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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

NATIONAL STRENGTH AND CONDITIONING ASSOCIATION,

Plaintiff,

v.

GREG GLASSMAN; RUSSELL BERGER; RUSS GREENE; and CROSSFIT, INC., a Delaware Corporation; and DOES 1 through 20, inclusive,

Defendants.

Case No. 37-2016-00014339-CU-DF-CTL

NOTICE OF DISCOVERY REFEREE'S ORDER NO. 9 SUPPLEMENTAL RULING RE DISCOVERABILITY OF IDENTITY OF PEER REVIEWERS

[IMAGED FILE]

Dept: C-73
Judge: Hon. Joel R. Wohlfeil
Action Filed: 05/02/2016
Trial Date 06/01/2018

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 3, 2018, the Honorable William McCurine, Jr. (Ret.), duly-appointed Discovery Referee, issued a Discovery Referee's Order No. 9 Supplemental Ruling Re Discoverability of Identity of Peer Reviewers ("Order") in the above-captioned case. A true and correct copy of the Order is attached hereto as EXHIBIT A.

Dated: January 3, 2018

TROUTMAN SANDERS LLP

By: Wynter L. Deagle

Wynter L. Deagle
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Joseph R. Dunn
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the County of San Diego, State of CA. I am over the age of 18 and not a party to the within action; my business address is 11682 El Camino Real, Suite 400, San Diego, CA 92130-2092.

On January 3, 2018, I served the following document(s) described as:

NOTICE OF DISCOVERY REFEREE'S ORDER NO. 9 SUPPLEMENTAL RULING RE DISCOVERABILITY OF IDENTITY OF PEER REVIEWERS

☒ **BY ELECTRONIC MAIL** (CRC 2.251): Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses, as last given or submitted on any document which he or she has filed in the case, listed on the attached service list.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 3, 2018, at San Diego, CA.

Jennifer Wolber

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EXHIBIT A

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DISCOVERY REFEREE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

NATIONAL STRENGTH AND CONDITIONING ASSOCIATION, Plaintiff, vs. GREG GLASSMAN; RUSSEL BERGER; RUSS GREENE; CROSSFIT, INC., a Delaware Corporation; and DOES 1 through 20, inclusive, Defendants.	Case No.: 37-2016-00014339-CU-DF-CTL **ORDER NO. 9** **SUPPLEMENTAL RULING RE DISCOVERABILITY OF IDENTITY OF PEER REVIEWERS** Dept: C-73 Hon. Joel R. Wohlfeil Complaint Filed: May 2, 2016

On or about December 5, 2017 the Discovery Referee issued a ruling regarding the discoverability of the identity of the peer reviewers in this matter. On or about December 15, 2017, the NSCA filed an objection to that ruling. One of the fundamental bases of that objection is that the Discovery Referee failed to consider the NSCA's First Amendment argument. The NSCA argues that the First Amendment prevents disclosure of the identity of the peer reviewers. The Discovery Referee disagrees. This supplemental ruling is written to answer that objection.

ANALYSIS

A. General Principles

Cases have identified different categories of speech that are entitled to different levels of protection under the First Amendment. Speech addressing matters of public concern, including political speech, is entitled to a high level of protection. However, commercial speech, and speech involving purely private matters, is entitled to a more limited measure of First Amendment

protection. And, again, deciding whether speech is of a public or private concern requires examination of the content, form, and context of that speech. See *Snyder, supra,* 131 S.Ct. at 2016.

The Supreme Court addressed the First Amendment's speech protection in *Snyder v. Phelps*, 131 S.Ct. 1207 (2011), a case that involved picketing, with signs, by members of a church near a soldier's funeral service.

