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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANA BOSTICK, et al.,

Plaintiffs,

v.

HERBALIFE INTERNATIONAL
OF AMERICA, INC., et al.,

Defendants.

CASE NO: 2:13-cv-02488-BRO-SHC

MOTION OF TRUTH IN
ADVERTISING, INC., FOR LEAVE TO
FILE *AMICUS CURIAE* BRIEF IN
OPPOSITION TO PROPOSED
SETTLEMENT

Assigned to:
Magistrate Judge:
Hon. Beverly Reid O'Connell

Date: May 11, 2015
Time: 1:30 p.m.
Courtroom: 14

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1 Truth in Advertising, Inc. (TINA.org) respectfully requests leave of the
2 Court to file the attached amicus curiae brief in the above-captioned case in
3 opposition to the proposed settlement. TINA.org is a 501(c)(3) nonprofit
4 organization whose mission is to protect consumers nationwide through the
5 prevention of false and deceptive marketing. To further its mission, TINA.org
6 investigates deceptive marketing practices and advocates before federal and state
7 government agencies, as well as courts.

8 With respect to the instant case, TINA.org is filing this motion and brief
9 because the proposed settlement is fundamentally unfair to the class members.
10 As a consumer advocacy organization working to eradicate false and deceptive
11 advertising, TINA.org has an important interest and a valuable perspective on the
12 issues presented in this case, and thus should be granted *amicus curiae* status.
13 *See, e.g., Safari Club Int'l v. Harris*, 2015 U.S. Dist. LEXIS 4467, at *2-3 (E.D.
14 Cal. Jan. 13, 2015) (granting motion for leave to file an amicus brief and stating
15 “[d]istrict courts frequently welcome amicus briefs from nonparties concerning
16 legal issues that have potential ramifications beyond the parties directly involved
17 or if the amicus has ‘unique information or perspective that can help the court
18 beyond the help that the lawyers for the parties are able to provide.’... ‘Even
19 when a party is very well represented, an amicus may provide important
20 assistance to the court.’”); *Jamul Action Committee, et al. v. Stevens, et al.*, 2014
21 U.S. Dist. LEXIS 107582 (E.D. Cal. Aug. 4, 2014) (granting motion for leave to
22 file an amicus brief); *State of Missouri, et al. v. Harris*, 2014 U.S. Dist. LEXIS
23 89716 (E.D. Cal. June 30, 2014) (granting motions for leave for file amicus
24 briefs); *Thalheimer, et al. v. City of San Diego, et al.*, Case No. 09-cv-2862 (S.D.
25 Cal. Jan. 19, 2010) (orders allowing two non-profit organizations to enter case as
26 *amicus curiae*). *See also Neonatology Assocs., P.A. v. Comm’r of Internal*
27 *Revenue, et al.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (“Even when a party
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1 is very well represented, an amicus may provide important assistance to the
 2 court. . . . Some friends of the court are entities with particular expertise not
 3 possessed by any party to the case. . .”); *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th
 4 Cir. 1997) (Posner, J.) (“An amicus brief should normally be allowed when . . .
 5 the amicus has unique information or perspective that can help the court beyond
 6 the help that the lawyers for the parties are able to provide.”); *Managing Class*
 7 *Action Litigation: A Pocket Guide for Judges*, 3d ed., Federal Judicial Ctr. 2010,
 8 at 17 (“Institutional ‘public interest’ objectors may bring a different perspective
 9 . . . Generally, government bodies such as the FTC and state attorneys general, as
 10 well as nonprofit entities, have the class-oriented goal of ensuring that class
 11 members receive fair, reasonable, and adequate compensation for any injuries
 12 suffered. They tend to pursue that objective by policing abuses in class action
 13 litigation. Consider allowing such entities to participate actively in the fairness
 14 hearing.”).¹

15 In addition, now that the parties to this lawsuit have reached an agreement,
 16 they no longer have an adversarial relationship, and thus this Court can look only
 17 to objectors to illuminate any potential issues with the settlement. *See In re HP*
 18 *Inkjet Printer Litig.*, 2011 U.S. Dist. LEXIS 65199, at *2-3 (N.D. Cal. June 20,
 19 2011) (“Objectors can play a valuable role in providing the court with
 20 information and perspective with respect to the fairness, adequacy, and
 21 reasonableness of a class action settlement.”); *In re Leapfrog Enterprises, Inc.*
 22 *Securities Litig.*, 2008 U.S. Dist. LEXIS 97232, at *7 (N.D. Cal. Nov. 21, 2008)
 23 (same); *see also Pearson, et al. v. NBTY, Inc., et al.*, 772 F.3d 778, 787 (7th Cir.
 24 2014) (“[O]bjectors play an essential role in judicial review of proposed
 25 settlements of class actions . . .”)

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27 _____
 28 ¹ Neither party nor their counsel played any part in the drafting of this Motion or contributed in any other way.

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The attached amicus brief explains in detail why TINA.org opposes the proposed settlement. In short, the brief explains that the terms are unfair because the proposed injunctive relief does not require Herbalife to make any substantive changes to its marketing or business structure, but rather allows the company to continue deceptively promoting and operating its illegal pyramid scheme. In addition, the proposed monetary relief unfairly treats two otherwise similarly situated groups of class members differently, leaving the vast majority of class members with inadequate compensation. And while the class members are left without fair and adequate compensation, class counsel will pocket \$5.25 million with leftovers going to a *cy pres* award.

For these reasons, TINA.org moves for leave to appear as amicus curiae and submit the attached brief in opposition to the proposed settlement, as well as the attached notice of intent to appear at the Final Fairness Hearing (attached hereto as Exhibits 1 and 2, respectively).

DATED: March 16, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been filed electronically on this 16th day of February 2015 and is available for viewing and downloading to the ECF registered counsel of record:

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8 DATED: March 16, 2015

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EXHIBIT 1

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BRIEF OF *AMICUS CURIAE* TRUTH IN
ADVERTISING, INC. IN OPPOSITION
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26 [https://a.next.westlaw.com/Document/I9ad4f84091ef11d9bc61beebb95be672/View/FullText.html?transitionType=UniqueDocItem&contextData=\(sc.UserEnteredCitation\)&userEnteredCitation=610+f.2d+1306](https://a.next.westlaw.com/Document/I9ad4f84091ef11d9bc61beebb95be672/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=610+f.2d+1306)

1 *Redman v. RadioShack Corp.*,
2 768 F.3d 622 (7th Cir. 2014)..... 12
3 [https://a.next.westlaw.com/Document/Ib99dfb57409511e4a795ac035416da91/View/FullText.html?transitionType=UniqueDocItem&contextData=\(sc.UserEnteredCitation\)&userEnteredCitation=768+f.3d+622](https://a.next.westlaw.com/Document/Ib99dfb57409511e4a795ac035416da91/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=768+f.3d+622)

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5 *Staton v. Boeing Co.*,
6 327 F.3d 938, 963 (9th Cir. 2003)..... 8, 12
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9 *Vassalle v. Midland Funding LLC*,
10 708 F.3d 747, 756 (6th Cir. 2013)..... 7, 9
11 [https://a.next.westlaw.com/Document/I4b710093801d11e28a21ccb9036b2470/View/FullText.html?transitionType=UniqueDocItem&contextData=\(sc.UserEnteredCitation\)&userEnteredCitation=708+f.3d+747](https://a.next.westlaw.com/Document/I4b710093801d11e28a21ccb9036b2470/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=708+f.3d+747)

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13 Civil Code section 1542 9
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I

INTRODUCTION

The proposed settlement in this case provides no meaningful benefit to consumers wronged by Herbalife International of America, Inc.’s (Herbalife), deception as alleged in the operative complaint. The proposed so-called injunctive relief is illusory – permitting Herbalife to continue unfettered with the deceptive scheme that forms the basis of plaintiffs’ complaint. Incredibly, the parties’ agreement does not require Herbalife to make any substantive changes to any corporate policy now in place. Moreover, Herbalife must only maintain this status quo for three short years while class members are required to ostensibly forfeit their legal rights forever. The proposed monetary relief fares no better as it arbitrarily and unfairly treats two otherwise similarly situated groups of class members differently – providing that some members will obtain relief at a possible rate of 0.5% on the dollar while others may obtain 100 times that amount, or a relief rate of 50%. Additionally, while the absent class members are left without fair and adequate compensation, class counsel will pocket \$5.25 million with leftovers going to a *cy pres* award. For these reasons, Truth in Advertising, Inc. (TINA.org), a national consumer advocacy organization dedicated to protecting consumers from false and deceptive advertising, opposes the proposed settlement, and respectfully urges the Court to reject it.

