews the issues de novo, the award should be confirmed.

II. FACTUAL BACKGROUND

LLR fully developed the record concerning the formation of parties' arbitration agreement in support of its motion to compel arbitration [Dkt. 76] and will not repeat itself in full here. The Court also recited many facts about the parties' arbitration agreement in its April 17, 2018 order. [Dkt. 95.]

A. The Arbitration Clause

LLR sells apparel at wholesale prices to retailers ("Retailers") who, in turn, resell these items to third-party customers. [Dkt. 76-1 (Declaration of Mark Stidham ¶ 4).] LLR's Retailer network extends to all 50 states and abroad, with tens of thousands of Retailers. [*Id.* ¶ 5).]

Each Plaintiff entered into a LuLaRoe Independent Consultant Program Application and Agreement ("Retailer Agreement"). [Dkt. 76-7 (Declaration of Megan Alvarez ¶ 3 & Exs. 33-56); Weldon Decl., Ex. 10 (Declaration of Kelly M. Purcaro in Support of Plaintiffs' Brief in Favor of Arbitrability of Plaintiffs' Class Claims ("Purcaro Decl."), Exs. B-W).] There are three relevant versions of the Retailer Agreement: 3.0, 4.0, and 6.5.1. [*See* Dkt. 95 (Order on Motion to Compel Arbitration or "Arbitration Order") p. 7; Dkt. 76-6, ¶¶ 3-5, Exs. 27-29.] In the body of Retailer Agreement versions 4.0 and 6.5.1, "the parties" agreed:

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> In the event of a dispute *between Consultant and LLR* arising from or relating to the Agreement, or the rights and obligations of *either party*, *the parties* shall attempt in good faith to resolve the dispute through nonbinding mediation as more fully described in the Policies and Procedures. LLR shall not be obligated to engage in mediation as a prerequisite to disciplinary action against Consultant. If *the parties* are unsuccessful in resolving their dispute through mediation, the dispute shall be settled totally and finally by arbitration as more fully described in the Policies and Procedures.

[Dkt. 76-6, Ex. 29, 28 (Ret. Agmt. version 6.5.1 § 25 (emphasis added); Ret. Agmt. version 4.0 § 21 (minor variations in wording)).]

In addition, all versions of the Retailer Agreement explicitly incorporate LLR, Inc.'s Policies and Procedures and related amendments, which contain an agreement to arbitrate. [Dkt. 76-6, Ex. 30 (Policies and Procedures), Ex. 27 (Ret. Agmt. version 3.0 at § 13 (". . . this Agreement shall include: (i) The LuLaRoe Policies and Procedures; (ii) The LuLaRoe Compensation Plan . . . all of which are hereby incorporated herein by reference.")); Ex. 28 (Ret. Agmt. version 4.0 at § 15 (minor variations in wording)); and Ex. 29 (Ret. Agmt. version 6.5.1 at § 11 (same)); *see also* Dkt. 95 at 9 (Arbitration Order); Weldon Decl., Ex. 10 (Purcaro Decl. Ex. X).] The Policies and Procedures were amended by a First Amendment to Policies and Procedures of LLR, Inc. ("First Amendment"), dated October 12, 2016, which changed the venue and choice of law for arbitration from Wyoming to California. [Dkt. 76-6, Ex. 31; Weldon Decl., Ex. 10 (Purcaro Decl. Ex. Y).]

The arbitration provision, at section 6.4 of the Policies and Procedures, is more than one full page, is clearly labeled "Arbitration," and reads (emphasis in the original):

> **If mediation is unsuccessful, any controversy or claim arising out of or relating to the Agreement, or the breach thereof, shall be settled by arbitration. The Parties waive all rights to trial by jury or to any court.** The arbitration shall be filed with, and administered by, the American Arbitration Association ("AAA") or JAMS under their respective rules and procedures. The *Commercial Arbitration Rules and Mediation Procedures* of the AAA are available at the AAA's website at www.adr.org. The *Streamlined Arbitration Rules & Procedures* of JAMS are available at the JAMS website at www.jamsadr.com. Copies of the AAA's *Commercial Arbitration Rules and Mediation Procedures* or JAM's *Streamlined Arbitration*

