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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLES BREWER, individually and on behalf of all other similarly situated current and former employees of Defendant,

Plaintiffs,

v.

GENERAL NUTRITION CORPORATION,

Defendant.

Case No. 11-cv-3587 YGR
PRETRIAL ORDER NO. 3
RE: DISCOVERY DESIGNATIONS
IN DISPUTE

Dkt. No. 304

Plaintiffs Charles Brewer, Jessica Bruns, Michael Mitchell, Michael Murphy, and Wayne Neal (“Named Plaintiffs”), on behalf of themselves and all others similarly situated (collectively, “Plaintiffs”) and Defendant General Nutrition Corporation (“Defendant” or “GNC”), pursuant to this Court’s Pretrial Instructions in Civil Cases Standing Order, have submitted their disputed discovery excerpts for decision by the Court. The Court having carefully considered the matters at issue, and for good cause show, **ORDERS** as follows:

As a general matter, where the Court has indicated that additional information is needed in order for it to rule, such additional designation, exhibit, or other information shall be submitted to the Court no later than **JANUARY 8, 2016**.

Further, where Defendant has offered designations of testimony given by absent class members, either in the present litigation or in the Abad and Naranja actions, the Court finds that Defendant has not demonstrated that such persons should be treated as “parties” for purposes of Federal Rule of Evidence 801(d)(2)(A), admissions of a party-opponent. Absent class members are considered “parties for some purposes and not for others.” *Devlin v. Scardelletti*, 536 U.S. 1,

1 10 (2002). In order for an absent class member to be treated as a party, or party-representative, for
2 purposes of FRE 801, there must be “some mechanism to ensure that he or she will represent the
3 interests of the class.” *Pierce v. County of Orange*, 526 F.3d 1190, 1202 (9th Cir. 2008).
4 Consistent with *Pierce*, in order for Defendant to introduce absent class member testimony under
5 Rule 801(d)(2)(A)’s “party-opponent” exception, Plaintiffs would have had to disclose these
6 persons as individuals they expected to testify. Plaintiffs have not so identified these individuals.
7 That Plaintiffs’ supplemental disclosures under Rule 26 generally identified persons who had
8 testified in the other litigation as “likely to have discoverable information...that the disclosing
9 party may use to support its claims or defenses” does not, standing alone, meet the prerequisite set
10 forth in *Pierce* for finding all such persons to be “parties” here.

11 Further, GNC has not made a showing that these persons are unavailable, i.e. that GNC
12 attempted but was unable to procure their attendance by process or other reasonable means, and
13 that plaintiffs in the earlier litigation “had an opportunity and similar motive to develop the
14 testimony by direct, cross, or redirect examination” compared to Plaintiffs here. FRE 804(b)(1).
15 As Plaintiffs note, *Abad* was an individual lawsuit and *Naranjo* involved different class members
16 and a different time period than the instant litigation.

17 Thus, the Court sustains Plaintiffs’ objections to GNC’s discovery designations for
18 testimony obtained in this case and in the *Abad* and *Naranjo* cases in the absence of a further
19 proffer establishing their admissibility under some hearsay exception other than FRE
20 801(d)(2)(A). Should Defendant wish to make some additional proffer with respect to the affected
21 designations, it shall file such proffer no later than **JANUARY 8, 2016**.

22 Set forth below are the Court’s rulings on the objections to specific designations:

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PLAINTIFFS’ LIST OF DISCOVERY EXCERPTS

<u>No.</u>	<u>Form of Excerpt</u>	<u>Designation in Dispute</u>	<u>Court’s Ruling</u>
P. 1	Thomas Scott Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 7:5-10:3	OVERRULED.
P. 2	Jeffrey Emerick Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 17:2-17:10 ----- p. 17:12-18 ----- p. 7:5-10:3	OVERRULED. ----- OVERRULED. ----- OVERRULED , except that ruling is RESERVED as to 9:1-10:3 which requires additional context for the Court to rule.
P. 3	Ron Hallock Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	None.	--
P. 4	James Inlow Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 12:19-21 ----- p. 69:3-71:8 ----- p. 34:6-17 ----- p. 54:1-5 ----- p. 54:6-25	RESERVED – Requires additional showing of foundation ----- OVERRULED. ----- RESERVED -- Requires additional showing of foundation ----- OVERRULED. ----- OVERRULED.
P. 5	Paul Katz Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 55:4-13	RESERVED. Court requires copy of exhibit referenced.
P. 6	Shannen Sternerson Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 102:13-104:1 ----- p. 97:21-98:8	SUSTAINED as to 102:24-103:14 only. Otherwise OVERRULED. ----- OVERRULED.
P. 7	Lona Toffolo Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 69:3-9 p. 9:11-17 & 10:21-11:5 p. 11:6-25 & 16:4-17:5	OVERRULED as to all.