II

INTEREST OF AMICUS CURIAE

TINA.org is a 501(c)(3) nonprofit organization dedicated to protecting consumers nationwide through the prevention of false and deceptive marketing. To further its mission, TINA.org investigates deceptive marketing practices and advocates before federal and state government agencies, as well as courts.

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1 As explained in detail in the attached Motion for Leave to File Brief as
2 Amicus Curiae in Opposition to Proposed Settlement, TINA.org has an important
3 interest and a valuable perspective on the issues presented in this case.¹

4 III

5 BACKGROUND

6 This class-action lawsuit alleges in three counts that Herbalife deceptively
7 markets and operates a pyramid scheme, which charges inappropriate shipping
8 and handling fees in order to bolster illegal profits. *See* First Am. Compl., dated
9 July 7, 2014. Just 18 months after filing this lawsuit, the parties entered into the
10 proposed settlement agreement, which handsomely rewards plaintiffs' counsel,
11 offers a possible *cy pres* award to the Consumer Federation of America, and will,
12 if approved, provide Herbalife with a court-endorsed settlement that allows it to
13 continue business as usual while simultaneously precluding a class of
14 approximately 1.3 million members from ever suing it again. *See* Stipulation of
15 Settlement, dated October 31, 2014.² In exchange for these rich concessions, a
16 majority of the class will in all likelihood receive less than \$20; a minority of
17 members will receive up to 50% of the money they spent on Herbalife products;
18 and all class members can return expired inventory for a refund. *See id.* at ¶ 4.

19 IV

20 ARGUMENT

21 The proposed settlement agreement sets out two forms of relief: (1) a
22 temporary injunction; and (2) partial financial redress – neither is fair nor
23 adequate. The injunctive relief is inadequate because it fails to address the
24 allegations of the complaint, does not require Herbalife to make any material

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26 ¹ Neither party nor their counsel played any part in the drafting of this brief or contributed in
any other way.

27 ² The proposed release permits three limited private rights of action concerning the purchase
and sale of Herbalife common stock, the calculation of bonuses to be paid to Herbalife
28 members, and defective Herbalife products. Stipulation of Settlement ¶ 8.1.

1 changes to its corporate policies, and is temporary. As for the monetary relief,
2 the settlement disparately treats class members in an arbitrary and capricious
3 manner, awards attorneys’ fees that are grossly disproportionate to the class
4 recovery, and provides for a possible *cy pres* award that will unjustly siphon
5 money away from under-compensated class members. Each defect is addressed
6 in turn.

7 A. The Temporary Injunctive Relief Is Inadequate The Proposed
8 Injunctive Relief Does Not Address The Allegations Of Wrongdoing

9 The injunctive relief in the proposed settlement fails to address the
10 fundamental elements of plaintiffs’ complaint, namely that Herbalife uses
11 deceptive marketing tactics to lure consumers into an illegal scheme in which
12 they are destined to fail. As currently drafted, the proposed settlement agreement
13 gives the false impression that defendants are making substantive changes to their
14 marketing practices and overall business structure to address these issues when,
15 in reality, Herbalife is simply maintaining the status quo. The injunctive relief –
16 in the form of 13 alleged changes to “Corporate Policies” – will in no way
17 remedy the unlawful practices at issue in this case.

18 1. Deceptive Marketing Unaddressed

19 In support of its three causes of action, plaintiffs’ 75-page complaint goes
20 to great lengths to show that Herbalife saturates consumers with a plethora of
21 false advertising and deceptive marketing materials. The complaint documents a
22 multitude of avenues Herbalife uses to market its business opportunity as a way
23 for consumers to make money – a lot of money – and Herbalife spreads this
24 message everywhere it can. For example, Herbalife promotes its business
25 opportunity by boasting that recruits can “achieve financial freedom,” “leave a
26 legacy,” earn “[i]mmediate [r]etail [p]rofit,” and become “multimillionaires.”
27 First Am. Compl. ¶¶ 32-33, 175. The complaint goes on to state that prospective
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1 participants are told that Herbalife is a “tested proven business plan” that
2 “provide[s] substantial and ongoing income,” so much so that some distributors
3 have “been able to upgrade to a bigger home and nicer car,” and even “quit
4 [their] job.” *Id.* at ¶¶ 31, 159. In reality, however, at least 88% of Herbalife
5 participants in 2012 and 2013 did not make any money. *Id.* at ¶ 20; Statement of
6 Average Gross Compensation Paid by Herbalife to U.S. Members in 2013,
7 available at [http://www.herbalife.com/Content/en-US/pdf/business-](http://www.herbalife.com/Content/en-US/pdf/business-opportunity/statement-of-average-gross-compensation-usen.pdf)
8 [opportunity/statement-of-average-gross-compensation-usen.pdf](http://www.herbalife.com/Content/en-US/pdf/business-opportunity/statement-of-average-gross-compensation-usen.pdf) (last accessed
9 March 16, 2015).

10 The complaint details how these grandiose claims can be found in
11 marketing materials and at events, including, but certainly not limited to:

- 12 • advertisements;
- 13 • Herbalife’s website;
- 14 • Herbalife’s YouTube channel;
- 15 • Herbalife’s Internet Business Starter Pack, with DVD;
- 16 • Herbalife’s Sales & Marketing Plan and Business Rules;
- 17 • Herbalife magazines;
- 18 • Herbalife conferences, conventions, and training programs;
- 19 • Herbalife flyers;
- 20 • Herbalife distributors’ websites;
- 21 • Herbalife distributor workbooks; and
- 22 • Herbalife’s Statement of Average Gross Compensation of U.S.
23 Supervisors (“SAGC”).

24 *Id.* at ¶¶ 19, 21, 29, 38-40, 44, 45, 66, 78, 160-161, 163-164, 168-171, 173-176,
25 178, 302.

26 However, not a single provision in the settlement agreement will address
27 this pervasive deception as articulated in the complaint. For example, not one
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1 provision will prohibit Herbalife from using distributor testimonials that
2 deceptively emphasize extraordinary and atypical financial gains. Not one will
3 prohibit Herbalife from using images of luxury items such as vehicles, boats, and
4 expensive homes to entice new recruits. And not one will prohibit Herbalife
5 from telling distributors that they can gain financial freedom with its business
6 opportunity.

7 Instead, plaintiffs claim that a single sheet of paper with Herbalife’s
8 Statement of Average Gross Compensation of U.S. Supervisors will single-
9 handedly counteract all of Herbalife’s false advertising and deceptive marketing
10 tactics as alleged in the complaint because this one piece of paper “ensures
11 transparency of Herbalife member success and failure rates and numbers.” Plts’
12 Memo. in Support of Joint Mot. for Prelim. Approval of Class Action Settlement,
13 dated Nov. 3, 2014 (Dkt. 94) at 13.³ Such a naïve opinion, which has no basis in
14 reality and is belied by every allegation in the complaint, is simply wrong, and as
15 a result the proposed injunction offers no relief to the class members when it
16 comes to Herbalife’s deceptive marketing practices.