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> *Rules & Procedures* will be emailed to Independent Fashion Consultants upon request to LLR's Legal & Compliance Department. Notwithstanding the rules of the AAA or JAMS, the following shall apply to all arbitration actions:
>
> - The Federal Rules of Evidence shall apply in all cases;
> - The parties shall be entitled to all discovery rights permitted by the Federal Rules of Civil Procedure;
> - The parties shall be entitled to bring motions under Rules 12 and/or 56 of the Federal Rules of Civil Procedure;
> - The arbitration shall occur within 180 days from the date on which the arbitrator is appointed, and shall last no more than five business days; and
> - The parties shall be allotted equal time to present their respective cases, including cross-examinations.
>
> Except as provided below for Louisiana residents, all arbitration proceedings shall be held in Cheyenne, Wyoming. There shall be one arbitrator . . . . Each party to the arbitration shall be responsible for its own costs and expenses of arbitration, including legal and filing fees. The decision of the arbitrator shall be final and binding . . . .
>
> The parties and the arbitrator shall maintain the confidentiality of the entire arbitration process and shall not disclose to any person not directly involved in the arbitration process: [the dispute and claim, testimony and evidence, award, or rulings] . . . .
>
> Notwithstanding the foregoing, nothing in these Policies and Procedures shall prevent either party from applying to and obtaining from any court having jurisdiction a writ of attachment, a temporary injunction, preliminary injunction, permanent injunction, or other relief available to safeguard and protect its intellectual property rights and/or to enforce its rights under the non-solicitation provision of the Agreement.

[Dkt. 76-6, Ex. 30 (Policies and Procedures § 6.4); Weldon Decl., Ex. 10 (Purcaro Decl., Ex. X).]

The First Amendment contains the same detailed arbitration provision as the Policies and Procedures, but the venue and choice of law was changed to California. [Dkt. 76-6, Ex. 31 (First Amendment); Weldon Decl., Ex. 10 (Purcaro Decl., Ex. Y).]

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B. Plaintiffs' Complaint

This action commenced on October 13, 2017, when four Retailers filed a complaint alleging that LuLaRoe, LLC and LLR, Inc. did not comply with refund policies arising out of their Retailer Agreements. [Dkt. 1.] Plaintiffs filed a first amended putative class action complaint in January 2018, which added new claims, 18 additional named Plaintiffs, and two individual defendants (LuLaRoe founders and officers, Mark Stidham and DeAnne Brady (Stidham)). [Dkt. 45.] The amended complaint asserted claims for Violation of Business & Professions Code section 17200, et seq., Violation of Business & Professions Code section 17500, et seq., Quasi-contract, Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, Conversion, Endless Chain Scheme violations, and violation of the Seller Assisted Marketing Plan Act. [*Id.*]

C. The Court Compelled the Parties to Arbitrate

On April 17, 2018, this Court entered an order granting in part Defendants' motion to compel arbitration and decided that the parties have "a valid and enforceable agreement to arbitrate Plaintiffs' claims" and that "Plaintiffs must arbitrate their claims." [Dkt. 95 at 17.] Defendants' position was that the Court (and not an arbitrator) should make the determination that the Plaintiffs must arbitrate their claims individually, and not as a class. [Dkt. 76 at 22-25.] Plaintiffs vigorously disagreed, arguing that the arbitrator should decide the question of class arbitrability. [Dkt. 81 at 24-25.] The Court ruled in favor of Plaintiffs on this question and deferred to the arbitrator to decide whether the Plaintiffs could arbitrate their claims on a class-wide basis. [Dkt. 95 at 15-16.]

D. The Parties Commenced Arbitration

On April 20, 2018, Defendants filed 22 Demands for Arbitration, one for each named Plaintiff.[1] [Weldon Decl. ¶ 2, Ex. 1.] Those demands are limited in

[1] In the Demands for Arbitration and filings in the Arbitrations, we refer to the Plaintiffs as the Lemberg Claimants.

scope, and seek a determination of certain threshold issues left open for the arbitrator under the Arbitration Order: (1) whether each Plaintiff must submit her claims to binding arbitration on an individual basis, and not a class basis; (2) whether each Plaintiff must first individually mediate her claims before proceeding with arbitration of those claims in accordance with the parties' contracts; (3) whether any such individual arbitration be stayed pending individual mediation between the parties; and (4) for such other relief as the arbitrator deems necessary or appropriate. [Weldon Decl. Ex. 1 (Demand for Arbitration re S. Lemberg).]

On April 27, 2018, Plaintiffs filed a Demand for Class Arbitration, alleging the same claims previously filed in the District Court action. [*Id*. Ex. 2 (Plaintiffs' Demand for Class Arbitration).]

