

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 In re) Case No. 05-6040-B11
12)
12 MII LIQUIDATION, INC., a) ORDER ON SECOND SUPPLEMENT
California corporation,) TO FEE APPLICATION OF ALLEN
13 formerly known as METABOLIFE) MATKINS LECK GAMBLE MALLORY &
INTERNATIONAL, INC.,) NATSIS, LLP
14)
Debtor.)
15)

16 Allen Matkins served as general counsel to Metabolife
17 International, Inc. (Debtor) through October 18, 2007, the
18 effective date of the Joint Amended Plan of Liquidation Dated
19 May 14, 2007, proposed by the debtors in possession, the Official
20 Creditors' Committee, and the Official Indemnitees' Committee,
21 effective October 18, 2007 (Plan). Under the Plan, John Brincko
22 serves as the chief liquidating officer of the liquidating debtor
23 and the trustee of the MII GUC Trust. For the purposes of this
24 Order the Court refers to Mr. Brincko as "Trustee." One duty of
25 the Trustee was to review and, if necessary, object to the fee
26 applications of the various professionals involved in the case.

1 Allen Matkins filed four interim fee applications, a final
2 application covering the time through September 30, 2007, and a
3 supplemental application for October 2007 (collectively the Fee
4 Application). The Fee Application sought fees and costs totaling
5 just more than \$3,000,000.00. The Trustee filed an objection to
6 the Application (as he did with the fee applications of virtually
7 all of the professionals.)

8 Over the next several weeks Allen Matkins on the one hand,
9 and the Trustee, through his attorneys at Latham & Watkins, on
10 the other, negotiated in an effort to resolve the fee dispute.
11 On March 10, 2008, attorney David Osias of Allen Matkins accepted
12 via email terms proposed by attorney Gregory Lunt of Latham &
13 Watkins. Counsel for the Trustee prepared and forwarded a draft
14 settlement agreement (Latham Draft). Allen Matkins responded
15 with a slightly modified draft and provided the fees and costs
16 for the period November 1, 2007 to March 8, 2008. The fees
17 and costs through December 12, 2007 exceeded an earlier estimate
18 by Allen Matkins by approximately \$8,500. Beginning on March 28,
19 2008 and the days to follow, counsel for the Trustee informed
20 Allen Matkins that they did not believe they were bound to go
21 forward with the settlement agreement.

22 This prompted Allen Matkins to file the "Request by Allen
23 Matkins Leck Gamble Mallory & Natsis LLP to Approve Allowance and
24 Payment of Fees and Costs in Accordance with Settlement" (Motion
25 to Approve Settlement Agreement).

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1 At the hearing on this matter the Court agreed with Allen
2 Matkins and held that the parties had in fact reached a binding
3 settlement agreement as of March 10, 2008 (Settlement Agreement).
4 The Court went on to approve the Settlement Agreement, finding
5 that from the perspective of the bankruptcy estate, it was a
6 reasonable resolution of the fee dispute. The remaining issue
7 was whether and to what extent Allen Matkins was entitled to fees
8 and costs for the period from March 26, 2008 (the date that Allen
9 Matkins learned that the Trustee would challenge the Settlement
10 Agreement) through the final resolution of the matter.

11 Prior to the hearing Allen Matkins had submitted its "Second
12 Supplement to Fee Application of Allen Matkins Leck Gamble
13 Mallory & Natsis LLP for the Period Commencing November 1, 2007."
14 The Second Supplement included a request for fees and costs for
15 the period of March 26, 2008 through April 14, 2007, in the
16 amounts of \$25,189.50 and \$69.16. It also included an estimate
17 of fees and costs from April 18, 2008 through the entry of an
18 order on this matter "not to exceed" \$15,000.00 and \$100.00.
19 Allen Matkins contended that under the terms of the Settlement
20 Agreement it was entitled to reasonable fees and costs incurred
21 in connection with getting the Settlement Agreement approved.

22 The Trustee did not object specifically to these fees and
23 costs. At the hearing, after the Court had made its oral ruling
24 finding that the Settlement Agreement had been reached and
25 approving same, counsel for the Trustee stated:

26 Your Honor, I guess I would defer to the Court on this,
 simply because - if there was a term of the settlement

1 that the court finds does exist was that Allen Matkins
2 get paid for their reasonable fees in connection with
3 the opposition to the settlement, you know, while I may
4 disagree with where the Court is at, that was part of
5 the settlement that was, apparently, reached.

6 The Court decided to take the matter under submission to
7 review the language of the Settlement Agreement to determine
8 whether such fees and costs were contemplated. The Court also
9 asked counsel for Allen Matkins to file a supplemental
10 declaration setting forth the actual figure for the period
11 April 15, 2008 through final resolution of this matter, since
12 the Second Supplement had only provided the estimate of "not to
13 exceed" \$15,100.00. The Court also gave the Trustee an
14 opportunity to respond to that declaration. On May 19, 2008
15 Allen Matkins filed its "Addendum to Second Supplement for
16 Estimated Costs Associated with Settlement Approval Process" and
17 the declaration of David Osias in support thereof. The Trustee
18 filed his response on May 27, 2008, and the matter was taken
19 under submission.

20 This Court has subject matter jurisdiction over the
21 proceeding pursuant to 28 U.S.C. § 1334 and General Order
22 No. 312-D of the United States District Court for the Southern
23 District of California. This is a core proceeding under
24 28 U.S.C. § 157(b)(2)(A) & (B).