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20 ³ According to plaintiffs, it does so specifically by requiring Herbalife to:

- 21 • disclose in the SAGC the total number and percentage of all members who do
22 not receive any compensation directly from Herbalife (which the company does
23 in the middle of the dense six-paragraph document) and attach the SAGC to the
24 membership application;
- 25 • require new members to acknowledge reviewing the SAGC when signing the
26 application, and swear that they have not relied on any other information
27 regarding the financial results they might achieve;
- 28 • clarify that members who have qualified as Supervisors have at least 12 months
to requalify as a Supervisor; and
- define the term “Compensation Statement” as “Statement of Average Gross
Compensation Paid by Herbalife.”

Stipulation of Settlement ¶¶ 5.1.11-5.1.15.

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2. Pyramid Scheme Unaddressed

As with Herbalife’s deceptive marketing practices, the proposed injunction will do nothing to address allegations that Herbalife is operating a pyramid scheme. According to the complaint, Herbalife’s compensation plan rewards the recruitment of new participants over product sales by, among other things, paying recruitment rewards to distributors regardless of whether they actually sold any products. First Am. Compl. ¶¶ 3, 23, 36, 153. The complaint also explains the company’s complex product pricing system, which effectively leads to inventory loading by pushing distributors to buy more products than they can feasibly sell in order to meet volume requirements set by the company. *Id.* at ¶¶ 22, 23, 153. Yet the proposed injunction does absolutely nothing to change the way the company’s business structure operates. Declaration of William Keep, attached hereto Exhibit A. *See Fed. Trade Comm’n v. Burnlounge, Inc., et al.*, 753 F.3d 878 (9th Cir. 2014) (determining that the company at issue was operating a pyramid scheme because: (1) members paid for the right to sell products; (2) the rewards paid by the company were primarily for recruitment of other participants; and (3) members were clearly motivated by the opportunity to earn cash rewards from recruitment).

3. Illegal Packaging, Handling, And Shipping Charges Unaddressed

Finally, the complaint alleges that Herbalife unlawfully charges a 7% “Packaging and Handling” fee separately from a 2.5% to 4% “shipping” fee. *Id.* at ¶¶ 24, 48, 196-198. The proposed injunction purports to address this allegation by relying on the company’s current pricing structure, which eliminated the “Packaging and Handling” fee in April 2013. *See Stipulation of Settlement* ¶ 5.1.3; Comparison of Herbalife’s Corporate Policies 2012-2014, attached hereto as Exhibit B. However, Herbalife continues to tack on 1.75% to the shipping fee,

1 and in eliminating the Packaging and Handling fee it increased the Suggested
2 Retail Price (“SRP”) by 5%. *Id.* Thus, although the overall percentage charged
3 for packaging, handling, and shipping products has gone down by 5.25%,
4 through a slight of hand the amount members are paying and the company is
5 receiving remains the same.⁴

6 * * *

7 As demonstrated above, the proposed injunctive relief gives nothing but
8 the illusion that Herbalife’s deceptive marketing practices, pyramid scheme, and
9 oppressive fees will be affected by the proposed settlement agreement. Courts
10 have rejected similar agreements that provide meaningless injunctive relief. *See,*
11 *e.g., Pearson v. NBTY, Inc., 772 F.3d 778, 785 (7th Cir. 2014)* (reversing
12 approval of settlement agreement, stating “[t]he injunction actually gives
13 [defendant] protection by allowing it, with a judicial imprimatur (because it’s
14 part of a settlement approved by the district court), to preserve the substance of
15 the claims by making...purely cosmetic changes in wording.”); *In re Dry Max*
16 *Pampers Litig., 724 F.3d 713, 715 (6th Cir. 2013)* (reversing approval of
17 settlement agreement, stating “[t]he parties and their counsel negotiated a
18 settlement that...provides nearly worthless injunctive relief.”); *Vassalle v.*
19 *Midland Funding LLC, 708 F.3d 747, 756 (6th Cir. 2013)* (reversing approval of
20 settlement agreement, stating “the relief provided to the unnamed class is

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24 ⁴ Under the old pricing structure, if a member purchased \$1,000 worth of products, that person
25 would pay a total of \$1,095 (\$1,000 in product + 7% P&H + 2.5% Shipping). Under the new
26 pricing structure, the same product now costs \$1,050 (due to the 5% increase in SRP) and so the
27 total cost would be \$1,094.63 (\$1,050 + 4.25% Shipping). *See* Herbalife Simplified Pricing
28 Structure, April 2013, available at http://herbalifemail.com/pdf/pricingstructureexamples_usen.pdf
(last accessed March 16, 2015). Similarly, under the old pricing structure, if a member purchased
\$500 worth of products, that person would pay a total of \$552.50 (\$500 in product + 7% P&H +
3.5% Shipping). Under the new pricing structure, the same product now costs \$525 and so the
total cost would be \$552.56 (\$525 + 5.25% Shipping). *Id.*

1 perfunctory at best” because, among other things, “it does not actually prohibit
2 [defendant] from creating false affidavits; rather, it only requires [defendant] to
3 change its policies and provides oversight of this process.”)

4 B. The Temporary Injunctive Relief Has Already Been Done

5 The proposed settlement does not require Herbalife to make any material
6 changes to its corporate policies. See TINA.org’s Comparison of Herbalife’s
7 Corporate Policies (Ex. B). In fact, nine out of the 13 Corporate Policies listed in
8 the settlement agreement as the proposed injunctive relief were in effect before
9 the class-action lawsuit was filed, and all 13 were in place prior to the proposed
10 settlement, which means, in sum, that the proposed injunctive relief is absolutely
11 worthless. *Id.*⁵

12 The parties’ reliance on past modifications to form part of the basis for
13 class members giving up their litigation rights is unacceptable. See, e.g., *Staton*
14 *v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (reversing approval of consent
15 decree that, among other things, provided injunctive relief that largely
16 incorporated already-existing company programs rather than creating new ones,
17 stating it is a “questionable factor[.]” that “suggest[s] that class counsel and [class
18 representatives] *could* have agreed to relatively weak prospective relief because
19 of other inducements offered to them in the course of the negotiations.”)
20 (emphasis in original); *In re Dry Max Pampers Litig.*, 724 F.3d at 719 (putting
21 the burden of proving the fairness of the settlement on the proponents, and
22 determining that a reinstated refund program would provide unnamed class
23 members little value because “most of them have already had access to it.”)

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26 ⁵ A small and immaterial portion of one of the corporate policies listed in the proposed
27 settlement agreement has not yet been effectuated, which is the defining of “Compensation
28 Statement” as “Statement of Average Gross Compensation.” Stipulation of Settlement, ¶
5.1.15. This minor change in definition does not address any of the allegations in the
complaint.

1 C. The Proposed Injunctive Relief Is
2 Temporary, Yet Class Members Will Be
3 Required To Forever Waive Their Right To Sue Herbalife

4 Even if the proposed injunctive relief was meaningful, which it is not, it is
5 temporary – expiring in three short years. In exchange for this trifling gesture of
6 maintaining the status quo for 36 months, class members are forced to give up their
7 right to sue Herbalife forever. *Compare* Stipulation of Settlement ¶ 5.1.1. (“All
8 corporate policies set forth in this Section [5] shall be continued for no less than
9 three years from the date the Court issues final approval of the Settlement
10 Agreement.”) (emphasis added) *with id.* at ¶ 8.1 (“...[Defendants]...shall be
11 released and forever discharged...from all claims, demands, rights, liabilities, suits,
12 or causes of action, known or unknown...”) (emphasis added).⁶

13 It is hard to imagine an arm’s length negotiation in which approximately
14 1.3 million consumers would be willing to ostensibly forfeit all known and
15 unknown claims forever in exchange for a company’s promise to be bound by a
16 three-year contract. There can be no doubt that these terms are completely
17 disproportionate, patently unfair, and wholly objectionable. *See Pearson*, 772
18 F.3d at 787 (reversing approval of settlement agreement, criticizing 30-month
19 injunction); *see also Vassalle*, 708 F.3d at 756 (reversing approval of settlement
20 agreement, stating the injunction is “of little value” because, among other things,
21 it “only lasts one year, after which [the defendant] is free to resume its predatory
22 practices should it choose to do so.”)⁷

23 ⁶ *See infra* fn. 2. In addition to giving up their rights to sue defendants, class members are also
24 waiving clear statutory rights they have under state laws, such as Section 1542 of the Civil
25 Code of the State of California, which prohibits general releases such as this one from being
26 extended to claims unknown at the time of executing the release, even if they would have
27 materially affected the settlement. *See* Stipulation of Settlement ¶ 8.2.