On June 14, 2018, JAMS commenced arbitration for Defendants' 22 individual demands and confirmed that the arbitration would be conducted in accordance with JAMS Streamlined Arbitration Rules. [*Id*. Ex. 3 (letter dated June 14, 2018 from JAMS re commencement of arbitration).] On July 20, 2018, JAMS commenced the arbitration for Plaintiffs' single demand and again confirmed application of the JAMS Streamlined Arbitration Rules. [*Id*. Ex. 4 (letter dated July 20, 2018 from JAMS re commencement of arbitration).] That same day (following the earlier distribution of arbitrator strike lists), JAMS appointed a single arbitrator, retired Judge Nancy Wieben Stock, to decide all threshold issues as to the 22 demands filed by Defendants and the single demand filed by the Plaintiffs. [*Id*. Ex. 5 (letter dated July 20, 2018 from JAMS re single arbitrator for threshold issues for 23 demands); Ex. 6 (letter dated July 20, 2018 from JAMS re appointment of arbitrator).]

In September 2018, Judge Stock held an initial call with counsel to determine the proper scope of the threshold issues. Following written submissions by the parties and this call, the arbitrator issued Scheduling Order No. 1 and established a briefing schedule to address the threshold issue whether Plaintiffs' class claims are

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arbitrable. [*Id*. Ex. 7 (Joint Preliminary Conference Report, dated September 14, 2018); Ex. 8 (Report of Preliminary Hearing and Scheduling Order No. 1).] Pursuant to Judge Stock's order, each side submitted an opening brief and related materials on October 22, 2018, and submitted responsive briefs on November 21, 2018. [*Id*. Exs. 9-17.] Judge Stock held an in-person hearing on December 6, 2018. [*Id*. Ex. 18.]

"[H]aving considered the briefs, documentary evidence, matters judicially noticed, and oral arguments of counsel," Judge Stock issued her partial final award on January 2, 2019. [*Id*. Ex. 19 (Partial Final Award at 7).]

E. The Partial Final Award

The arbitrator relied heavily on Supreme Court precedent in concluding that the Plaintiffs could not proceed by class. Finding that the parties' arbitration award is "silent on the issue of representative actions," the arbitrator analyzed the parties' contracts to determine their intent. [*Id*. Ex. 19 at 9.] The arbitrator heeded *Stolt-Nielsen*'s admonition that an agreement to class arbitration should not be lightly inferred given the great differences between individual and multiparty arbitration. [*Id*.] The FAA thus allows class arbitrations only where the parties "explicitly agree to class arbitration." [*Id*., citing *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 910 (9th Cir. 2011).] The arbitrator found it "apparent" that the parties "did not expressly agree to class arbitration." It was also "clear that the Arbitration Agreement is silent on the issue," which foreclosed the availability of class-wide arbitration. [*Id*. at 9.]

The arbitrator went on to fully examine the language of the Arbitration Agreement that evidenced intent to "foster prompt, cost-effective arbitration of individual claims, as soon as they arose." [*Id*.] Both the mediation and arbitration provisions identified only two parties—the Consultant and the LLR Inc.—which courts have held indicates that class arbitration is not allowed. [*See id*. at 10, citing *Kinecta Alternative Financial Solutions, Inc. v. Superior Court*, 205 Cal.App.4th

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506, 511 (2012).] The arbitrator also relied on the following provisions:

- A provision for pre-arbitration mediation, which "shall occur within 60 days of the appointment of the mediator [that] is remarkable and inconsistent with class-wide mediation." [*Id.* Ex. 19 at 10.] The arbitrator found that it would be "impossible for each of the 22 individuals to be on the same page for mediation" under the time constraints provided by the Agreement. [*Id.*] It was thus "evident that the Arbitration Agreement calls for the mediation of individual claims on a one-by-one basis." [*Id.*]
- Incorporation of the Streamlined Arbitration Rules and Procedure of JAMS, which is "also inconsistent with class-wide arbitration." [*Id.* at 10-11.] These Streamlined Rules are only meant to apply if the claim does not exceed $250,000 and include shortened discovery processes.
- Provisions requiring arbitration to be completed within 120 days of the arbitrator's appointment and limiting the hearing to five business days. [*Id.* at 11.] The provisions also provide that the parties "shall be allotted equal time to present their respective cases." The arbitrator found these provisions to be the "most telling" as they are "inconsistent with the need to develop, present and defend a nationwide consumer class-action, involving 80,000 class members." [*Id.*][2]

The arbitrator rejected reliance on cases cited by Plaintiffs where courts have upheld an arbitrator's decision to permit class-wide arbitration. Those cases reflect the highly deferential standard in favor of an arbitrator's decision even where a

[2] The arbitrator made an immaterial typographical error in stating the Arbitration Agreement required completion in 120 days, as it calls for 180 days.

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"serious error" is made, and not the merits of the arbitrator's decision. [*Id*. at 12.]

Finally, the arbitrator rejected Plaintiffs' claim that they "lacked the subjective intent to waive class claims." The arbitrator found no evidence that the Plaintiffs considered the availability of class claims when they signed the agreement. [*Id*.]

The Partial Final Award concludes that the Plaintiffs' claim "is not arbitrable as a class action." The Plaintiffs could "pursue individual arbitration claims" either through separate filings or as cross-claims on the 22 pending individual arbitrations filed by Defendants. [*Id*. at 12.]

III. THE ARBITRATOR'S AWARD SHOULD BE CONFIRMED UNDER THE LIMITED REVIEW THAT IS PERMITTED UNDER THE FAA

If the parties have agreed that a judgment shall be entered upon an award, and an award is not vacated, modified, or corrected on the limited grounds provided by 9 U.S.C. §§ 10 and 11, then the court *must* timely grant a motion to confirm the award. 9 U.S.C. § 9; *Wulfe v. Valero Ref. Co.-California*, No. CV-12-05971-MWF (EX), 2013 WL 12212090 **1-2, 7 (C.D. Cal. Dec. 17, 2013) (granting motion to confirm partial final award finding agreement did not permit class arbitration). Here, the Arbitration Agreement provides that "[t]he decision of the arbitrator shall be final and binding on the parties and may, if necessary, be reduced to a judgment in any court of competent jurisdiction." [Dkt. 76-6, Ex. 30, p. 58 & Ex. 31, p. 64.] *See, e.g., Applied Underwriters Captive Risk Assurance Co. v. Barker Mgmt., Inc.*, No. SACV1701529JVSDFMX, 2017 WL 6819929, at *4 (C.D. Cal. Nov. 13, 2017) (similar language). "[A] provision that the arbitrator's award shall be binding on the parties impliedly confers power on a court to enter judgment thereon." *Id*., *citing Stater Bros. Markets v. Int'l Brotherhood of Teamsters, Local No. 63, On Behalf of Massey*, No. EDCV 14-02275-VAP (DTBx), 2014 WL 12561594, at *2 (C.D. Cal. Dec. 3, 2014).

Nor is there question that the award cannot and should not be vacated,

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modified, or corrected. The Court's review of an arbitration award under the Federal Arbitration Act ("FAA") is "both limited and highly deferential." *Coutee v. Barington Capital Grp., L.P.*, 336 F.3d 1128, 1132 (9th Cir. 2003) (citations and internal quotation marks omitted). Indeed, an award can be vacated "only in very unusual circumstances" involving corruption, fraud, undue means, evident partiality or corruption of the arbitrator, arbitrator misconduct in refusing to postpone the hearing or refusing to hear evidence or other prejudicial behavior, or an arbitrator exceeding her powers. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013), citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995); *see* 9 U.S.C. § 10. None of these circumstances apply here. Nor do any of the narrow grounds on which a court may modify or correct an award. *See* 9 U.S.C. § 11 (court may modify award where there is evident material miscalculation or description, arbitrator has awarded on matter not submitted to him, or where award is imperfect in matter of form).

Here, JAMS distributed a list of arbitrators to the parties to allow each side to "strike" an arbitrator and to rank the remaining arbitrators. [Weldon Decl. Ex. 3 (letter dated June 14, 2018 from JAMS).] JAMS appointed Judge Stock to decide all threshold issues without objection from any party. [*Id*. Ex. 6.] Judge Stock then invited input from the parties to determine the proper scope of the threshold issues. [*Id*. Ex. 7.] Following input by the parties, the arbitrator issued Scheduling Order No. 1 and established a briefing schedule to address the threshold issue whether the Plaintiffs' class claims are arbitrable. [*Id*. Ex. 8.] Pursuant to Judge Stock's order, each side submitted an opening brief, submitted a responsive brief, and argued at an in-person hearing. Judge Stock issued her partial final award after "having considered the briefs, documentary evidence, matters judicially noticed, and oral arguments of counsel." [*Id*. Ex. 19 (Partial Final Award at 7).] There was simply no corruption, fraud, or misconduct of any kind.

Nor did Judge Stock decide anything beyond the scope of her power.

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9 U.S.C. § 10(4). Judge Stock decided a question that the court explicitly delegated to her at Plaintiffs' urging. [Dkt. 95 at 15-17; Dkt. 81 at 24-25.] Judge Stock has now answered the exact question presented – "whether the Arbitration Agreement permits or forecloses class-wide or representative claims." [Weldon Decl. Ex. 19 (Partial Final Award at 8).][3]

A party seeking relief on the ground that the arbitrator exceeded her power bears a heavy burden. *Oxford Health Plans LLC*, 569 U.S. at 569. Even a serious error on the merits is not enough. *Id*. An award "even arguably construing or applying the contract" must stand, regardless of a court's view of its merits. *Id*. (citations omitted). Judge Stock "focused on the arbitration clause's text" and analyzed it to decide whether the parties intended to agree to class arbitration. *Id*. at 570. As the *Oxford* court made clear, it does not matter whether the arbitrator's analysis is correct. *Id*. Judge Stock's decision is grounded in a reasoned construction of the parties' Arbitration Agreement and on that basis alone must be confirmed.