> "Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public concern, as determined by all the circumstances of the case" (131 S.Ct. at 2015). "[S]peech on 'matters of public concern' .. . is 'at the heart of the First Amendment's protection'" (*Id*).)
>
> "'[N]ot all speech is of equal First Amendment importance,'" however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. [Citations omitted] That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest" (*Id*). "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' [citation omitted], or when it 'is a subject of legitimate news interest, that is, a subject of general interest and of value and concern to the public,' [citations omitted]. " (131 S.Ct. at 1216). "Deciding whether speech is of public or private concern requires us to examine the "'content, form, and context' of that speech" (*Id*).

The Ninth Circuit addressed First Amendment expression and anonymity in *In re Anonymous Online Speakers v. United States District Court, et al.*, 661 F.3d 1168 (9th Cir. 2011). In that case the plaintiff sued the defendant alleging that defendant had "orchestrated an Internet smear campaign via anonymous postings and videos disparaging [the plaintiff] and its business

practices" (at 1171). As part of discovery the plaintiff sought the identity of the five anonymous online speakers in the postings and videos. The district court ordered that the identities of three of the five be disclosed; and the Court of Appeals decided that the order was not clear error. In its opinion the Ninth Circuit first noted that identity protection is a part of First Amendment freedom of speech protection. "It is now settled that 'an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment'" (661 F.3d at 1173). The Court then noted two things: (1) all speech is not equally protected under the First Amendment, and (2) some speech is not protected at all.

> "The right to speak, whether anonymously or otherwise, is not unlimited, however, and the degree of scrutiny varies depending on the circumstances and the type of speech at issue. Given the importance of political speech in the history of this country, it is not surprising that courts afford political speech the highest level of protection. [Citation omitted] Commercial speech, on the other hand, enjoys 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' [citation omitted], as long as 'the communication is neither misleading nor related to unlawful activity.' [Citation omitted] And some speech, such as fighting words and obscenity, is not protected by the First Amendment at all" (*Id*).

In *In re Anonymous Online Speakers* the Ninth Circuit noted various tests that have been used to determine whether anonymity will be granted. See *In re Anonymous Online Speakers,* 661 F.3d at 1175-76. The Ninth Circuit further noted that, "the nature of the speech should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes" (1177). See also *OBI Pharma, Inc. v. Does 1-20*, 2017 WL 1520085, *2 (S.D. Cal. 2017).

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B. Speech Not Protected By The First Amendment

In *United States v. Alvarez*, 132 S.Ct. 2537 (2012), the Supreme Court cited the following as categories of speech not protected under the First Amendment: (1) "advocacy intended, and likely, to incite imminent lawless action," (2) "obscenity," (3) "defamation," (4) "so-called 'fighting words,' (5) "child pornography," (6) "fraud," (7) "true threats," and (8) "speech presenting some grave imminent threat the government has the power to prevent". 132 S.Ct. at 2544.

In addition to certain *categories* of speech identified as falling outside the protection of the First Amendment, cases have identified certain specific speech as being outside the protection. In *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. 2011), the court stated:

> "However, the right to anonymity is not absolute. Where anonymous speech is alleged to be unlawful, the speaker's right to remain anonymous may give way to a plaintiff's need to discover the speaker's identity in order to pursue its claim" (*4). [*Art of Living Foundation* may be particularly applicable to the NSCA case in question, depending on the nature and strength of the "credible claim of fraud."]

In *U.S. v. Szabo*, 760 F.3d 997, 1002 (9th Cir. 2014), the Ninth Circuit said "[s]peech that threatens a person with violence is not protected by the First Amendment."

D. Levels of First Amendment Protected Speech.

As noted above, cases have identified different categories of speech that are entitled to different levels of protection under the First Amendment. Speech addressing matters of public concern, including political speech, is entitled to a high level of protection. However, commercial speech, and speech involving purely private matters, are entitled to a more limited measure of First Amendment protection. And, again, deciding whether speech is of a public or private concern requires examination of the content, form, and context of that speech. See *Snyder, supra,* 131 S.Ct. at 2016.

In *In re Anonymous Online Speakers* the Ninth Circuit noted various tests that have been used to determine whether anonymity will be granted. See *In re Anonymous Online Speakers,* 661 F.3d at 1175-76. The Circuit further noted that, "the nature of the speech should be a driving force

in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes" (1177). See also *OBI Pharma, Inc. v. Does 1-20*, 2017 WL 1520085, *2 (S.D. Cal. 2017).

E. Application

As noted above, cases have identified different categories of speech that are entitled to different levels of protection under the First Amendment. Speech addressing matters of public concern, including political speech, is entitled to a high level of protection. However, commercial speech, and speech involving purely private matters, are entitled to a more limited measure of First Amendment protection. And, again, deciding whether speech is of a public or private concern requires examination of the content, form, and context of that speech. See *Snyder, supra,* 131 S.Ct. at 2016.

The speech here is most akin to commercial speech. It is not political and it is not private or personal. According to CrossFit, the aim of the speech in question was to commercially damage CrossFit while at the same time commercially benefitting the NSCA. In the federal action Judge Sammartino has already determined the following as between the NSCA and CrossFit[1]:

1. It is taken as established that the Erratum's statement, that two participants were injured during the course of the Study, misled the public and harmed CrossFit.
2. It is taken as established that the NSCA's false statement in the Devor Study was disseminated sufficiently to the purchasing public to constitute advertising or promotion.
3. It is taken as established that the NSCA caused the false statement in the Devor Study to enter interstate commerce.
4. It istaken as established that it was foreseeable that the false statement in the Devor Study would be circulated to the media.
5. It is taken as established that a loss in CrossFit's certification revenue

[1] The following statements were taken *verbatim* from Judge Sammartino's ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SANCTIONS. [Dkt. No. 176, pgs 12-14.

was the natural and probable result of the false injury data in the Devor Study.

6. The jury may, but is not required to, infer from the NSCA's spoliation of documents informing CrossFit's Lanham Act claim that the NSCA violated the Lanham Act as alleged in Count I of CrossFit's Complaint.
7. The jury may, but is not required to, infer from the NSCA's spoliation of documents informing CrossFit's state law false advertising claim that the NSCA violated California Business and Professions Code § 17500 as CrossFit alleges in Count II of its Complaint.
8. The jury may, but is not required to, infer from the NSCA'sspoliation of documents that the NSCA's false statement in the Devor Study was *commercial speech.*
9. The NSCA shall not be permitted to enter evidence that it does not compete with CrossFit.

In addition to the above, Judge Sammartino has already ruled as between CrossFit and the NSCA that the injury data in the Devor Study was false.[2] Therefore, there is credible evidence that the injury data was *knowingly false*, that the NSCA not only participated in, but perpetrated, the creation and dissemination of the knowingly false injury data. Given that the speech in question is akin to commercial speech, it is entitled to little, if any, protection under the First Amendment. Further, given that the information was *knowingly false*, it is not entitled to First Amendment protection, especially where such protection would subvert the search for truth.

The NSCA relies on *Richards of Rockford v. Pacific Gas Elec.,* 71 F.R.D. 388, 390 (N.D. Cal. 1976). However, that reliance is misplaced. The issue is *Richards* was: "whether on these facts, plaintiff's interest in satisfying its discovery request outweighs the public interest in

[2] Judge Sammartino's ORDER(1) GRANTING CROSSFIT, INC.'S PARTIAL MSJ AND (2) GRANTING IN PART AND DENYING IN PART NATIONAL STRENGTH AND CONDITIONING ASSOCIATION'S MSJ. Dkt. No. 121.

maintaining confidential relationships between academic researchers and their sources." *At 389.* *Richards* involved the alleged breach of a commercial contract to build and supply certain cooling equipment for Pacific Gas & Electric ("PG&E") which refused to make the final payment. During discovery Plaintiff Richards learned that a Harvard Professor had done a study to determine how utility companies make environmental decisions. The focus of the professor's study was "the relationship between organizational structure and decision-making." *Id.* In the course of that study, the professor interviewed some PG&E employees under a promise of confidentiality. PG&E was one of six utilities studied. Plaintiff Richards wanted PG&E to identify the employees and submit them to deposition. The *Richards* Court noted that "[t]The law begins with the presumption that the public is entitled to every person's evidence."[3] *At 389* The Court denied the request for discovery on grounds that are illuminating for this case. *First,* there was a public policy in favor of preserving the confidentiality of the professor's sources. However, other than the general rule allowing relevant discovery in connection with the search for truth, there was no countervailing public policy in favor of disclosure. Such is not the case here. As the Discovery Referee already stated in his previous ruling, there is a strong public policy promoting honest and fair scientific inquiry untainted by fraud and manipulation for commercial advantage. Indeed the public policy in favor of honest scientific inquiry free of fraud and manipulation outweighs the need to protect the identity of the authors of the Devor study. In this case, the falsity of the Devor Study has already been adjudicated adverse to the NSCA.[4] *Second,* the information sought was "supplementary"; Plaintiff Richards had already obtained what he needed in discovery: "The terms of the written agreement, the relevant weather conditions, and the technical performance of the modules, are readily and independently adducible. Any information Professor Roberts or Lane McIntosh may have as to the identity of those PGE officials who decided to abandon the system and the reasons for their decision is available to plaintiffs through interrogatories propounded to PGE. In short, the information sought

[3] Citing and relying on *Blackmer v. United States,* 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375 (1932).

[4] Please see footnotes 1 and 2 above.

is largely supplementary." *At 390.* In contrast, the information being sought here lies at the heart of the NSCA's complaint *and* at the heart of CrossFit's defense. The information is *not* supplementary, but critical and not obtainable from any other source. *Third,* the focus of the professor's study was tangential to Plaintiff Richards' lawsuit. In contrast, the Devor study is at the very heart of NSCA's complaint and CrossFit's defense. It is *the reason* the NSCA is suing CrossFit in this action and why CrossFit is suing the NSCA in the federal action. *Finally,* the *Richards* Court was very clear that "*there is authority that one who publishes defamatory statements has no First Amendment privilege to refuse to reveal the identity of the source for such statements. Garland v. Torre,* 259 F.2d 545 (2 Cir. 1958), *cert. denied,* 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958). In *Garland,* however, the deponent was a party; more importantly, only the identity of the source for the alleged defamation was at issue. It was beyond dispute that allegedly defamatory statements had been published. Here, by contrast, there is absolutely no evidence that Richard was defamed during the interviews with Professor Roberts. No such allegations appear in plaintiff's complaint, nor, as far as the Court can determine, in any of plaintiff's answers to interrogatories." *At 390* (Emphasis added.) As stated above, the issue of defamation is at the heart of the instant action. The NSCA claims that CrossFit has defamed it; CrossFit avers its charges against the NSCA and the Devor study are true. The NSCA says the integrity of the peer review process must be obtained. CrossFit argues that the peer review process was fraudulent and corrupted. Disclosure of the identity of the peer reviewers is critical to determine which party is correct.

The NSCA also relies on *In Re Cusumano, 162 F.3d 708 (1st Cir. 1998).* However, that case is distinguishable and, in any event, is more helpful to CrossFit than to the NSCA. Cusumano was an antitrust case which Microsoft brought against Netscape. In the course of discovery, Microsoft "learned about a forthcoming book entitled *Competing on Internet Time: Lessons from Netscape and the Battle with Microsoft* and obtained a copy of the manuscript." *At 711* two distinguished ivy league academicians wrote the book. In preparing the book, the professors signed a non-disclosure

agreement with Netscape not to reveal proprietary information. The professors also obtained agreements to record various personnel on condition that the interviewees could review all quotes attributed to them before the book was published. It is important to understand that Microsoft knew the identities of the interviewees and the authors and had a copy of the pre-published manuscript. What Microsoft sought in discovery were the two professors' recordings and notes from the various interviews. Weighing all the relevant factors, the trial court decided the First Amendment protected such information from disclosure, analogizing the professors to journalists. The 1st Circuit Court of Appeal upheld the district court's ruling for the following reasons. *First,* The quotations in the manuscript were attributed to *named* individuals who were available to be deposed. *At 716. Second,* Microsoft could obtain the information it wanted through less intrusive means; for example, deposing the interviewees. *Third,* "allowing Microsoft to obtain the notes, tapes, and transcripts it covets would hamstring not only the respondents' future research efforts but also those of other similarly situated scholars. This loss of theoretical insight into the business world is of concern in and of itself. Even more important, compelling the disclosure of such research materials would infrigidate the free flow of information to the public, thus denigrating a fundamental First Amendment value." *At* 717. *Fourth,* the [two professors] are strangers to the antitrust litigation; insofar as the record reflects, they have no dog in that fight." *At* 717. *Finally,* the First Circuit approved the trial court's decision to retain jurisdiction in case the trial court needed to modify its decisions to allow some or all of the requested discovery. "Our confidence in the appropriateness of this ruling is fortified by the fact that the district court took pains to protect Microsoft's legitimate interests. After denying the motion to compel, the court announced that it would retain jurisdiction so that, should a material conflict develop between quotations from the book and other evidence, it could review the notes, tapes, and transcripts in camera for purposes of

verification and, if necessary, order production. This even-handed ruling treats all parties fairly. We discern no error." *At 717.*

It is clear that *Cusumano* is distinguishable from the instant case. *First,* in *Cusumano* the identities of the researchers and interviewees were clearly known. But here the identities of the peer reviewers are *not* known. Indeed, the NSCA is fighting hard to shield the identities of the peer reviewers. Moreover, in *Cusumano* there was no argument that the identities of the interviewers or interviewees were not discoverable. *Second,* the two professors had "no dog in this (antitrust) fight." In contrast, as already stated above and in the earlier ruling, the integrity of the peer review process is what the current litigation is all about. The NSCA, CrossFit and the peer reviewers are all intimately and inextricably involved in this lawsuit and in the related federal action. They all have a dog in this fight.

Lastly, the NSCA relied on *Dow Chemical Co. vs Allen,* 672 F.2d 1262 (7th Cir. 1982)[5]. Again, reliance on that case is misplaced. The issue in *Dow Chemical* was "whether a private corporation, Dow Chemical Company, threatened with possible government cancellation of certain herbicides it manufactures, may compel through administrative subpoenas University of Wisconsin researchers to disclose all of the notes, reports, working papers, and raw data relating to on-going, incomplete animal toxicity studies so that it may evaluate that information with a view toward possible use at the cancellation hearings." *At 1265-66.* The 7th Circuit affirmed the District Court's ruling "that *the present facts* do not warrant forced disclosure of the university research information." *At 1266* (Emphasis added.) For the 7th Circuit one of the issues to be determined was First Amendment protection of academic freedom. *At 1274-75.* The 7th Circuit was strongly

[5] The NSCA cites this case as 121 F.R.D. 163 (N.Y.E.D. 1988). However, the Discovery Referee could not find this case.

influenced by the fact that the challenged subpoena of the Administrative Law Judge was so broad and onerous that it threatened to chill academic freedom: "In the present case, the 25 ppt and 5 ppt administrative subpoenas by their terms would compel the researchers to turn over to Dow virtually every scrap of paper and every mechanical or electronic recording made during the extended period that those studies have been in progress at the university. The ALJ's decision would have further obliged the researchers to continually update Dow on "additional useful data" which became available during the course of the proceedings. These requirements threaten substantial intrusion into the enterprise of university research, and there are several reasons to think they are capable of chilling the exercise of academic freedom. To begin with, the burden of compliance certainly would not be insubstantial. More important, enforcement of the subpoenas would leave the researchers with the knowledge throughout continuation of their studies that the fruits of their labors had been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs. It is not difficult to imagine that that realization might well be both unnerving and discouraging." *At 1276.* The key to the 7th Circuit's ruling rejecting enforcement of the subpoena there in question was that the information being sought was not relevant at that time. "Based on the facts before us which, among other things, show that potentially probative evidence will not be available from the 25 ppt or 5 ppt studies for months or years to come, that Dow will not be confronted by information from the studies at the cancellation hearing, and that present 25 ppt and 5 ppt study data cannot be used to test the validity of the 500 ppt study, we conclude there is little to justify an intrusion into university life which would risk substantially chilling the exercise of academic freedom. *At 1277.* At the risk of being unnecessarily repetitious, unlike the information in *Dow Chemical,* the information being sought here in the instant case is at the heart of the subject lawsuit. The information CrossFit seeks, and which the NSCA seeks to shield, is highly relevant, if not probative, of the parties' respective defenses and claims. Moreover, *academic freedom* is not