28 ⁷ While there have been district courts that have approved settlements that include such short-
term injunctive relief in the past (*see, e.g., Dennis v. Kellogg Co.*, 2013 U.S. Dist. LEXIS
163118 (S.D. Cal. Nov. 14, 2013), most recently, Judge Posner in the Seventh Circuit took the
better view. *See Quinn v. Walgreen, Co.*, Case No. 12-cv-8187, S.D.N.Y., Amendment to
Settlement Agreement and General Release, dated Jan. 30, 2015 (Dkt. 141-1) (parties

1 D. The Proposed Monetary Relief Is Unfair To Class Members

2 1. Disparate Treatment Of Class Members Is Unacceptable

3 The proposed settlement agreement provides for a Net Settlement Fund to
4 be distributed to class members who certify, among other things, that they joined
5 Herbalife primarily to pursue a business opportunity and not primarily for self-
6 consumption. Stipulation of Settlement ¶ 4.4.2. These class members are
7 divided into two groups:

8 (1) those who spent at least \$750 to purchase products during a twelve-
9 month period between April 1, 2009 and December 2, 2014 (the
10 “Class Period”);⁸ and

11 (2) everyone else (i.e., those who never reached the \$750 threshold in at
12 least one twelve-month period at issue).

13 *Id.* at ¶¶ 4.4.5-4.4.6. Class members who fall into the first group are eligible for
14 what the settlement agreement calls a “pro rata award,” under which they will
15 receive the lesser of 100% of the estimated total loss from their product sales or
16 50% of the total price paid for products. *Id.* at ¶ 4.4.5.⁹ Class members who fall
17 into the second group get a payment of between \$3 and \$20, depending on how
18 many class members make claims.¹⁰ *Id.* at ¶ 4.4.6.

19
20 renegotiated settlement agreement and revised the injunctive relief to include broader language
21 and a permanent injunction after TINA.org filed an amicus curiae brief opposing, among other
things, the temporary nature of the injunctive relief).

22 ⁸ It is important to note that all of the five named plaintiffs, who will be receiving a total of
23 \$30,000 if the proposed settlement agreement is approved, fall into this group.

24 ⁹ The settlement agreement also provides that if the aggregate payment for Pro Rata Awards is
25 less than 75% of the Net Settlement Fund less the aggregate Flat Rate Awards, either party can
26 move the Court to increase payments up to the lesser of 75% of the price paid by the claimant,
or the total Net Settlement Fund. Stipulation of Settlement ¶ 4.4.5.

27 ¹⁰ The proposed settlement agreement states that class members who fall into this second group
28 will receive a flat payment of \$20. Stipulation of Settlement ¶ 4.4.6. However, the proposed
settlement devotes only \$3 million to the claimants eligible for this award, and states that if the
aggregate amount claimed by all the flat rate claimants exceeds this amount (i.e., if more than

1 Thus, pursuant to the agreement, if a class member purchased \$750 worth
2 of product in 2012, that person can claim \$375. However, if another class
3 member purchased \$749 worth of product every calendar year during the five-
4 year class period – for a total of \$3,745 – that person will receive a maximum of
5 \$20, and as little as \$3 if plaintiffs’ estimates regarding class size and the division
6 of claimants are accurate. Such disparate treatment is arbitrary and unfair.¹¹ See
7 *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 808 (3d
8 Cir. 1995) (reversing approval of settlement that benefitted some class members
9 more than others, even though they were equally harmed, stating “[o]ne sign that
10 a settlement may not be fair is that some segments of the class are treated
11 differently from others”). See also *Piambino v. Bailey*, 610 F.2d 1306, 1329 (5th
12 Cir. 1980), *cert. denied*, 449 U.S. 1011 (1980) (holding that the trial court has a
13 duty to assure the settlement is fair, adequate, and reasonable with respect to *each*
14 category of the class).

15 E. Attorneys’ Fees Are Grossly Disproportionate To Class Recovery

16 The proposed agreement allocates 30% of the entire settlement fund, or
17 \$5.25 million, to plaintiffs’ attorneys.¹² Dkt. 94 at 16. Given the meaningless

18 150,000 class members make claims), the \$20 flat rate awards will be diminished on a pro rata
19 basis. *Id.*

20 Given that plaintiffs estimate that the settlement class consists of approximately 1.3 million
21 former and current Herbalife members/distributors, and that more than two-thirds (and possibly
22 up to three-quarters) of those class members (i.e., between 860,000 and 975,000 class
23 members) fall into the \$20 flat award group, it is likely that flat rate claimants will receive
substantially less than \$20. See Dkt. 94 at 9 and 19. In fact, if 975,000 class members make a
claim for the \$20 flat award, each member will actually receive \$3.08.

24 ¹¹ The reasoning provided for the \$750 cut-off is that claimants who purchased less than \$750
of product in a year could have reasonably self-consumed it. Dkt. 94 at 8. This rationale
25 directly contradicts the terms of the settlement agreement, which requires all class members
who are seeking cash reimbursement (as opposed to a product refund) to certify under penalty
26 of perjury that they joined Herbalife primarily to pursue a business opportunity and not
primarily for self-consumption. Stipulation of Settlement ¶ 4.4.2.

27 ¹² Demonstrating just how outsized this fee award is, the proposed settlement agreement does
28 not even subtract out anticipated administrative costs from the amount on which class counsel

1 temporary injunctive relief and exceedingly modest amount of monetary relief
2 that class members may receive, such exorbitant fees are simply not justified in
3 this case. *See e.g., Staton*, 327 F.3d at 974 (reversing district court’s approval of
4 proposed consent decree that awarded \$3.85 million to class counsel while
5 awarding approximately \$1,000 to each unnamed class member, and injunctive
6 relief that largely incorporated already-existing company programs rather than
7 creating new ones, stating “[p]recisely because the value of injunctive relief is
8 difficult to quantify, its value is also easily manipulable by overreaching lawyers
9 seeking to increase the value assigned to a common fund,” and increase their
10 fees); *Dennis v. Kellogg Co.*, 697 F.3d 858, 861 (9th Cir. 2012) (reversing district
11 court’s approval of a settlement that provided for, among other things, \$2 million
12 in attorneys’ fees and a maximum of \$15 to each class member, stating “[i]n a
13 class action ... any settlement must be approved by the court to ensure that class
14 counsel and the named plaintiffs do not place their own interests above those of
15 the absent class members.”); *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th
16 Cir. 2014) (Posner, J.) (reversing district court’s approval of settlement that
17 awarded over \$990,000 in fees for class counsel while class members received a
18 \$10 coupon, stating “[w]e have emphasized that in determining the
19 reasonableness of the attorneys’ fee agreed to in a proposed settlement, the
20 central consideration is what class counsel achieved for the members of the class
21 rather than how much effort class counsel invested in the litigation.”). *See also*
22 *In re Dry Max Pampers Litig., supra*, 724 F.3d at 721 (reversing district court’s
23 approval of a settlement that awarded \$2.73 million to class counsel while

24 is basing their fees. *See* Stipulation of Settlement ¶ 10.1; Dkt. 94 at 16. Because such costs are
25 not benefitting class members, the failure to exclude them prior to calculating the attorneys’
26 fee award is completely unjustified. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th
27 Cir. 2014) (“administrative costs should not have been included in calculating the division of
28 the spoils between class counsel and class members. Those costs are part of the settlement but
not part of the value received from the settlement by the members of the class.”); *Pearson*, 772
F.3d at 781 (same).