Though it is not necessary for this Court to agree with the arbitrator's decision in order to confirm it, as we will explain in the argument that follows, Judge Stock decided the issue correctly.

IV. THE ARBITRATOR'S AWARD IS CORRECT

Plaintiffs have steadfastly maintained that the availability of class arbitration

[3] Having advanced and won the argument that the arbitrator should determine the availability of class arbitration, the Plaintiffs are estopped from arguing the question was outside the scope of the arbitrator's authority. *See PowerAgent Inc. v. Elec. Data Sys. Corp*., 358 F.3d 1187, 1192 (9th Cir. 2004) (having affirmatively urged arbitrators to decide arbitrability, party "cannot await the outcome, and, after an unfavorable decision, challenge the authority of the arbitrators to act on that very issue."); *Wulfe v. Valero Ref. Co.-California*, No. CV-12-05971-MWF (EX), 2013 WL 12212090, at *2 (C.D. Cal. Dec. 17, 2013) (party estopped from arguing that court should decide whether claims can be arbitrated as class and that partial final award should be reviewed de novo where he took contrary position in opposing motion to compel).

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is a question for the arbitrator and not the Court. [Dkt. 81 at 24-25.] That said, if Plaintiffs nevertheless urge the Court to reverse itself and review the merits of the arbitrator's decision de novo, such an argument by Plaintiffs would come far too late. Even if the Court were to consider the merits of the award, the outcome should be the same because Judge Stock's decision is correct.

A. Each Retailer's Case Should Proceed by Individual Arbitration

1. Under the FAA, an Arbitrator Cannot Order Class Arbitration If the Parties Did Not Agree to Class Arbitration

Judge Stock relied heavily on the United States Supreme Court decision in *Stolt-Nielsen*. [Weldon Decl. Ex. 19 (Partial Final Award at 8-9).] There, the Supreme Court decided that where there is no agreement to class arbitration, class arbitration may not be compelled and arbitration can only proceed on an individual basis. *Stolt-Nielsen S. A.*, 559 U.S. at 668-69. As Judge Stock noted, the parties' arbitration agreement (like the one in *Stolt-Nielsen*) contained no language that allows for class arbitration. *Id*.

Stolt-Nielsen's holding is clear. "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S. A.*, 559 U.S. at 684 (italics in original). To decide otherwise would be "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id*. at 684. This holding was based on two foundational principles: (1) "that parties may specify *with whom* they choose to arbitrate their disputes" (*id*. at 683 (italics in original)) and (2) that class arbitration causes such changes to the arbitration process that an agreement to class arbitration cannot be presumed or implied from the fact that the parties agreed to arbitration. *Id*. at 685.

Judge Stock also adopted *Stolt-Nielsen's* reasoning that the "differences between individual arbitration and multiparty arbitration proceedings 'are to[o] great'" to presume that the parties' silence on the issue constitutes consent to class

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arbitration. [Weldon Decl. Ex. 19 (Partial Final Award at 9, citing *Stolt-Nielsen S. A.*, 559 U.S. at 687).] As the Supreme Court explained, arbitration's benefits—"lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"—"are much less assured" in class-wide arbitration, "giving reason to doubt the parties' mutual consent" to that procedure." *Stolt-Nielsen S. A.*, 559 U.S. at 685; *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (reiterating that "one of arbitration's fundamental attributes" is its "individualized nature"). "Confidentiality becomes more difficult" in class-wide arbitrations, "potentially frustrating the parties' assumptions when they agreed to arbitrate." *Stolt-Nielsen S. A.*, 559 U.S. at 686. Moreover, "commercial stakes of class-action arbitration are comparable to those of class-action litigation . . . even though the scope of judicial review is much more limited." *Id*. In class arbitration, the arbitrator "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties." *Id.; see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348-50 (2011) (finding that class arbitration "sacrifices the principal advantage of [bilateral] arbitration"—it is "slower, more costly," "more likely to generate procedural morass," "requires procedural formality," "increases risks to defendants" as it has higher stakes but not multiple layers of review); *Epic Sys. Corp.*, 138 S. Ct. at 1623 ("But *Concepcion*'s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent.").

2. The Terms of the Arbitration Provision Show that the Parties Agreed to Individual Arbitration

As demonstrated above, the absence of any affirmative agreement to arbitrate on a class or multiple claimant basis was reason enough for the Judge Stock to determine that Plaintiffs' claims may proceed only by individual arbitration. But

there is more. The arbitration provision itself demonstrates that the parties envisioned only *individual* binding arbitrations.

Two California Court of Appeal cases that have applied *Stolt-Nielsen* are illustrative. *Kinecta Alternative Financial Solutions, Inc.*, 205 Cal.App.4th at 506; *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115 (2012). The arbitration provision in *Kinecta* did not make any mention of class arbitration or contain a waiver of class arbitration. In directing the trial court to dismiss plaintiff's class claims, the court of appeal focused on the language of the parties' agreement, noting that it "identifies only two parties to the agreement, 'I, Kim Malone' and "Kinecta Federal Credit Union and its wholly owned subsidiaries'" and "made no reference to employee groups or to other employees of Kinecta." *Id.* at 517, 519. The court thus concluded that the arbitration clause, "expressly limited arbitration to the arbitration of disputes between [the two parties to the agreement]" and "made no reference to, and did not authorize, class arbitration of disputes." *Id.* at 510. So, too, here, the parties' arbitration agreement refers to disputes between a single "Retailer and LLR." [*Compare* Dkt. 76-6 (Lyon Decl., Exs. 28 (Ret. Agmt. version 4.0, § 21 [emphasis added]) and Ex. 29 (Ret. Agmt. version 6.5.1 § 25)) to contract language in *Kinecta* at 511.]

In *Nelsen*, the California Court of Appeal found that plaintiff's arbitration agreement that covered claims, disputes, and controversies "between myself and Legacy Partners" "by its ordinary meaning, unambiguously negates an intention by [Legacy Partners] to arbitrate claims or disputes" on a class basis. *Nelsen*, 207 Cal.App.4th at 1129-30. The court found that additional provisions referencing "either party's written request" and whereby plaintiff acknowledged that "Legacy Partners and I give up our rights to trial by jury" all contemplated a two-party arbitration. *Id.* at 1130-31. *See also Chico v. Hilton Worldwide, Inc.*, No. CV 14-5750-JFW SSX, 2014 WL 5088240 at *12 (C.D. Cal. Oct. 7, 2014) ("finding "no contractual or other basis for concluding that the parties agreed to class-wide

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arbitration" because the contract referred to plaintiff singularly and did not reference employee groups, putative class members, other employees, or other employees' claims or disputes).

The language and terms of the Retailer Agreement go even farther than those in *Kinecta* and *Nelsen* in reflecting the parties' intent to resolve their disputes by individual arbitration:

- The preamble and signature page for each Retailer Agreement defines "the parties" to be a single Retailer and LLR, so that every subsequent reference to "the parties" contemplates an arbitration involving only a single Retailer. [Dkt. 76-6 (Lyon Decl., Exs. 27 (Ret. Agmt. version 3.0); 28 (Ret. Agmt. version 4.0) and 29 (Ret. Agmt. version 6.5.1)).]
- "In the event of a dispute *between Consultant and LLR Inc.* . . . ." [*Id.* (Ex. 28, § 21 [emphasis added]) and Ex. 29, § 25).]
- "If *the parties* are unsuccessful in resolving their dispute through mediation, the dispute shall be settled totally and finally be arbitration . . . ." [*Id.* (emphasis added)]
- A mediation provision that provides that "[t]he mediation shall occur within 60 days from the date on which the mediator is appointed. The mediator's fees and costs . . . shall be divided equally between the parties. Each party shall pay its portion of the anticipated shared fees and costs at least 10 days in advance of the mediation . . . . Mediation . . . shall last no more than two business days." [*Id.* Ex. 30 at 57 (Policies and Procedures, § 6.3)).]
- "*The Parties* waive all rights to trial by jury or to any court." [*Id.* (Policies and Procedures, § 6.4) (emphasis added)).]
- "*The parties* shall be entitled to all discovery rights permitted by the California Rules of Civil Procedure." [*Id.* Ex. 31 at 64 (emphasis added).]

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- "The arbitration shall occur within 180 days from the date on which the arbitrator is appointed . . . ." [*Id*. Ex. 30 at 58.]
- "The arbitration . . . shall last no more than 5 business days . . . ." [*Id.*]
- "*The parties* shall be allotted equal time to present their respective cases . . . ." [*Id.* (emphasis added).]
- In the case of JAMS arbitration, the parties specified the Streamlined Rules that apply to smaller disputes. [*Id.*]
- "*The parties* and the arbitrator shall maintain the confidentiality of the entire arbitration and shall not disclose to any person not directly involved in the arbitration process:
    - The substance of, or basis for, the controversy, dispute, or claim;
    - The content of any testimony or other evidence presented at an arbitration hearing or obtained through discovery in arbitration
    - The terms or amount of any arbitration award; or
    - The rulings of the arbitrator on the procedural and/or substantive issues involved in the case." [*Id.* (emphasis added).]

Judge Stock properly concluded that the language of the Arbitration Agreement evidenced the parties' intent to "foster prompt, cost-effective arbitration of individual claims, as soon as they arose." [Weldon Decl. Ex. 19 (Partial Final Award at 9).] As further explained in section II.E above, Judge Stock found these and several other provisions particularly telling, and "inconsistent with the need to develop, present and defend a nationwide consumer class-action, involving 80,000 class members." [*Id*.]

As Judge Stock concluded, proceeding with class or other multiple claimant arbitration under these parameters would be impossible. Class arbitration requires full discovery for both class and substantive issues and—assuming a class is certified—would require a full trial on the merits of class-wide claims, possibly followed by yet another phase of individualized proof of damages. Completing

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such a colossal effort in 180 days is wholly unreasonable. Nor could such a matter—involving potentially thousands of class members—be tried in a mere five business days.

The partial final award on threshold issues in this case came 166 days after the July 20 appointment of the arbitrator. Imagine how much more time would be needed to resolve the merits of 22 claims, much less those of an entire class or classes of thousands. *See Concepcion*, 563 U.S. at 348-49 (average time from filing to dismissal, withdrawal or settlement of AAA class arbitrations was 630 days; as of September 2009, not a single case had yet resulted in a final award on the merits).

Conducting a class-wide arbitration in compliance with the specific confidentiality requirements in the Policies and Procedures and the First Amendment is also impossible. [Dkt. 76-5 (Declaration of Elizabeth M. Weldon in Support of Motion to Compel Plaintiffs to Individually Arbitrate and to Dismiss or Stay This Action, Ex. 25 (JAMS Class Action Procedures, Rule 4 (providing for notice of class determination to all class members), Rule 6 (providing for notice of settlement to all class members))]. *See Stolt-Nielsen S. A.*, 559 U.S. at 686 ("Confidentiality becomes more difficult" in class-wide arbitrations, "potentially frustrating the parties' assumptions when they agreed to arbitrate").

Plaintiffs have previously argued that the parties' arbitration agreement is invalid because of the prohibitive costs it imposes on Plaintiffs. This argument has been denied twice, by both this Court and the arbitrator. As part of the Court's analysis of substantive unconscionability, the Court rejected the argument that the arbitration provision imposes excessive costs on the Lemberg Claimants. [Dkt. 95. at 13.] The court observed that "[f]inding that this arbitration agreement is 'prohibitively expensive' would 'in effect, limit the enforcement of arbitration agreements to situations in which all of the parties to the agreement are wealthy. This absurd result, we think, is not what Congress intended when it enacted the

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FAA.'" [*Id.*, quoting *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343, 347 (6th Cir. 2006).] Plaintiffs also raised and lost these arguments before Judge Stock. [Weldon Decl. Ex. 19 (Partial Final Award at 12).]

B. The SAMP Claim Does Not Impact the Threshold Issue

In their briefing on the threshold issue, though not in oral argument, Plaintiffs argued that under the Seller Assisted Marketing Plan Act ("SAMP") the parties' agreements, containing the arbitration agreement, were illegal and void and thus the arbitration agreement was unenforceable. [Weldon Decl. Ex. 9 (Claimants' Brief in Favor of Class Arbitration, 21:11-24:11).] Should Plaintiffs reargue (wrongly) that the arbitration agreements are unenforceable, it bears emphasis that Plaintiffs' alleged right to void their entire contracts with LLR goes to the merits of their claims and was not a proper threshold issue in the first phase of arbitration.

1. This Court Already Declared the Contracts Enforceable

This Court already decided that the parties have an enforceable agreement to arbitrate and must arbitrate *all* of the Lemberg Claimants' claims—including the SAMP claim. [Dkt. 95 at 17.] There was no way to reconcile the Plaintiffs' request to the arbitrator that she decide there is no enforceable agreement to arbitrate (based on SAMP) with this Court's decision that there is a valid arbitration agreement and all claims must be arbitrated. [Dkt. 76-5, Ex. 25 (JAMS Class Action Procedures, Rule 1(d) (the arbitrator shall follow court orders relating to any matter that would otherwise be decided by an arbitrator)).]