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<u>No.</u>	<u>Form of Excerpt</u>	<u>Designation in Dispute</u>	<u>Court's Ruling</u>
P. 8	Kenneth Wunschel Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 112:15-113:21 ----- p. 247:14-248:1	OVERRULED. ----- OVERRULED.
P. 9	Anthony Masztak Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 132:3-8	OVERRULED.
P. 10	GNC's First Supplemental Responses to Plaintiffs' Special Interrogatories, Set Three	No. 26 No. 27 No. 28 No. 29 No. 34	OVERRULED as to all, and objections therein are likewise overruled.
P. 11	GNC's Responses to Plaintiffs' Request for Admissions, Set Two	No. 5 No. 6 No. 12 No. 13	OVERRULED as to all.
P. 12	GNC's Responses to Plaintiffs' Special Interrogatories, Set Five	No. 48 ----- No. 49 ----- No. 50 ----- No. 51 ----- No. 65 No. 66 No. 72 No. 73	SUSTAINED. ----- SUSTAINED. ----- SUSTAINED. ----- SUSTAINED. ----- As to 65, 66, 72, and 73, RESERVED. Evidence of remedial action would be inadmissible.
P. 13	GNC's Responses to Plaintiffs' Special Interrogatories, Set Four	No. 43 No. 46 No. 47	RESERVED as to all.
P. 14	GNC's Responses to Plaintiffs' Special Interrogatories, Set Three	No. 33 No. 36 No. 37	RESERVED as to all.
P. 15	GNC's Responses to Plaintiffs' Request for Admissions, Set One	No. 1 No. 2	OVERRULED as to all.

DEFENDANT’S LIST OF DISCOVERY EXCERPTS

<u>No.</u>	<u>Form of Excerpt</u>	<u>Designation in Dispute</u>	<u>Court’s Ruling</u>
D.1	Charles Brewer Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 29:6-25 p.30:15-17 p. 31:24-33:3 p. 50:22-51:4 p. 97:17-98:1 p. 102:8-103:10	OVERRULED as to all, and objections therein are likewise overruled.
D.2	Wayne Neal Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 12:9-10; 19-20 p. 23:3- 24:5	OVERRULED as to all, and objections therein are likewise overruled.
D.3	Michael Mitchell Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 11:24 – 12:2 ----- p. 22:10 – 23:1 ----- p. 59:20 – 60:11	OVERRULED , and objections therein are likewise overruled. ----- OVERRULED , and objections therein are likewise overruled. ----- RESERVED.
D.4	Matthew Testa Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 4:10-5:4 p. 5:5-22 p. 13:1- 14:15 p. 26:4-13 p. 45:6-46:15 p. 49:1-4	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.5	Richard Doan Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 5:7-6:20 p. 18:3-19-16 p. 23:10-19 p. 28:24-29:9 p. 29:13-30:16 p. 31:8-32:2 p. 32:25-33:14	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.6	Naim Deghany Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 8:10-24 p. 56:7-58:8 p. 58:16- 60:12	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.7	Leandro Fusco Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 5:14-17 p. 6:20-21 p. 7:2-3 p. 30:22- 31:6 p. 31:22-25 p. 41:14-20	SUSTAINED as to all. As stated above, no showing that individual is a party.

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<u>No.</u>	<u>Form of Excerpt</u>	<u>Designation in Dispute</u>	<u>Court's Ruling</u>
D.8	Jessica Bruns Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 9:22-10:1 p. 10:22-25 p. 14:9-15:8 p. 32:14-22	OVERRULED as to all.
D.9	Christopher Gregory Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 4:10-5:2 p. 35:13-16 p. 35:18-25	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.10	Houman Nayebi Deposition Transcript (Brewer et al., v. GNC, Inc. Case No. 11-cv-03587)	p. 6:3-21 p. 35:4-18 p. 35: 23- 36:6	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.11	Anthony Lozano Deposition Transcript (Naranjo et al. v. GNC, Case no. RG12619626)	p. 11:13-21 p. 14:2-12 p. 88:17-89:24 p. 92:13-92:22 p.93:14- 94:9	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.12	Cassandra Draeger Deposition Transcript (Naranjo et al. v. GNC, Case no. RG12619626)	p. 23:24-25:13 p. 36:1-37:3 p. 45:6-22 p. 63:24-64:12 p. 64:21-65:12 p. 91:6-10 p. 93:9-94:8	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.13	Stephen Hermanson Deposition Transcript (Naranjo et al. v. GNC, Case no. RG12619626)	p. 11:16-13:18 p. 22:2-4 p. 22:24-25:4 p. 33:11-25 p. 71:3-20	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.14	Christopher Schafer Deposition Transcript (Naranjo et al. v. GNC, Case no. RG12619626)	p. 8:12-9:21 p. 20:21- 21:13 p. 21:24- 22:5 p. 23:17- 25:19 p. 65:6 - 67:2 p. 67:10- 68:2	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.15	Grant Thomas Deposition Transcript (Naranjo et al. v. GNC, Case no. RG12619626)	p. 11:7-12:6 p. 45:3-24 p. 79:1-24 p. 86:5-87:4	SUSTAINED as to all. As stated above, no showing that individual is a party.