1 unnamed class members received relief of only negligible value, determining that
2 the agreement benefited class counsel “vastly more than it [did] the consumers
3 who comprise the class,” and therefore was unfair); *In re Bluetooth Headset*
4 *Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (vacating district court’s
5 approval of class-action settlement that provided for, among other things,
6 \$800,000 in attorneys’ fees but no monetary compensation to unnamed class
7 members, noting that a sign of collusion among the negotiating parties is “when
8 counsel receive a disproportionate distribution of the settlement.”)

9 F. Cy pres Award Is Unjust To Class
10 Members Who Have Not Been Fully Compensated

11 The settlement agreement also provides for a *cy pres* award if there are
12 amounts remaining in the Net Settlement Fund. Stipulation of Settlement ¶ 4.1.
13 The use of a *cy pres* award in this case, where the majority of class members will
14 receive a maximum of \$20 is inappropriate and unfair. *See Oetting v. Green*
15 *Jacobson*, 2015 U.S. App. LEXIS 306 (8th Cir. 2015) (vacating district court’s
16 approval of settlement agreement that provided for a *cy pres* award even when a
17 further distribution to the class was feasible); *In re Baby Prod. Antitrust Litig.*,
18 708 F.3d 163, 169 (3d Cir. 2013) (vacating district court’s approval of settlement
19 agreement that provided for a *cy pres* award in lieu of further compensation to
20 class members, stating “[c]y pres distributions, while in our view permissible, are
21 inferior to direct distributions to the class because they only imperfectly serve the
22 purpose of the underlying causes of action—to compensate class members.”);
23 *Klier v. Elf Atochem N. Am. Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) (reversing
24 district court’s order distributing unused funds to third-party charities, stating
25 “[b]ecause the settlement funds are the property of the class, a *cy pres*
26 distribution to a third party of unclaimed settlement funds is permissible ‘only
27 when it is not feasible to make further distributions to class members’...except

1 where an additional distribution would provide a windfall to class members with
2 *liquidated*-damages claims that were 100 percent satisfied by the initial
3 distribution.” (quoting ALI § 3.07)); *In re Hydroxycut Mktg. and Sales Practices*
4 *Litig.*, 2013 U.S. Dist LEXIS 165225 (S.D. Cal. Nov. 19, 2013) (rejecting
5 proposed settlement agreement because it provided for a *cy pres* award while the
6 claimants had not been fully compensated for their damages); *see also Pearson*,
7 772 F.3d at 784 (“A *cy pres* award is supposed to be limited to money that can’t
8 feasibly be awarded to the intended beneficiaries, here consisting of the class
9 members.”); *Dennis*, 697 F.3d at 865 (9th Cir. 2012) (holding that *cy pres*
10 distribution in settlement agreement was improper); *Nachshin v. AOL, LLC*, 663
11 F.3d 1034, 1038 (9th Cir. 2011) (same). Accordingly, the proposed settlement
12 should not be approved.

13 V

14 CONCLUSION

15 In sum, the proposed settlement agreement is patently unfair to class
16 members because, while they will be effectively banned from ever suing
17 Herbalife again, Herbalife is simply bound for a three-year term to maintain a
18 status quo that will not require it to change its deceptive marketing practices,
19 refrain from operating its pyramid scheme, or eliminate its fraudulent billing
20 practices. In addition, while most class members will receive a de minimis
21 amount of money compared to their loss, class counsel will receive \$5.25 million

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1 with leftovers going toward a *cy pres* award instead of fully compensating class
2 members. For these reasons, TINA.org respectfully urges this Court to deny
3 approval of the proposed settlement.

4 DATED: March 16, 2015

Respectfully submitted,

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EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANA BOSTICK, et al.

Plaintiffs,

v.

HERBALIFE INTERNATIONAL
OF AMERICA, INC., et al.

Defendants.

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

DECLARATION OF DR. WILLIAM W. KEEP

I, William W. Keep, declare as follows:

1. I have a doctoral degree in marketing from Michigan State University. I currently hold the positions of professor of marketing and dean of the School of Business at The College of New Jersey. I have previously served as an expert witness, working with the United States Department of Justice (in the matter of *U.S. v. Gold Unlimited, Inc.*), the Commonwealth of Kentucky (in the matter of *Commonwealth of Kentucky, ex rel. v. TravelMax, Int'l*), the State of Florida (in the matter of *State of Florida v. Int'l Metals and Trade Corp.*), the Securities and Exchange Commission (in the matter of *Sec. and Exch. Comm'n v. Int'l Heritage Inc.*), and private parties. I have published two academic papers with Dr. Peter Vander Nat, senior economist and primary pyramid scheme analyst at the Federal Trade Commission (retired) on multilevel marketing (MLM) and pyramid schemes, both of which are cited below. A copy of my curriculum vitae is attached.

2. My opinion pertains to the proposed settlement in the matter of *Bostick v. Herbalife International of America Inc.*, Case No. 13-cv-02488 (C.D. Cal.). I focus on two key issues the proposed Settlement Agreement purports to address: 1) Corporate Policies regarding the endless chain pyramid scheme accusation; and 2) ineffective company rules and policies regardless of enforcement.

3. The Plaintiffs' First Amended Complaint states: "Herbalife is operating an endless chain scheme." First Am. Compl. ¶ 256. The parties claim the proposed Settlement Agreement attempts to address this problem. It prohibits Herbalife from defining all "members" as "distributors," and requires implementation and enforcement of rules designed to promote the sale of product and further discourage recruitment over sales. Stipulation of Settlement §5. The proposed Settlement Agreement also requires Herbalife to: (1) discourage its members from incurring debt to buy product, (2) pay the shipping charges for product that is legitimately returned by its members, (3) prohibit its members from selling leads to or purchasing leads from other members, (4) prohibit the purchase of product as a condition of membership, (5) require experience and training of nutrition club members, and (6) maintain procedures for enforcement of these and other rules, including a member compliance department tasked with giving substance to these rules and policies. *Id.*

4. Actually, the proposed Settlement Agreement fails to mitigate the risk of Herbalife operating a pyramid scheme or address key enforcement issues raised in the First Amended Complaint. My affidavit addresses each failure separately.

5. A pyramid scheme illegally transfers wealth by compensating participants for recruiting others into the fraud, a mechanism most obvious in simple investment

pyramid schemes. Such schemes combine recruitment-based rewards with the promise of exceptional investment returns, similar to those found in a Ponzi scheme. Where a Ponzi scheme grows by voluntary investments, a pyramid scheme grows by rewarding participants for recruiting others. The “investment returns” actually come from the investment dollars of subsequent recruits. Such schemes may also include an affinity component (e.g., gifting clubs) whereby recruits are found among friends and family members.

6. Product-based pyramid schemes (the word “product” includes services, such as booking travel or downloading music) similarly and illegally transfer wealth via recruitment-based rewards using fees and/or exceptional product margins. For example, in *U.S. v. Gold Unlimited, Inc.* (1996), the “product” of gold had a selling price only slightly higher than the daily market price for gold. The wealth transfer occurred as recruits paid fees for the right to sell gold and recruit others who, in turn, paid fees for the right to sell gold and recruit others, in an unending chain. Sales of gold to non-recruits were de minimis. Alternatively, in *Fed. Trade Comm’n v. Equinox Int’l* (2000), the compensation model did not include fees but relied instead on products (e.g., water filters) sold at an exceptionally large margin. Gold Unlimited, Inc. was found to be a pyramid scheme and facing a pyramid scheme charge; Equinox agreed to dissolve the company and pay a \$40 million settlement, and its founder accepted a lifetime prohibition from participating in any multilevel marketing or pyramid scheme operation.

7. As the expert witness in multiple pyramid scheme cases, including *U.S. v. Gold Unlimited, Inc.*, I have gained experience with a variety of compensation structures. In 2002, Dr. Vander Nat and I published the first academic paper with a model for

differentiating a product-based pyramid scheme from a legal multilevel marketing operation. See Peter J. Vander Nat and William W. Keep, *Marketing Fraud: An Approach for Differentiating Multi-Level Marketing From Pyramid Schemes*, Journal of Public Policy & Marketing, Vol. 21, 139-151 (Spring 2002). Based on numerous successful pyramid scheme cases, the model illustrates the role of sales to non-distributors as a means of demonstrating that compensation to participants does not rely primarily on recruitment.

8. For decades, the vast majority of revenues for U.S. direct selling companies derived from sales to customers not part of the sales force. An historical review shows, however: a) a trend away from a single-level selling toward an MLM structure that rewards distributors for purchases made by those they recruit; and b) an uptick in the incidence of product-based pyramid schemes. Industry data shows that as the number of people engaged in direct selling tripled from 1991 to 2011—growth corresponding to the adoption of the MLM model—direct selling as a percent of total retail sales in the United States remained well below one percent. See William W. Keep and Peter J. Vander Nat, *Multilevel Marketing and Pyramid Schemes in the United States: An Historical Analysis*, Journal of Historical Research in Marketing, 6(2), 188-210 (November 2014). Sales per sales person declined. Thus, tripling the number of direct-selling sales people, engaged primarily through the MLM model, did not increase the percent of U.S. retail sales attributed to direct selling. Some MLM companies that were either found to be pyramid schemes or that closed in the face of a pyramid scheme prosecution operated for many years, covering a range of product areas. The losses are substantial. In the most recent complete pyramid scheme case brought by the Federal

Trade Commission (*Fed. Trade Comm'n v. Burnlounge, Inc.*, 753 F.3d 878 (9th Cir. 2014)), an estimated ninety-four percent of all the company's salespeople lost money. Thus, the risk of an MLM operating a pyramid scheme that creates victims rather than customers and sustains an MLM company primarily through endless recruitment remains.

9. The proposed Settlement Agreement misses the defining characteristic of a pyramid scheme. Labeling members as distributors, or not, fails to address the key issue of recruitment-driven compensation. While discouraging recruits from incurring debt, paying shipping for returned merchandise, prohibiting lead generation, prohibiting membership based on product purchases, and requiring experience and training for nutrition club members may represent reasonable requirements, they too fail to directly address the endless chain pyramid scheme problem. Focusing on these activities detracts from key pyramid scheme characteristics.

10. Further, the proposed Settlement Agreement fails to be true to the First Amended Complaint, particularly regarding policies and enforcement. According to the First Amended Complaint, "Herbalife does or did not employ or enforce such provisions," "there must be evidence that the program's safeguards are enforced and actually serve to deter inventory loading and encourage retail sales," "[a]nd even if the *Amway* rules were relevant, Herbalife does not follow or adequately enforce them." First Am. Compl. ¶¶ 27, 208, 209. The proposed Settlement Agreement does not remedy Herbalife's ineffective policies (i.e., not effective even if enforced). Herbalife's Ten Customer Rule "does not mandate sales to customers not already Herbalife distributors," allowing recruitment to drive sales. *Id.* at ¶ 224. The 70% Rule permits an endless chain of wholesale sales without requiring sales to non-distributor customers. Further, the

policy allows the 70% requirement to apply to “the total value of Herbalife products [distributors] hold for resale.” *Id.*, Ex. C, p. 21. With each distributor determining the amount held for resale, the 70% may actually apply to 0% of a distributor’s purchases. In fact, the First Amended Complaint notes that both policies are ineffective: “Herbalife’s 10 Customer Rule and 70% Rule are ineffective in ensuring its distributors focus on retailing the products over recruiting.” *Id.* at ¶ 227. The proposed Settlement Agreement offers no remedy for these ineffective policies.

11. The above statements are true to the best of my knowledge.

Executed March 10, 2015.



William W. Keep

EXHIBIT B

HERBALIFE CORPORATE POLICIES UNCHANGED: 2012-2014

Column A documents the 13 corporate policy “changes” listed in the proposed settlement agreement.

Column B shows that 9 of the 13 policies were in effect prior to the initiation of this lawsuit, which was originally filed on April 8, 2013.

Column C illustrates that all 13 policies were in effect prior to the settlement of this lawsuit, which occurred on October 31, 2014.

A Proposed Injunctive Relief	B Policies in Effect Prior to April 2013 Complaint?	C Policies in Effect Prior to October 2014 Settlement?
<p>“Herbalife shall not simultaneously and separately charge its members a ‘Packaging & Handling’ fee (or similar fee) and an “Order Shipping Charge” (or similar fee) as was done during the Class Period up until Herbalife adopted its Simplified Pricing Structure, when the two charges were combined into a single ‘Shipping & Handling’ charge.”</p> <p>Stipulation of Settlement, ¶ 5.1.3.</p>	<p>No. However, a revised pricing structure came into effect in April 2013 (the same month the complaint was filed).</p> <p><i>See</i> Simplified Pricing Structure, dated April 2013, available at http://herbalifemail.com/pdf/pricingstructureexamples_usen.pdf.</p>	<p>Yes.</p> <p><i>See</i> Simplified Pricing Structure, dated April 2013, available at http://herbalifemail.com/pdf/pricingstructureexamples_usen.pdf.</p>
<p>“Herbalife shall not define ‘Distributor’ in its Glossary of Terms as “Everyone who purchases an Official Herbalife Member Pack (HMP) and submits to Herbalife a valid and complete Membership Application and whose Application has been accepted by Herbalife.”</p> <p>Stipulation of Settlement, ¶ 5.1.4.</p>	<p>No.</p>	<p>Yes.</p> <p><i>See</i> 2013 Herbalife Sales & Marketing Plan and Business Rules, page 26, available at https://www.myherbalife.com/Content/en-US/pdf/distributorForms/Book4_SalesandMarketing.pdf (hereinafter “2013 Marketing Plan and Business Rules”).</p> <p>“Distributor: Any Herbalife Member who has risen to the level of Supervisor, or above in Herbalife is also referred to as a Distributor.”</p>

<p>“Herbalife shall continue to discourage members from incurring debt to pursue the Herbalife business opportunity, consistent with Rule 1.1.2. of Herbalife’s Member Rules of Conduct.”</p> <p>Stipulation of Settlement, ¶ 5.1.5.</p>	<p>Yes.</p> <p><i>See</i> 2012 Marketing Plan and Business Rules, page 95.</p> <p>“1-J Encouraging or Requiring Personal Debt Not Permitted No Herbalife Distributor, in connection with Business Methods, may encourage or require that a current or prospective Distributor go into debt in order to become a Distributor, grow an existing business, or purchase Business Methods or Herbalife products.”</p>	<p>Yes.</p> <p><i>See</i> 2013 Marketing Plan and Business Rules, page 113.</p> <p>“1-J Encouraging or Requiring Personal Debt Not Permitted No Herbalife Member, in connection with Business Methods, may encourage or require that a current or prospective Member go into debt in order to become a Member, grow an existing business, or purchase Business Methods or Herbalife products.”</p>
<p>“Herbalife shall continue to pay shipping charges for the return of products to Herbalife in connection with inventory repurchases, consistent with Rule 2.5.3. of Herbalife’s Member Rules of Conduct.”</p> <p>Stipulation of Settlement, ¶ 5.1.6.</p>	<p>No.</p>	<p>Yes.</p> <p><i>See</i> 2013 Marketing Plan and Business Rules, page 66.</p> <p>“A resigning Member may return unused products or sales materials, which are unopened and in resalable condition, for repurchase by Herbalife if the products were purchased within the last 12 months and the resigning Member provides proof of purchase. Reimbursement to the Member will be issued for the Member’s original net cost for the returned product. Although shipping and handling paid on the original order will not be reimbursed, Herbalife will arrange pick up and will pay all shipping charges for the return of the product to Herbalife.” (emphasis added).</p>
<p>“Herbalife shall continue to maintain procedures for the enforcement of its rules, including but not limited to continuing to maintain a member compliance department to enforce its policies, procedures and member rules. Herbalife shall continue to revise and supplement such policies, procedures and member rules as deemed necessary by Herbalife in the exercise of reasonable business judgment.”</p>	<p>Yes.</p> <p><i>See</i> 2012 Marketing Plan and Business Rules, page 34, 122-123.</p> <p>“Does Herbalife have specific policies and rules regarding advertising and promotion? The integrity of Herbalife’s Sales & Marketing Plan and legalities make it necessary for us to enforce</p>	<p>Yes.</p> <p><i>See</i> 2013 Marketing Plan and Business Rules, page 40, 140-141.</p> <p>“Does Herbalife have specific policies and rules regarding advertising and promotion? The integrity of Herbalife’s Sales & Marketing Plan and legalities make it necessary for us to enforce</p>

<p>Stipulation of Settlement, ¶ 5.1.7.</p>	<p>important rules and policies regarding advertising and promotion. We are confident that you will find these rules and policies protect you and your business as much as they protect Herbalife.”</p> <p>“ENFORCEMENT PROCEDURES Introduction The Herbalife Rules of Conduct are in place to protect the business for all Distributors. Violations of these rules are considered extremely serious. Violations can have a significant negative impact on the business for all Distributors as well as negatively influence the opinion of regulators, the media or the public about Herbalife, its products and Distributors. Herbalife attempts to educate our Distributors as to appropriate ethical business practices. In the event of a violation, the Company attempts to correct the violation by counseling the Distributor. However, more severe measures may be required in more serious cases...”</p>	<p>important rules and policies regarding advertising and promotion. We are confident that you will find these rules and policies protect you and your business as much as they protect Herbalife.”</p> <p>“ENFORCEMENT PROCEDURES Introduction The Herbalife Rules of Conduct are in place as protections of our business. Violations of these rules are considered serious; they may have an adverse affect on the Herbalife business as a whole, and can negatively influence the opinion of regulators, the media, or the public about Herbalife, its products, and Members. Therefore, Herbalife attempts to educate and counsel its Members about appropriate business practices. More severe measures may be required as appropriate. The company’s decisions shall not create liability to pay compensation for loss of profits or goodwill...”</p>
<p>“Herbalife shall maintain its rule prohibiting members from selling leads to other members or purchasing leads from any source, consistent with Rule 3.3.2 of Herbalife’s Member Rules of Conduct.”</p> <p>Stipulation of Settlement, ¶ 5.1.8.</p>	<p>Yes.</p> <p><i>See</i> 2012 Marketing Plan and Business Rules, page 81.</p> <p>“Rule 26-E(2)(I): “Herbalife Distributors are prohibited from selling leads;”</p>	<p>Yes.</p> <p><i>See</i> 2013 Marketing Plan and Business Rules, page 98.</p> <p>“Rule 26-E(2)(I): “Herbalife Members are prohibited from selling leads;”</p>
<p>“Herbalife shall continue to prohibit members from requiring a person to buy product (other than a Mini or Full Member Pack) as a condition to becoming an Herbalife member or distributor.”</p> <p>Stipulation of Settlement, ¶ 5.1.9.</p>	<p>Yes.</p> <p><i>See</i> 2012 Marketing Plan and Business Rules, page 3, 59, 93.</p> <p>“Becoming a Distributor – The Important First Step The only required purchase in order to become an Herbalife Independent Distributor is the Herbalife Mini IBP (the smaller version of our official Distributor Kit).”</p> <p>“Rules of Conduct and Distributor Policies...Rule 1-</p>	<p>Yes.</p> <p><i>See</i> 2013 Marketing Plan and Business Rules, page 3, 76, 111.</p> <p>“Becoming a Member – The Important First Step The only required purchase in order to become an Herbalife Member is the Mini Herbalife Member Pack (Mini HMP), or at your election, an Herbalife Member Pack (HMP).”</p> <p>“Rules of Conduct and Distributor Policies...Rule</p>

	<p>A Becoming a Distributor ...The only required purchase in order to become, succeed or advance as a Distributor is the Mini IBP.”</p> <p>“Supplemental Rules of Conduct... 1-C No Required Purchase Other Than International Business Pack The only required purchase in order to become, succeed or advance as an Herbalife Distributor is the Herbalife IBP (that is, Herbalife’s official International Business Pack/Distributor Kit).”</p>	<p>1-A Becoming a Member The only required purchase in order to become, succeed or advance as a Member is the Mini Herbalife Member Pack (Mini HMP).”</p> <p>“Supplemental Rules of Conduct... 1-C No Required Purchase Other Than Mini Herbalife Member Pack The only required purchase in order to become, succeed or advance as an Herbalife Member is the Mini Herbalife Member Pack (Mini HMP).”</p>
<p>“Herbalife shall maintain its rule that before signing a lease or opening a Nutrition Club in a non-residential location, the member must have been an Herbalife member for at least 90 days and receive mandatory Nutrition Club operator training, consistent with Rule 8.4.1 of Herbalife’s Member Rules of Conduct.”</p> <p>Stipulation of Settlement, ¶ 5.1.10.</p>	<p>No.</p>	<p>Yes.</p> <p><i>See</i> 2013 Marketing Plan and Business Rules, page 127.</p> <p>“Herbalife Nutrition Club Rules... 5-A Nutrition Club Registration Process Members may not open a Nutrition Club in a non-residential location or sign a lease for a non-residential premise for the purposes of a Nutrition Club, unless they have been an officially registered Herbalife Member for at least 90 days and have completed the process required by the Company at the time as to site location and proposed signage, training and other matters.”</p>
<p>“Herbalife shall include its Statement of Average Gross Compensation (‘SAGC’) as part of its member application either incorporated as part of that application, attached hereto, or otherwise prominently located and accessible.”</p> <p>Stipulation of Settlement, ¶ 5.1.11.</p>	<p>Yes.</p> <p><i>See</i> 2012 Marketing Plan and Business Rules, page 38 (Sample Application for International Distributorship).</p> <p>“3. I hereby represent, warrant and agree that I: ... e. Have received and reviewed the Statement of Average Gross Compensation of U.S. Supervisors and the Policy Statement on Business Methods, both of which are contained in the Mini IBP and the IBP and</p>	<p>Yes.</p> <p><i>See</i> 2013 Marketing Plan and Business Rules, page 45-47 (Sample Herbalife Membership Application and Agreement, which contains the SAGC).</p> <p>The SAGC is also readily available online at http://www.herbalife.com/Content/en-US/pdf/business-opportunity/statement-of-average-gross-compensation-usen.pdf, or by going to the main Herbalife website (http://company.herbalife.com/),</p>