If the Plaintiffs wish to argue that the agreements as a whole are unenforceable due to violations of the SAMP Act, this is an issue for the arbitrator to decide at the later merits stage, as discussed in more detail in the next section. The U.S. Supreme Court has rejected the argument that an arbitration agreement can be voided by claimed illegality of the entire contract. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-49 (2006). *See also Kubista v Value Forward Network, LLC*, No. CIV 12-4066, 2012 WL 2974675 *4-5 (D.S.D. July 20, 2012)

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(enforcing arbitration clause despite claim that entire contract was void ab initio under South Dakota's equivalent to California's SAMP Act); *Fluehmann v. Associates Financial Services*, No. CIV.A. 01-40076-NMG, 2002 WL 500564 * 8 (D. Mass. Mar. 29, 2002) ("plaintiff's putative rescission here [under federal Truth in Lending Act] does not render the Arbitration Agreement null and void"); *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88, 90 (1st Cir. 2002) (affirming order compelling arbitration where borrower claimed to have rescinded loan agreement pursuant to TILA); *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 50, 55 (1st Cir. 2002)(party's assertion of the right to rescind "does not undo the obligation to take the rescission claim to arbitration."). [4]

2. The Merits of Plaintiffs' SAMP Claims Are Not a Threshold Issue

The arbitrator also properly ruled in her scheduling order that the merits of whether Plaintiffs "are entitled to relief under the SAMP Act" or whether the Plaintiffs "successfully exercised a statutory right of recession of any agreement(s) comprising the Arbitration Agreement" are not among the threshold issues in the arbitration. [Weldon Decl. Ex. 8 (Report of Preliminary Hearing and Scheduling Order No. 1, Sept. 26, 2018, ¶ 6, p. 6).] Judge Stock also reminded the parties at hearing that her role was focused on the threshold issue of class arbitration, and not on the merits of the underlying claims. [*Id*. at Ex. 18 (Hearing Transcript, Dec. 6, 2018, 5:11-6:3; 8:8-24).]

Whether any of the Plaintiffs' contracts with LLR are voidable under SAMP is a merits issue requiring extensive discovery, and is not a threshold issue to be decided before class certification, much less at the even more preliminary stage of

[4] One Plaintiff, Stuckart, who purported to void her contract under the SAMP Act argued in Plaintiffs' opposition to LLR's original motion to compel arbitration that her arbitration agreement was invalid on that basis, but Plaintiffs then dropped this argument from the opposition to the second motion to compel arbitration that this Court ultimately decided. [*See* Dkt. 49 at 12:24-13:14; Dkt. 81.]

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deciding whether class arbitration is even possible. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (a court has no authority to "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"); *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1023 (2012) ("resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided"). Allowing a merits inquiry before certification would "contravene" Rule 23 "by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it." *Eisen*, 417 U.S. at 177. Additionally, the U.S. Supreme Court has noted that "a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials." *Id.* [*See* Dkt. 76-5, Ex. 25 (JAMS Class Action Procedures, Rules 2, 3, 4, 5 (setting forth proper sequence of decisions, first the "threshold matter" whether the parties have agreed to class arbitration, then whether to certify a class, then provide notice to class members, and last, issue a final award on the merits)).]

And the Plaintiffs failed to even establish that the SAMP Act applies to the Retailer Agreements. A SAMP is a defined term: "Seller assisted marketing plan' means any sale or lease or offer to sell or lease any product, equipment, supplies, or services that requires a total initial payment exceeding five hundred dollars ($500), but requires an initial cash payment of less than fifty thousand dollars ($50,000), that will aid a purchaser or will be used by or on behalf of the purchaser in connection with or incidental to beginning, maintaining, or operating a business when the seller assisted marketing plan seller has advertised or in any other manner solicited the purchase or lease of the seller assisted marketing plan and done any of the following acts . . . ." Cal. Civ. Code § 1812.201(a). The "following acts" are representations listed at (a)(1)-(3):

- Representations about earning an amount in excess of the initial payment.

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- Representations that there is a market for the product, equipment, supplies, services, etc.
- Representations that the seller will or is likely to buy back certain products made, produced, fabricated, grown, or bred by the purchaser.

And even if the elements of the SAMP definition were met, there is a lengthy list of exemptions from the Act, which may apply to some or all individual Plaintiffs. *Id*. at. § 1812.201(b)(1)-(10). Among others, there is the exemption for purchasers who also sell other products or services, if those other products or services are more than 25% of the purchaser's sales; the exemption for a purchasing relationship that existed at least six months before; and the exemption for renewal of agreements. *Id*. at (6), (8), (9).

Facts, evidence, and discovery are required to determine if the SAMP Act even applies, whether exemptions apply to the Plaintiffs, and whether each Plaintiff timely and properly exercised a right of rescission. None of these facts were proven in the threshold arbitration proceeding, and these merits issues have no place in the determination whether the Plaintiffs may proceed with their class claims, or whether to confirm the arbitrator's partial final award.

V. CONCLUSION

Defendants respectfully request that the Court grant this motion to confirm the partial final award rendered by Judge Stock.

Dated: January 24, 2019

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