involved here. Here, CrossFit implicitly argues that this case involves *commercial speech* "constitute[ing] advertising or promotion" fraudulently disguised as independent scientific research and used to harm a feared competitor.

The main point of *Solarex, Richards, Cusumano* and *Dow Chemical* is that the Court needs to engage in a balancing test to determine whether the First Amendment protects certain information from disclosure. There was no single balancing test. Each court looked at a variety of factors. Some factors were the same; some factors were different. The Discovery Referee engaged in the relevant balancing test in its first opinion and does so again now. Weighing all relevant factors, the balance comes down solidly in CrossFit's favor under the facts of this case.

SUMMARY

The NSCA must forthwith disclose the identity and contact information of the peer reviewers of the Devor study. CrossFit also has the right under the California Code of Civil Procedure to conduct discovery into (1) the reviewers' relationship with NSCA officials and the scientific rigor and (2) the integrity of their work and the peers review process. The First Amendment does not provide a shield against such disclosure.

Dated: January 3, 2018

William McCurine, Jr.

Hon. William McCurine, Ret.

Discovery Referee

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PROOF OF SERVICE

National Strength & Conditioning Association vs. Greg Glassman, et al.
Case No.: 37-2016-00014339-CU-DF-CTL

I, the undersigned, an employee of Judicate West, located at 1851 E. First Street, Suite 1600, Santa Ana, CA 92705 declare under penalty of perjury that I am over the age of eighteen (18) and not a party to this matter or proceeding.

On January 3, 2018, I served the foregoing documents, described as:

ORDER NO. 9 SUPPLEMENTAL RULING RE DISCOVERABILITY OF IDENTITY OF PEER REVIEWERS

to the following parties:

SEE ATTACHED MAILING LIST

(X) **BY E-MAIL** I caused the above-referenced document to be transmitted via electronic mail (e-mail) to the parties as listed on this Proof of Service

( ) **BY ELECTRONIC FILING** I caused such document to be sent via electronic service by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.

( ) **BY FASCIMILE** I caused the above-referenced document to be transmitted via facsimile to the parties as listed on this Proof of Service. The document was transmitted by facsimile transmission and the transmission was reported as complete and without error.

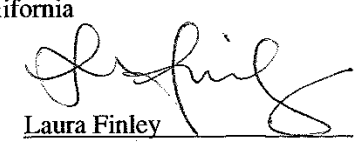
( ) **BY PERSONAL SERVICE** I personally delivered the documents to the persons at the address (es): by leaving the documents at the person (s) office, in an envelope or package clearly labeled to identify the person(s) being served, with a receptionist or an individual in charge of the office.

( ) **BY UNITED STATES PARCEL SERVICE** I am readily familiar with the business' practice for collection and processing of correspondence and mailing with the United States Postal Service; such correspondence would be deposited with the United States Postal Service the same day of deposit with postage thereon fully prepaid at Santa Ana, California in the ordinary course of business

(X) **STATE** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

( ) **FEDERAL** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **January 3, 2018,** at Santa Ana, California



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as of Wednesday, January 03, 2018

JW Case #: A233444

Case Caption: National Strength & Conditioning Association vs. Greg Glassman, et al.

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