	<p>which are available on www.MyHerbalife.com or upon request from my Sponsor or the Distributor Relations Department.”</p>	<p>clicking on “Business Opportunity” (which brings you to http://opportunity.herbalife.com/), and then clicking on “Statement of Average Gross Compensation” at the bottom of page.”</p> <p>In fact, the complaint even alleges that Herbalife included the SAGC in the Sales and Marketing Plan received by Plaintiffs and the class, and posted them online as well. First Am. Compl. ¶19.</p>
<p>“Herbalife shall require that new members acknowledge reviewing the SAGC when signing a new Herbalife Membership Application and Agreement (the ‘Membership Agreement’). Herbalife shall continue to include and/or link to the SAGC with the Membership Agreement.”</p> <p>Stipulation of Settlement, ¶ 5.1.12.</p>	<p>Yes.</p> <p>See 2012 Marketing Plan and Business Rules, page 38 (Sample Application for International Distributorship).</p> <p>“I have received and reviewed the Statement of Average Gross Compensation of U.S. Supervisors and the Policy Statement on Business Methods, both of which are contained in the Mini IBP and the IBP and which are available on www.MyHerbalife.com or upon request from my Sponsor or the Distributor Relations Department.”</p>	<p>Yes.</p> <p>See 2013 Marketing Plan and Business Rules, page 46 (Sample Herbalife Membership Application and Agreement).</p> <p>“A. 3. Herbalife Member Pack: I have purchased and received a new, previously unopened ‘Member Pack’... The Member Pack includes the...the Statement of Average Gross Compensation Paid by Herbalife,...”</p> <p>“B. 1. Diligent inquiry: If I wish to consider engaging in an Herbalife business, by selling Herbalife® products or sponsoring other Members to do so, I agree as an essential part of that consideration, to carefully review the Materials contained in the Member Pack and those then available on MyHerbalife.com. Herbalife encourages careful prior review so I will be informed about the potential risks, benefits and rules applicable to Members engaged in business activities.”</p>
<p>“Herbalife shall continue disclosing in its SAGC the total number and percentage of all members who do not receive any compensation payment directly from Herbalife.”</p> <p>Stipulation of Settlement, ¶ 5.1.13.</p>	<p>Yes.</p> <p>See Statement of Average Gross Compensation Paid by Herbalife to United States Distributors in 2012, available at http://opportunity.herbalife.com/Content/en-US/pdf/business-</p>	<p>Yes.</p> <p>See Statement of Average Gross Compensation Paid By Herbalife to U.S. Members in 2013, available at http://www.herbalife.com/Content/en-US/pdf/business-opportunity/statement-of-average-gross-compensation-usen.pdf.</p>

	<p><u>portunity/StatementAverageCompensation2011EN.pdf</u>, or Exhibit B of First Am. Compl.</p> <p>“The compensation chart below indicates that 434,125 Distributors (88%) received no payments from Herbalife during 2012.”</p>	<p>“For most people (88%), the economic benefits resulted exclusively from a discounted price on products they purchased for personal and family use or for resale to others, neither of which took the form of a payment from the Company.”</p>
<p>“Herbalife shall clarify in its Sales & Marketing Plan that upon qualifying as a Supervisor, a member shall have at least twelve (12) months during which to requalify as a Supervisor.”</p> <p>Stipulation of Settlement, ¶ 5.1.14.</p>	<p>Yes.</p> <p><i>See</i> 2012 Marketing Plan and Business Rules, page 12.</p> <p>“Requalification All Supervisors must requalify their status annually between February 1 and January 31 to maintain their rights and privileges. The requalification requirements for this are described below.</p> <ul style="list-style-type: none"> • One-Month Qualification: Achieve 4,000 Volume Points in one Volume Month (with a minimum 1,000 of those 4,000 Volume Points unencumbered). • Two-Month Qualification: Achieve 2,500 Volume Points for two consecutive months (with a minimum of 1,000 of those 2,500 Volume Points unencumbered for each month). • Twelve-Month Requalification: Accumulate 4,000 Unencumbered Total Volume Points over the 12-month Requalification period. <p>Or,</p> <p>Accumulate 10,000 Unencumbered Total Volume Points over the 12-month requalification period.”</p>	<p>Yes.</p> <p><i>See</i> 2013 Marketing Plan and Business Rules, page 14.</p> <p>“Requalification All Supervisors must requalify their status annually between February 1 and January 31 to maintain their rights and privileges. The requalification requirements for this are described below.</p> <ul style="list-style-type: none"> • One-Month Qualification: Achieve 4,000 Volume Points in one Volume Month (with a minimum 1,000 of those 4,000 Volume Points unencumbered). • Two-Month Qualification: Achieve 2,500 Volume Points for two consecutive months (with a minimum of 1,000 of those 2,500 Volume Points unencumbered for each month). • Twelve-Month Requalification: Accumulate 4,000 Unencumbered Total Volume Points over the 12-month Requalification period.”
<p>“Herbalife shall amend the hardcopy Membership Agreement as follows: (a) the term ‘Compensation Statement’ shall be expressly defined as ‘Statement of Average Gross Compensation Paid by Herbalife;’ and (b) the second sentence of paragraph 2 of box B in version 42 of the Membership Agreement shall read: ‘I hereby represent, warrant and agree that I am not relying upon and that I will not rely upon any other written or oral</p>	<p>Yes.</p> <p><i>See</i> 2012 Marketing Plan and Business Rules, page 38 (Sample Application for International Distributorship).</p> <p>“I hereby represent, warrant and agree that I: ... b. Am not relying upon any representations as to the financial results I might achieve.</p>	<p>Yes.</p> <p><i>See</i> 2013 Marketing Plan and Business Rules, page 46, 49 (Sample Herbalife Membership Application and Agreement).</p> <p>“B. 2. Compensation I Might Receive or Income that I Might Earn: The Compensation Statement</p>

<p>information or representations about the financial results I might achieve.’ Herbalife reserves the right to modify its Membership Agreement and other documents provided that such modifications are not materially inconsistent with the amendments provided in this Subsection.”</p> <p>Stipulation of Settlement, ¶ 5.1.15.</p>	<p>...</p> <p>e. Have received and reviewed the Statement of Average Gross Compensation of U.S. Supervisors and the Policy Statement on Business Methods, both of which are contained in the Mini IBP and the IBP and which are available on www.MyHerbalife.com or upon request from my Sponsor or the Distributor Relations Department.”</p>	<p>(contained in the Member Pack and available on MyHerbalife.com) is the only authorized presentation of the matters it sets forth. I hereby represent, warrant and agree that I am not relying upon and that I will not rely upon any other written or oral information or representations about the financial results I might achieve.”</p> <p>“Compensation Statement: The Compensation Statement is the only authorized presentation of the matters it sets forth. I hereby represent, warrant and agree that I am not relying and will not rely in the future upon any other written or oral information or representations about the financial results I might achieve.”</p> <p><u>Note:</u> The one and only change that has not yet been effectuated is the defining of “Compensation Statement” as “Statement of Average Gross Compensation,” which is a completely insignificant change and does not address any of the allegations in the complaint.</p>
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been filed electronically on this 16th day of February 2015 and is available for viewing and downloading to the ECF registered counsel of record:

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8 DATED: March 16, 2015

Respectfully submitted,

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EXHIBIT 2

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Attorneys for Truth In Advertising, Inc.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANA BOSTICK, et al.,

Plaintiffs,

v.

HERBALIFE INTERNATIONAL
OF AMERICA, INC., et al.,

Defendants.

CASE NO: 2:13-cv-02488-BRO-SHC

NOTICE OF *AMICUS CURIAE* TRUTH
IN ADVERTISING, INC.'S INTENT TO
APPEAR AT FAIRNESS HEARING

Assigned to:
Magistrate Judge:
Hon. Beverly Reid O'Connell

Date: May 11, 2015
Time: 1:30 p.m.
Courtroom: 14

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TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF
RECORD:

PLEASE TAKE NOTICE that proposed *amicus curiae* Truth in
Advertising, Inc. hereby files this written Notice of its Intent to Appear, through
its counsel, at the Final Fairness Hearing on May 11, 2015, at 1:30 p.m. in the
above-entitled court.

DATED: March 16, 2015

Respectfully submitted,

MARKS, FINCH, THORNTON & BAIRD, LLP

By: s/ Andrea L. Petray
ANDREA L. PETRAY
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1439.005/3818624.nlh

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