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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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12 DANA BOSTICK, et al.,

13 Plaintiffs,

14 v.

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

16 Defendants.
17
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Case No. 2:13-cv-02488-BRO-SHC

**MOTION OF NATIONAL CONSUMERS
LEAGUE INC. FOR LEAVE TO FILE
BRIEF AS AMICUS CURIAE IN
OPPOSITION TO PROPOSED
SETTLEMENT**

Date: May 11, 2015

Time: 1:30 p.m.

Place: Courtroom 14

Judge: Hon. Beverly Reid O’Connell
19

20 The National Consumers League Inc. (“NCL”) respectfully requests leave of the Court to file
21 the attached amicus curiae brief in the above-captioned case in opposition to the proposed
22 settlement. NCL is a 501(c)(3) nonprofit organization representing consumers and workers on
23 marketplace and workplace issues since our founding in 1899. Headquartered in Washington, DC,
24 today NCL provides government, businesses, and other organizations with the consumer’s
25 perspective on concerns including child labor, privacy, food safety, and medication information.¹
26

27 ¹ Neither party nor their counsel played any part in the drafting of this brief or contributed in any
28 (continued on next page)

1 NCL has long had an interest in advocating on behalf of consumers affected by pyramid schemes,
2 particularly those that may be disguised as multi-level marketing businesses.² In addition, NCL was
3 the first consumer organization to call on the Federal Trade Commission to investigate allegations
4 that Herbalife is in fact a sophisticated pyramid scheme.³

5 With respect to the instant case, NCL is filing this motion and brief because the proposed
6 settlement is fundamentally unfair to the class members. As a consumer advocacy organization
7 working to promote social and economic justice for consumers and workers in the United States and
8 abroad, NCL has an important interest and a valuable perspective on the issues presented in this
9 case, and thus should be granted *amicus curiae* status. *See, e.g., Safari Club Int'l v. Harris*, 2015
10 U.S. Dist. LEXIS 4467, at *2-3 (E.D. Cal. Jan. 13, 2015) (granting motion for leave to file an amicus
11 brief and stating “[d]istrict courts frequently welcome amicus briefs from nonparties concerning
12 legal issues that have potential ramifications beyond the parties directly involved or if the amicus has
13 ‘unique information or perspective that can help the court beyond the help that the lawyers for the
14 parties are able to provide.’... ‘Even when a party is very well represented, an amicus may provide
15 important assistance to the court.’”); *Jamul Action Committee, et al. v. Stevens, et al.*, 2014 U.S.
16 Dist. LEXIS 107582 (E.D. Cal. Aug. 4, 2014) (granting motion for leave to file an amicus brief);
17 *State of Missouri, et al. v. Harris*, 2014 U.S. Dist. LEXIS 89716 (E.D. Cal. June 30, 2014) (granting
18 motions for leave for file amicus briefs); *Thalheimer, et al. v. City of San Diego, et al.*, No. 09-cv-
19 2862 (S.D. Cal. Jan. 19, 2010) (orders allowing two non-profit organizations to enter case as *amicus*
20 *curiae*). *See also Neonatology Assocs., P.A. v. Comm’r of Internal Revenue, et al.*, 293 F.3d 128, 132

21 (footnote continued from previous page)
22 other way.

23 ² *See e.g.* “More bad economic news: Recession putting consumers at increased risk of being
24 duped by pyramid schemes,” National Consumers League press release. February 26, 2009. Online:
http://www.nclnet.org/more_bad_economic_news_recession_putting_consumers_at_increased_risk_of_being_duped_by_pyramid_schemes

25 ³ “National Consumers League calls on FTC to investigate allegations against Herbalife,” National
26 Consumers League press release. March 12, 2013. Online:
http://www.nclnet.org/national_consumers_league_calls_on_ftc_to_investigate_allegations_against_herbalife

1 (3d Cir. 2002) (Alito, J.) (“Even when a party is very well represented, an amicus may provide
2 important assistance to the court. . . . Some friends of the court are entities with particular expertise
3 not possessed by any party to the case. . . .”); *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997)
4 (Posner, J.) (“An amicus brief should normally be allowed when . . . the amicus has unique
5 information or perspective that can help the court beyond the help that the lawyers for the parties are
6 able to provide.”); *Managing Class Action Litigation: A Pocket Guide for Judges*, 3d ed., Federal
7 Judicial Ctr. 2010, at 17 (“Institutional ‘public interest’ objectors may bring a different perspective .
8 . . . Generally, government bodies such as the FTC and state attorneys general, as well as nonprofit
9 entities, have the class-oriented goal of ensuring that class members receive fair, reasonable, and
10 adequate compensation for any injuries suffered. They tend to pursue that objective by policing
11 abuses in class action litigation. Consider allowing such entities to participate actively in the
12 fairness hearing.”).⁴

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

22 The attached *amicus* brief explains in detail why NCL opposes the proposed settlement. In
23 short, the brief explains that the terms are unfair because the proposed injunctive relief does not
24 require Herbalife to make any substantive changes to its marketing or business structure, but rather
25

26 ⁴ Neither party nor their counsel played any part in the drafting of this Motion or contributed in
27 any other way.

1 allows the company to continue deceptively promoting and operating its illegal pyramid scheme. In
2 addition, the proposed monetary relief unfairly treats two otherwise similarly situated groups of class
3 members differently, leaving the vast majority of class members with inadequate compensation.
4 And while the class members are left without fair and adequate compensation, class counsel will
5 pocket \$5.25 million with leftovers going to a *cy pres* award.

6 For these reasons, NCL moves for leave to appear as *amicus curiae* and submit the attached
7 brief in opposition to the proposed settlement.

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DATED: March 24, 2015

Respectfully submitted,

THE STURDEVANT LAW FIRM
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By: /s/ James C. Sturdevant
JAMES C. STURDEVANT

Attorneys for Plaintiffs

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CONSUMERS LEAGUE INC. IN
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Date: May 11, 2015

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19
20 **INTRODUCTION**
21

22 The National Consumers League, Inc. (“NCL”) opposes this settlement for the reasons
23 described below. In summary, the very limited remedies for the harms this case seeks to address
24 appear woefully inadequate when put into the larger context of the allegations against Herbalife
25 made by Plaintiffs.

26 **INTEREST OF AMICUS CURIAE**

27 The National Consumers League Inc. is a 501(c)(3) nonprofit organization representing
28 consumers and workers on marketplace and workplace issues since our founding in 1899.

1 Headquartered in Washington, DC, today NCL provides government, businesses, and other
2 organizations with the consumer’s perspective on concerns including child labor, privacy, food
3 safety, and medication information.¹ NCL has long had an interest in advocating on behalf of
4 consumers affected by pyramid schemes, particularly those that may be disguised as multi-level
5 marketing businesses.² In addition, NCL was the first consumer organization to call on the Federal
6 Trade Commission to investigate allegations that Herbalife is in fact a sophisticated pyramid
7 scheme.³

8 ARGUMENT

9 This settlement, as proposed, provides little in the way of meaningful relief to the
10 approximately 1.55 million Class members. The proposed injunctive relief (which is temporary in
11 nature) requires Herbalife to make no significant changes to the potentially deceptive business
12 practices identified in the complaint. Indeed, the company has largely already implemented the
13 business changes envisioned. In fact, many of the changes proposed by this settlement were already
14 in place before Plaintiffs’ complaint was even filed. Significant changes to Herbalife’s business
15 model that *would* address Plaintiffs’ complaint – such as ending the practice of allowing distributors
16 to maintain an infinite number of levels in their “downlines” – are not contemplated in the proposed
17 injunctive relief.

18 Regarding the monetary relief proposed by the settlement, the National Consumers League
19 (NCL) shares the concerns raised by *amicus curiae* Truth in Advertising, Inc. (TINA.org) with
20 regards to the arbitrary way that similarly situated groups of class members receive relief. In
21

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

24 ² See e.g. “More bad economic news: Recession putting consumers at increased risk of being
25 duped by pyramid schemes,” National Consumers League press release. February 26, 2009. Online:
http://www.nclnet.org/more_bad_economic_news_recession_putting_consumers_at_increased_risk_of_being_duped_by_pyramid_schemes

26 ³ “National Consumers League calls on FTC to investigate allegations against Herbalife,” National
27 Consumers League press release. March 12, 2013. Online:
http://www.nclnet.org/national_consumers_league_calls_on_ftc_to_investigate_allegations_against_herbalife

1 addition, we are concerned that the proposed *cy pres* award does not meet the “next best use” test.
2 The proposed *cy pres* award recipient, Consumer Federation of America (CFA), has explicitly stated
3 that the organization has no knowledge of the allegations or claims that are at the heart of this
4 lawsuit, making them – by definition – a poor choice for *cy pres* here.⁴ The term “*cy pres*” means
5 “next best use” and *cy pres* distributions are reserved for those charitable organizations whose work
6 is *closely related* to the cause of action in the case; *Nachsin v. AOL*, No. 10-55129 D.C. No. 2:09-cv-
7 03568-CAS-PLA at 20294 (9th Cir. 2011) (“When selection of *cy pres* beneficiaries is not tethered
8 to the nature of the lawsuit and the interests of the silent class members, the selection process may
9 answer to the whims and self-interests of the parties, their counsel, or the court.”). In addition, CFA
10 has little history of engaging in consumer education initiatives focused specifically on consumers
11 affected by pyramid schemes. The organization is indeed engaged in other important work, but is an
12 inappropriate and poor choice for *cy pres* in this case.

13 In return for the insubstantial and temporary changes to its business model and little in the
14 way of monetary relief, this settlement frees Herbalife from a significant civil liability burden
15 *permanently*. In addition, we are concerned that the Court’s approval of this settlement will quickly
16 be submitted by Herbalife to federal and state law enforcement agencies engaged in ongoing
17 investigations of the company’s business practices (*e.g.* Federal Trade Commission, state attorneys
18 general) as evidence that it is not engaging in unfair or deceptive business practices.

19 For these reasons, NCL, a national consumer and worker advocacy organization presenting
20 consumers and workers on marketplace and workplace issues since our founding in 1899, opposes
21 the proposed settlement, and respectfully urges the Court to reject it.

22 ///

23 ///

24 _____
25 ⁴ “Declaration of Stephen Brobeck,” Consumer Federation of America. December 1, 2014. (“I
26 have not reviewed the allegations in the Complaint and I have no opinion or position concerning the
27 merits of the parties’ respective positions. I have not been advised of the terms of the proposed
28 settlement of this action and I am not expressing any opinion concerning the fairness or adequacy of
the settlement.”) Online: <https://www.truthinadvertising.org/wp-content/uploads/2015/02/Bostick-v.-Herbalife-dec-of-Consumer-Federation-of-America.pdf>

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DATED: March 24, 2015

Respectfully submitted,

THE STURDEVANT LAW FIRM
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