25 DISCUSSION

26 Having ruled that the Settlement Agreement was in fact a
binding agreement, and having approved same, the Court is left
with three issues:

1 1. Whether, under the terms of the Settlement Agreement,
2 Allen Matkins is entitled to an award of fees and costs
3 associated with seeking approval of the Settlement Agreement over
4 the objection of the Trustee;

5 2. Whether the fees and costs sought by Allen Matkins are
6 reasonable; and

7 3. Whether Allen Matkins is bound by the estimate in the
8 Second Supplement and the statement that the fees and costs for
9 the period April 15, 2008 through resolution of this matter were
10 "not to exceed" \$15,100.00. For the reasons set forth below, the
11 Court concludes that the Settlement Agreement does authorize fees
12 and cost incurred in enforcing the agreement; that the fees and
13 costs set forth in the Second Supplement for the period March 26,
14 2008 through April 14, 2008 are reasonable and will be awarded;
15 and that Allen Matkins is bound by its "not to exceed" language
16 in the Second Supplement for the fees and costs for the period
17 after April 14, 2008.

18 **Terms of the Settlement Agreement**

19 The Court held that a binding agreement had been reached by
20 the parties on March 10, 2008, when David Osias e-mailed his
21 acceptance of the terms offered by Gregory Lunt. The parties
22 clearly contemplated reducing the agreement to writing. To this
23 end, on March 13, 2008, Lunt forwarded a draft to Osias for his
24 review. No final writing was ever executed and no further drafts
25 were prepared by Lunt or anyone on behalf of the Trustee. Thus,
26 this "Latham Draft" is the most complete transcription to which

1 counsel for the Trustee agreed. Accordingly, the Court will rely
2 on it for the purposes of this Order.

3 The Latham Draft provided that fees and costs incurred after
4 December 12, 2007 would be capped at \$10,000.00 and \$XXXXX
5 (apparently to be determined) respectively. However, the Latham
6 Draft of the Settlement Agreement also provided:

7 In the event that one or more objections are filed to
8 this Stipulation, Allen Matkins shall be permitted to
9 file a supplemental fee application for all fees and
10 costs incurred in responding to such objection(s). The
fees and costs requested in that supplemental
application that are approved by the Court will not be
subject to the subordination described above.

11 It seems quite clear that the parties contemplated that, in the
12 event Allen Matkins incurred fees in its efforts to obtain an
13 order approving the Settlement Agreement, the fees would be
14 allowed to the extent reasonable. The Second Supplement seems
15 specifically contemplated, and the Court finds that, to the
16 extent reasonable, the fees and costs are properly allowable
17 under the Settlement Agreement.

18 **Reasonableness of Fees and Costs in Second Supplement**

19 For the period from March 26, 2008 (the date upon which
20 Allen Matkins learned that the Trustee intended to deny that the
21 Settlement Agreement was binding) and April 14, 2008 (the day
22 before the Second Supplement was filed) Allen Matkins seeks fees
23 of \$25,189.50 and costs of \$100.00. This includes preparation of
24 the Motion to Approve Settlement Agreement. In his opposition to
25 the Motion, the Trustee did not challenge the reasonableness of
26 the fees sought. In his post-hearing brief, however, the Trustee

1 complains that Allen Matkins relied too heavily on senior (and
2 hence more expensive) counsel to prepare and bring the Motion.

3 At the hearing counsel for Allen Matkins explained that the
4 work was performed by senior attorneys, Osias, Barnes and Riley,
5 due to their experience with the case - they are admittedly more
6 expensive, but "they are also faster because of our familiarity
7 and involvement in this dispute..." The Court finds this general
8 explanation sensible. The Court has reviewed the billing
9 statements and finds the activities engaged in to be a reasonable
10 response to the Trustee's decision to attempt to get out of the
11 Settlement Agreement. According, the Court awards the fees and
12 costs sought in the Second Supplement for the period March 26,
13 2008 through April 14, 2008 in the amounts requested - \$25,189.50
14 and \$69.16.

15 **"Not to Exceed" Language**

16 The next issue concerns the period from April 15, 2008
17 through May 19, 2009. In the post-hearing Addendum, Allen
18 Matkins seeks fees of \$30,221.00 and costs of \$198.99. However,
19 as discussed above, in the Second Supplement Allen Matkins
20 estimated the amount to be \$15,100 for fees and costs and
21 voluntarily inserted the "not to exceed" language. The Court can
22 only surmise that the purpose of the language, was to avoid the
23 kind of misunderstanding which the Trustee alleged, gave rise to
24 the decision to attempt to back out of the Settlement Agreement
25 in the first place. That, or it was designed to assure the Court
26 that the fees and costs sought in connection with the fight over

1 the Settlement Agreement were, and would continue to be,
2 reasonable. In either case, or perhaps some other, it was Allen
3 Matkins' decision to insert the language. In his declaration in
4 support of the Addendum, counsel explains that the estimated fees
5 not to exceed \$15,000, did exceed \$15,000 by more than 100%,
6 because the Trustee's opposition to the Motion to Approve
7 Settlement Agreement went far beyond the issues which had been
8 discussed previously by the parties. However, at the hearing,
9 which was obviously after the opposition had been filed and after
10 Allen Matkins had prepared the reply papers and had prepped for
11 the hearing, counsel continued to use the "not to exceed" figure,
12 explaining to the Court that the total fees were \$40,000
13 (\$25,189.50 for the period through April 14 and \$15,000.00 for
14 the period thereafter).

15 Whatever the purpose, the fact remains that Allen Matkins
16 voluntarily subjected itself to a cap. Allen Matkins could have
17 forsworn the cap at the hearing after it learned of the scope of
18 the Trustee's objections, but chose not to. The Court determines
19 to hold Allen Matkins to that cap. Fees and costs for the period
20 after April 14, 2008 are limited to \$15,000.00 and \$100.00.

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