<u>No.</u>	<u>Form of Excerpt</u>	<u>Designation in Dispute</u>	<u>Court's Ruling</u>
D.16	Viviana Armenta Deposition Transcript (Naranjo et al. v. GNC, Case no. RG12619626)	p. 20:7-21:25 p. 40:22-24 p. 41:8-42:8	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.17	Matt Cappadonna Deposition Transcript (Naranjo et al. v. GNC, Case no. RG12619626)	p. 8:10-9:9 p. 43:21-44:12 p. 46:9-48:21 p. 55:13-56:2	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.18	Perelandra Harris Deposition Transcript (Naranjo et al. v. GNC, Case no. RG12619626)	p. 16:5-8 p. 31:9-21 p. 62:18-64:24 p. 65:5-23 p. 68:5-23 p. 88:2-89-8	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.19	Ben Ramey Deposition Transcript (Naranjo et al. v. GNC, Case no. RG12619626)	p.12:15-13-24 p.16:20-17:16 p. 35: 14-24 p. 118:3-118-17	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.20	Misty Fair Deposition Transcript (Naranjo et al. v. GNC, Case no. RG12619626)	p. 16:20-18:23 p. 38:8-18 p. 61:24-62:19 p. 75:10-77:2	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.21	6/12/13 Transcript, Vol. 1 – Abad (Abad)	p. 40:18-21 p. 57:12-58:11 p. 59:3-21 p. 61:25-62:5 p. 70:19-71:3 p. 71:10-13 p. 79:22-80:6	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.22	6/13/13 Transcript, Vol. 1 – Abramson (Abad)	p. 5:24-6:6 p. 6:19-7:1 p. 26:13-19 p. 27:15-17 p. 31:1-25 p. 33:19-34:17 p. 35:8-36:11 p. 36:22-37:10 p. 42:17-44:6	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.23	6/12/13 Transcript, Vol. 1 – Ansine (Abad)	p. 69:23-72:22 p. 85:10-86:14 p. 87:6-88:2	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.24	6/12/13 Transcript, Vol. 2 – Ansine (Abad)	p. 7:7-15 p. 14:25-16:4 p. 26:12-25	SUSTAINED as to all. As stated above, no showing that individual is a party.

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<u>No.</u>	<u>Form of Excerpt</u>	<u>Designation in Dispute</u>	<u>Court's Ruling</u>
D.25	Robino Abad Deposition Transcript (Abad et al., v. GNC, Inc. Case No. 8:09-cv-00190)	p. 7:13-17 p. 7:25-9:15 p. 19:3-8 p. 29:16-31:1	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.26	Isaac Bailey Deposition Exhibits (Abad et al., v. GNC, Inc. Case No. 8:09-cv-00190)	p. 6:22-23 p. 8:19-11:6 p. 19:3-11 p. 21:6-7 p. 22:20-24 p. 24:5-13 p. 29:4-16 p. 33:9-34:11 p. 34:25-35:19 p. 38:12-16 p. 41:24-42:4 p. 51:4-52:20 p. 55:21-24 p. 59:12-23 p. 62:5-9 p. 62:21-63:13	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.27	Ashley Abramson Deposition Transcript (Abad et al., v. GNC, Inc. Case No. 8:09-cv-00190)	p. 6:11-12; 19-24 p. 10:13-11:2 p. 11:19-24 p. 13:8-14:19 p. 15:12-16:9 p. 17:6-19 p. 21:21-23:16 p. 25:4-13 p. 31:9-35:18 p. 41:25-42:10 p. 43-8:16 p. 44:9-46:12 p. 54:17-56:9 p. 56:19-58:23 p. 64:15-65:11 p. 66:17-67:12 p. 68:8-70:13	SUSTAINED as to all. As stated above, no showing that individual is a party.
D.28	Greta Ansine Deposition Transcript (Abad et al., v. GNC, Inc. Case No. 8:09-cv-00190)	p. 4:6-7 p. 9:12-10:1 p. 10:6-12:17 p. 17:19-18:15 p. 40:3-15 p. 45:3-46:4 p. 47:20-24 p. 48:21-49:16	SUSTAINED as to all. As stated above, no showing that individual is a party.

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<u>No.</u>	<u>Form of Excerpt</u>	<u>Designation in Dispute</u>	<u>Court's Ruling</u>
		p. 51:19-52:4 p. 52:10-16 p. 53:7-9 p. 56:13-57:11 p. 58:9-14 p. 59:4-12 p. 62:7-9 p. 68:1-69:1 p. 75:12-77:1 p. 79:1-25 p. 80:9-17	

IT IS SO ORDERED.

Dated: December 21, 2015


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE