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**IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

DANA BOSTICK, *et al.*,

Plaintiffs,

vs.

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

Defendants.

**Case No. 2:13-CV-02488-BRO-
RZ**

**OBJECTORS' MOTION FOR
RECONSIDERATION**

Hon. Beverly Reid O'Connell

Hearing Date: August 24, 2015

Time: 1:30 pm

Courtroom 14

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on Monday, August 24,, 2015, at 1:30 p.m.,
3 or as soon thereafter as the matter may be heard, before the Hon. Beverly Reid
4 O'Connell, United States District Judge, at the United States Courthouse, located
5 at 312 North Spring Street, Los Angeles, CA 90012-4701, Objectors¹ will and
6 hereby do move the Court, pursuant to Rule 59(e) of the Federal Rules of Civil
7 Procedure, for reconsideration of the Final Judgment and Order of Dismissal, as
8 amended and entered in this Court on June 17, 2015.
9
10
11

12 This motion is based on this notice of motion and the accompanying
13 memorandum of points and authorities submitted concurrently herewith, all other
14 papers that may be submitted before or at the hearing, and all of the pleadings and
15 papers on file in this action.
16
17

18 Dated: July 15, 2015
19

20 s/Douglas M. Brooks

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25
26 ¹ The Objectors are Elvia Acosta, Silvia C. Arias, Sabas Avila, Miguel Calderon,
27 Felipe Colon, Elizabeth Correa, Maria Cutzal, Juana Estala, Jose G. Garcia,
28 Valentina Leon, Rossina Martinez, Gilberto Melchor Sanchez, Yader A. Pastran,
Susana Perez, Eric Rodensky, Jose Tafoya, Olivia Torres, Julia Ulloa, Martil
Palma Vallecillo (collectively referred to herein as "Objectors").

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am over the age of eighteen (18) and not a party to the within action. I am employed in the law firm of Cohen McKeon LLP, 1910 West Sunset Boulevard, Suite 440, Los Angeles, California 90026.

On July 15, 2015, I used the Central District of California's Electronic Case Filing System, with the ECF account registered to Michael L. Cohen, to file the following document(s):

OBJECTORS' MOTION FOR RECONSIDERATION

The ECF system is designed to send an e-mail message to all parties in the case, which constitutes service. The Parties served by e-mail in this case are found on the Court's Electronic Mail Notice List.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 15, 2015, at Los Angeles, California.

/S/ ROBIN GRIER
Robin Grier

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TABLE OF CONTENTS

I.	Summary of Issues for Reconsideration.....	6
II.	The Class Notice Program was Inadequate.....	6
	A. The Class Notice Program	
	Overrelied on Email.....	7
	B. The Notice Program Failed	
	To Consider Class Demographics.....	10
	C. The Claims Period Was Too Short.....	14
	D. The Court Should Appoint a	
	Notice Expert.....	15
III.	This Court’s Findings that Molnar and Vasko	
	Had Standing to Sue for Injunctive Relief was	
	Clear Error.....	16
IV.	This Court’s Failure to Make an Independent	
	Evaluation of Plaintiffs’ Claims was Clear	
	Error.....	23
V.	Recent Evidence Demonstrates That Herbalife	
	Is Unable or Unwilling to Police Itself.....	25
VI.	Conclusion.....	29

TABLE OF AUTHORITIES

FEDERAL CASES

Arevalo v. D.J's Underground, Inc. 2010 U.S. Dist.

LEXIS 109193 (D. Md. 2010) at *8.....13

Bates v. United Parcel Service, Inc. (9th Cir. 2007)

511 F.3d 974.....17,23

Beal v. Lifetouch, Inc. 2012 U.S. Dist.

LEXIS 122350 (N.D. Cal. 2012).....23

Braunstein v. Arizona Department of Transportation (9th Cir. 2012)

683 F.3d 1177.....17

Carroll v. Nakatani (9th Cir. 2003)

342 F.3d 934.....23

Chavez v. Lumber Liquidators, Inc. 2015 U.S. Dist.

LEXIS 60789 at *14.....24

Ellis v. Costco Wholesale Corp. (9th Cir. 2011)

657 F.3d 970.....17,18

Gonzalez v. USF Reddaway, Inc.

Case No. 5:10-CV-01514-AHM-OP.....25

In re Currency Conversion Fee Antitrust Litigation (S.D.N.Y. 2009)

263 F.R.D. 110.....16

In re Holocaust Victims Assets Litigation

105 F. Supp. 2d 139.....11

In re Black Farmers Discrimination Litigation

856 F. Supp, 2d 1, 36-37.....12

Kaufman v. American Express Travel Services, Inc. (S.D.Ill. 2012)

283 F.R.D. 404, 405-408.....16

Lusby v. Gamestop Inc. (N.D. Cal. 2013)

297 F.R.D. 400, 414.....14,24

Multi-Ethnic Immigrant Workers Organizing Network v. City of Los Angeles (C.D. Cal. 2009)

LEXIS 132270. *15.....12

Neilson v. The Sports Authority (N.D. Cal. 2012)

LEXIS 168226, *16.....15

Nicholas Millan v. Cascade Water Service, Inc. 2015 U.S. Dist.

LEXIS 15412, *38-39 (E.D. Cal. 2015).....14,24

Sanchez v. Johnson (N.D. Cal. 2004)

301 F. Supp. 2d 1060.....6

Slayman v. Dedex Ground Package System Inc. (9th Cir. 2014)

765 F.3d 1033.....18,22

Steinfeld v. Discover Financial Services, 2013 U.S. Dist.

LEXIS 91429 (N.D. Cal. 2013).....14

Tijero v. Aaron Brothers, Inc. (N.D. Cal. 2012)

LEXIS 183238, *31.....14

Valdez v. The Neil Jones Food Company 2014 U.S. Dist.

LEXIS 111766 (E.D. Cal. 2014), at *19-21.....13,14

RULES AND STATUTES

Federal Rules of Civil Procedure §23(b)(2).....6,16

Federal Rules of Civil Procedure §23(c)(2)(B).....7

Federal Rules of Civil Procedure §59(e).....6

TREATISES

West v. Car-Fax, Inc. 2009 Ohio App. LEXIS 5758, ***17.....8

I. Summary of Issues for Reconsideration

“Under Rule 59(e) of the Federal Rules of Civil Procedure ... , the granting of a motion for reconsideration is a matter of discretion for a district court and is appropriate if the district court: (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.” *Sanchez v. Johnson*, 301 F. Supp. 2d 1060, 1061-62 (N.D.Cal. 2004).

Objectors respectfully submit that the following issues compel reconsideration of this Court’s Final Judgment and Order of Dismissal:

- A. Clear error and new evidence concerning the adequacy of the Class Notice Program.
- B. Clear error concerning the standing of Plaintiffs Beverly Molnar and Anita Vasko to represent the Rule 23(b)(2) Injunctive Relief class.
- C. Clear error in the failure to make independent findings concerning the valuation of Plaintiff’s claims.
- D. New evidence demonstrating Herbalife’s inability or unwillingness to police its high level distributors.

II. The Class Notice Program was Inadequate

In its order on final approval, this Court “recognize[d] that the class response rate is low, as only 7,457 class members have filed a claim for relief. ... This

1 equates to a response rate of less than 1%.”¹ In response to Objectors’ arguments
 2 concerning the failure of the notice program, this Court stated that it “agrees in
 3 theory that a broader notice campaign could have benefitted the class.” Order, p.
 4 47. But Rule 23(c)(2)(B) does not provide that the class notice is sufficient if it
 5 meets some minimum standard. The Rule mandates that the class must receive the
 6 “best notice that is practicable under the circumstances.” Fed.R.Civ.P.
 7 23(c)(2)(B). This Court’s judgment that the notice met that standard, despite the
 8 claims rate of less than ½ of 1% and its own finding that a broader notice campaign
 9 would have been better, was clear error. Objectors respectfully submit that the
 10 Court should vacate its judgment approving the settlement, and appoint an
 11 independent notice expert to assess the effectiveness of the class notice program
 12 and, if appropriate, design a new notice program tailored to the circumstances of
 13 this case and the class.
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19 **A. The Class Notice Program Overrelied on Email**

20 The Stipulation of Settlement called for the parties to request a preliminary
 21 approval order that called for “maximum use of notice by e-mail and other
 22 electronic means.” Stipulation of Settlement (Dkt. 90-5), ¶6.1.10. Accordingly,
 23
 24

25 ¹ See Order Re: (1) Plaintiffs’ Motions for Final Approval of Class Action
 26 Settlement, to Increase the Awards to Business Opportunity Claimants, and for an
 27 Award of Attorneys Fees and Expenses [110, 125, 129]; (2) Defendants’ Motion
 28 for Joinder [131]; and (3) Amici’s Motions for Leave to File Amicus Curiae Briefs
 [114, 117] (“Order”), p. 48.

the parties adopted a “cheaper is better” approach to class notice. Email may be cheap, but it does not necessarily meet the “best practicable” standard for class notice. The Federal Judicial Center has published a checklist for Courts to use in evaluating class notice programs. Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide (Federal Judicial Center 2010) (“FJC Checklist”).² The FJC Checklist warns against overreliance on email:

Will e-mailed notice be used instead of postal mailings?

If available, parties should use postal mailing addresses, which are generally more effective than e-mail in reaching class members: mail-forwarding services reach movers, and the influx of “SPAM” e-mail messages can cause valid e-mails to go unread. If e-mail will be used – e.g., to active e-mail addresses the defendant currently uses to communicate with class members – be careful to require sophisticated design of the subject line, the sender, and the body of the message, to overcome SPAM filters and ensure readership.

FJC Checklist, p. 3.

Sending a class notice via email may be appropriate where the defendant’s business was primarily conducted electronically. *See, e.g., West v. Car-Fax, Inc.,*

² available at [http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf)

1 2009 Ohio App. LEXIS 5758, **17 (Ohio App. 2009) (Trapp., P.J., concurring)
2 (discussing problems with email notice and noting that “the courts have deemed
3 email notice particularly suitable in cases where ... class members' claims arise
4 from their visits to the defendant's Internet business.”). Herbalife, however,
5 employs a person-to-person marketing system where new distributors are recruited
6 by existing distributors, not by Herbalife itself. Accordingly, the preference for
7 email notice in this case was not justified.
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10 An example of the problems with email notice was provided to undersigned
11 counsel after the final approval hearing. On May 18, 2015, Brent Wilkes,
12 National Executive Director of the League of United Latin American Citizens,
13 wrote to undersigned counsel and stated that he was a current Herbalife distributor
14 but that the notice was diverted to his spam filter, and it was a “miracle” that he
15 noticed it. *See* Declaration of Douglas M. Brooks in Support of Motion for
16 Reconsideration (“Brooks Decl.”), ¶2 and Exhibit A. Further, Mr. Wilkes advised
17 that he received “daily messages from Herbalife ... None of them go to my spam
18 folder.” *Id.* Mr. Wilkes cannot be the only class member who experienced this
19 problem. In fact, five of the Objectors submitted declarations stating that they did
20 not receive the class notice. Declaration of Objector Miguel Calderon (Dkt. 121-
21 1), ¶9; Declaration of Objector Felipe Colon (Dkt. 121-1); ¶8; Declaration of
22 Objector Valentina Leon (Dkt. 121-1), ¶7; Declaration of Objector Gilberto
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Melchor Sanchez (Dkt. 121-1), ¶7; Declaration of Objector Martil Palma Vallecillo (Dkt. 121-1), ¶7. That five out of the eighteen objectors represented by undersigned counsel did not receive the class notice suggests that the “reach” calculated by the notice administrator, and upon which the Court relief, was inflated.³

B. The Notice Program Failed to Consider Class Demographics

The FJC Checklist also provides that the Court should consider the demographics of the class:

Is the notice plan conducive to reaching the demographics of the class?

The notice plan should include an analysis of the makeup of the class. There may be more women than men; it may skew older; it may be less educated than average. Each audience can be matched with the most efficient and effective methods of notice for reaching those people.

FJC Checklist, p. 2. The Federal Judicial Center has also published a Pocket Guide for Judges dealing with class actions. The Guide advises that the Court should:

Make sure the notice plan takes into account any cultural and language barriers to notifying class members. For example, the class actions involving

³ The Order states that “Objectors do not dispute that the combined email and postcard notices reached approximately 92.91% of the class.” Order, pp. 47-48. In light of these declarations and the correspondence from Mr. Wilkes, that finding was not correct. Some unknown percentage of the class were sent the notice via emails which were diverted to their “spam” folders, making the notice administrator’s “reach” statistics suspect.

1 assets of Holocaust victims demanded a far- reaching notice campaign to
2 notify the many dispersed Jewish survivors as well as gays, Jehovah's
3 Witnesses, and Romani ("gypsy") migrants. The judge approved a
4 'multifaceted plan' that included 'worldwide publication, public relations
5 (i.e., 'earned media'), Internet, and grass roots community outreach.' In re
6 Holocaust Victims Assets Litigation, 105 F. Supp. 2d 139, 144–45
7 (E.D.N.Y. 2000). As the judge in the Holocaust victims' class actions was,
8 be alert to cultural differences that might affect the attention recipients will
9 give to the proposed notices. A class of migrant farm workers, for example,
10 might rely on radio more often than urban factory workers would. A class of
11 people challenging searches and seizures as unreasonable might respond
12 differently to official court notices than, say, people who have never been
13 arrested.
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19 Class Action Pocket Guide (Federal Judicial Center, 3d ed.) ("FJC Guide"), pp. 29-
20 30. The FJC Guide suggests a number of actions the Court can take in response to
21 a low claims rate, including the use of outreach programs:
22

23 If you anticipate or find evidence of a low claims rate, ask counsel whether
24 they have considered alternatives that might enhance the reach of the claims
25 process and tailor it to the characteristics of class members, such as using
26 surveys to determine reasons for nonresponses, improving the clarity of the
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1 claims forms, and adding outreach programs. See Francis E. McGovern,
2 Distribution of Funds in Class Actions-Claims Administration, 35 J. Corp.
3 L. 123 (2009).

4
5 Class Action Pocket Guide (3d ed.), p. 30. *See also In re Black Farmers*
6 *Discrimination Litigation*, 856 F. Supp. 2d 1, 36-37 (D.D.C. 2011); *Multi-Ethnic*
7 *Immigrant Workers Organizing Network v. City Of Los Angeles*, 2009 U.S. Dist.
8 LEXIS 132270, *15 (C.D.Cal. 2009).

9
10 The Federal Trade Commission has also recognized the importance of using
11 creative methods to communicate with immigrant communities affected by fraud.
12 Commissioner Terrell McSweeney recently spoke on this issue:

13
14 The best way to combat fraud is to empower consumers and foster
15 collaboration across stakeholder groups, so that we can quickly identify new
16 scams and work together to stop them. All too often consumers are unaware
17 that they can come complain to us, to their state AG, to their local Better
18 Business Bureau – and that their complaints are taken seriously.

19
20 That’s why we are redoubling our efforts to reach out to underserved
21 communities, or groups that might be particularly targeted. Our Division of
22 Consumer and Business Education has found that merely translating
23 materials from English into a native language isn’t always effective in
24 conveying information to an immigrant community. So we are retooling
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consumer education pieces to make them culturally aware and meaningful.

As an example, we have begun using graphic fotonovelas for some of our Spanish language outreach.

Common Ground Conference (November 19, 2014, Seattle, Washington)

Keynote Remarks of Commissioner Terrell McSweeney.⁴

In this case, given the evidence of Herbalife's aggressive marketing to the Latino community,⁵ the notice plan should have been designed to actually reach that community. *See Valdez v. The Neil Jones Food Company*, 2014 U.S. Dist. LEXIS 111766 (E.D.Cal. 2014), at *19-21 (where class included migrant workers, notice limited to mailing to their last known address was inadequate); *Arevalo v. D.J.'s Underground, Inc.*, 2010 U.S. Dist. LEXIS 109193 (D. Md. 2010) at *8 (after notice by mail resulted in an opt-in rate of only 10%, the Court ordered additional notice, noting that "given the common characteristics of the collective class members, notice by publication in a Spanish language daily newspaper and via Hispanic community organizations may prove to be more effective than would

⁴ Available at

https://www.ftc.gov/system/files/documents/public_statements/601281/mcsweeney-common-ground-conference-11-19-14.pdf An example of this creative approach, referenced by Commissioner McSweeney, is the FTC's "fotonovela" concerning income opportunity scams. <http://www.consumidor.ftc.gov/articulos/spdf-0197-estafa-de-ingresos.pdf>

⁵ *See* Objections to Class Action Settlement (Dkt. 121), pp. 60-62; Opposition to Final Approval of Class Action Settlement (Dkt. 134), pp. 9-10.

1 contact by phone.”).

2 In this case, for example, the notice program should have addressed the
3 “digital divide” between whites and Hispanics, and between English-dominant
4 Hispanics, Spanish-Dominant Hispanics and foreign born Hispanics, especially
5 considering the notice program’s overreliance on email notice as discussed above.⁶
6

7 **C. The Claims Period Was Too Short**

8 The FJC Checklist states that while 30 days is the minimum, a claims period
9 of from 60-90 days is preferred:
10

11 **Does the notice plan allow enough time to act on rights after notice** 12 **exposure?** 13

14 Class members need time to receive a notice by mail or in a publication. A
15 minimum of 30 days is necessary from completed dissemination before
16 deadlines, with 60–90 days preferred. This allows for re- mailings,
17 fulfillment of requests for more information, and consideration of rights and
18 options.
19

20 FJC Checklist, p. 4. District courts in the Ninth Circuit have been increasingly
21 inclined to find that 30 days notice is too short. *See Nicholas Millan v. Cascade*
22 *Water Services, Inc.*, 2015 U.S. Dist. LEXIS 15412, *38-39 (E.D.Cal. 2015) (45
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28 ⁶ See generally Closing the Digital Divide: Latinos and Technology Adoption (Pew Research Center 2012),
available at http://www.pewhispanic.org/files/2013/03/Latinos_Social_Media_and_Mobile_Tech_03-2013_final.pdf

days was too short, 60 to 90 days is preferable); *Valdez v. The Neil Jones Food Company*, 2014 U.S. Dist. LEXIS 111766, *21-22 (E.D.Cal. 2014) (45 days was inadequate); *Steinfeld v. Discover Financial Services*, 2013 U.S. Dist. LEXIS 91429, *2 (N.D.Cal. 2013) (30 days was “unnecessarily brief”); *Lusby v. Gamestop Inc.*, 297 F.R.D. 400, 414 (N.D. Cal. 2013) (30 days was inadequate); *Tijero v. Aaron Brothers, Inc.*, 2012 U.S. Dist. LEXIS 183238, *31 (N.D.Cal. 2012) (30 days was inadequate); *Nielson v. The Sports Authority*, 2012 U.S. Dist. LEXIS 168226, *16 (N.D.Cal. 2012) (30 days was inadequate). At minimum, the Court should have required the parties to articulate why they wanted such a brief notice period. Since 60 to 90 days is preferred and increasingly becoming the norm, using a shorter period should be based on some justification. There is no basis in the record for imposing such a brief claims deadline.

D. The Court Should Appoint a Notice Expert

There is ample authority for this Court to appoint an independent expert to assess the adequacy of the class notice program. The FJC Checklist states as follows:

Do you have unbiased evidence supporting the plan’s adequacy?

Be careful if the notice plan was developed by a vendor who submitted a low bid and might have incentives to cut corners or cover up any gaps in the notice program. *In order to find the “best practicable” notice as Rule 23*

1 *requires, your own expert report may be advisable.* This is especially true in
2 the diminished adversarial posture in which settlement places the parties. It
3 is also true at preliminary approval, before outsiders are aware of the
4 proposed notice plan, which itself may limit the parties' awareness, in turn
5 impacting your final approval decision.
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8 FJC Checklist, p. 2, (emphasis supplied). The extremely low claims rate in this
9 case was a storm warning that the notice program was inadequate. In keeping with
10 the guidelines of the Federal Judicial Center, this Court should appoint an expert
11 on class action notice to assess the effectiveness of the class notice and to design a
12 more effective program. *See, e.g., Kaufman v. American Express Travel Services,*
13 *Inc.*, 283 F.R.D. 404, 405-408 (S.D.Ill. 2012) (where class notice resulted in
14 extremely low claims rate, court ordered the appointment of an class notice expert
15 to design a second round of notice). Similarly, during the initial notice program in
16 *In Re Currency Conversion Fee Antitrust Litigation*, 263 F.R.D. 110 (S.D.N.Y.
17 2009), the Court received "storm warnings," including a low claims rate of
18 approximately 1/3 of 1%. 263 F.R.D. at 118-119. To address this issue, the Court
19 appointed a Special Master who proposed revisions to the notice and claims
20 procedures. 263 F.R.D. at 119-120. The revised notice program was a
21 "resounding success," resulting in a claims rate of over 26%. 263 F.R.D. at 120-
22 121 & n.2.
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1 **III. This Court's Finding that Molnar and Vasko Had Standing to Sue for** 2 **Injunctive Relief was Clear Error**

3 Objectors initially argued that there was no adequate representation for the
 4 Rule 23(b)(2) injunctive relief class because none of the named plaintiffs were
 5 current Herbalife distributors. Objections to Class Action Settlement (Dkt. 121),
 6 pp. 38-44. After the parties amended the Settlement to exclude Herbalife
 7 distributors who are subject to the arbitration clause implemented in September of
 8 2013, Objectors argued that not only did the named plaintiffs lack standing but that
 9 none of the remaining members of the injunctive relief class had standing.
 10 Opposition to Final Approval of Class Action Settlement (Dkt. 134), pp. 11-16.
 11 Plaintiffs then filed their Reply (Dkt. 138), along with declarations by two of the
 12 named plaintiffs, Anita Vasko and Beverly Molnar, who asserted that they have
 13 "remained continuously" Herbalife distributors. This Court rejected Objectors'
 14 standing arguments on the strength of these two declarations. Order re: Final
 15 Approval of Class Action Settlement (Dkt. 145), pp. 25-26. In doing so, the Court
 16 committed a clear error of law which merits reconsideration.

17 "In a class action, the plaintiff class bears the burden of showing that Article
 18 III standing exists." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978 (9th Cir.
 19 2011). "To satisfy Article III standing, a plaintiff must show (1) he has suffered an
 20 "injury in fact" that is concrete and particularized and actual or imminent, not
 21 conjectural or hypothetical; (2) the injury is fairly traceable to the challenged

1 action of the defendant; and (3) it is likely, as opposed to merely speculative, that
2 the injury will be redressed by a favorable decision.” *Braunstein v. Arizona*
3 *Department of Transportation*, 683 F.3d 1177, 1184 (9th Cir. 2012).
4

5 A plaintiff seeking prospective injunctive relief "must demonstrate that he
6 has suffered or is threatened with a concrete and particularized harm, coupled with
7 a sufficient likelihood that he will again be wronged in a similar way." *Bates v.*
8 *United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). To satisfy the
9 second requirement, there must be a "real and immediate threat of repeated injury."
10
11 Id.
12

13 When evaluating standing, "[the court] must look at the facts as they exist at
14 the time the complaint was filed." *Slayman v. Fedex Ground Package System Inc.*,
15 765 F.3d 1033, 1047 (9th Cir. 2014). The original complaint in this case was filed
16 in April of 2013. At that time Bostick was the sole named plaintiff. Mr. Bostick
17 has submitted a declaration stating that "I left Herbalife in April of 2013, and do
18 not intend on rejoining." Declaration of Plaintiff Dana Bostick (Dkt 90-3), ¶ 3.
19 Accordingly, when the case was filed, Bostick "lacked standing to seek injunctive
20 or declaratory relief because [he] would not stand to benefit from such relief."
21 *Slayman*, 765 F.3d at 1047-48); *see also Ellis*, 657 F.3d at 988 ("[O]nly current
22 employees have standing to seek injunctive relief.").
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1 In June of 2014 the Amended Complaint was filed, adding four named
2 plaintiffs. There is no dispute that two of the newly named plaintiffs have no
3 standing to seek injunctive relief. Plaintiff Chester Cote's Herbalife distributorship
4 has expired, and he has product he wishes to return. Amended Complaint (Dkt
5 78), ¶ 10; Declaration of Chester Cote (Dkt. 90-3), ¶ 3. Plaintiff Judi Trotter
6 resigned from her Herbalife distributorship in the Fall of 2012. Amended
7 Complaint, ¶ 68.
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10 There should be no dispute that the other two named plaintiffs also have no
11 standing to seek injunctive relief. Plaintiff Anita Vasko ceased operating her
12 Herbalife Nutrition Club in January of 2014, six months before she was added to
13 the case. Amended Complaint, ¶ 56. As of the filing of the Amended Complaint
14 she was no longer "actively working on her Herbalife distributorship" and was
15 stuck with product she was unable to sell. Amended Complaint, ¶ 59. Vasko still
16 has product she was unable to return because she purchased it more than one year
17 before she wanted to return it. Declaration of Anita Vasko (Dkt. 90-3), ¶ 2.
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22 While Plaintiff Beverly Molnar was still registered as a Herbalife distributor
23 when the Amended Complaint was filed, she was "not active." Amended
24 Complaint, ¶ 9. Six months after her first large purchase of Herbalife products in
25 June, 2011, "Molnar stopped trying to resell product and just consumed it."
26 Amended Complaint, ¶71. Molnar "stopped buying leads over a year ago", i.e.,
27
28

before June of 2013. Amended Complaint, ¶ 73. Molnar still has Herbalife inventory and wants to return it. Declaration of Beverly Molnar (Dkt. 90-3), ¶ 3.

The fact that both Molnar and Vasko want to return their remaining inventory to Herbalife is significant, both because a Herbalife distributor may ask Herbalife to repurchase their inventory only if they resign their distributorship,⁶ and because it indicates that neither of them intend to resume operating as Herbalife distributors in the future.

Plaintiffs argued that Vasko and Molnar still have “Active” status with Herbalife. Plaintiffs’ Reply to Opposition to Motion for Final Approval (Dkt 138), p. 6. This is simply not true. Beverly Molnar averred that:

3. I became an Herbalife distributor in 2011. Since that date I have remained continuously an Herbalife distributor or member.

Declaration of Class Representative Beverly Molnar in Support of Motion for Final Approval of Settlement (Dkt 138-2). Similarly, Anita Vasko averred that:

* **I became an Herbalife distributor in approximately September of 2012. Since that date I have remained continuously an Herbalife distributor.**

Declaration of Class Representative Anita Vasko in Support of Motion for Final Approval of Settlement (Dkt 138-2) (emphasis in original).

⁶ See Herbalife Sales and Marketing Plan and Business Rules, pp. 49-50, attached to Amended Complaint as Exhibit C.

1 Neither Vasko nor Molnar explicitly disown or repudiate their prior
2 declarations or pleadings, which indicate that they ceased operating as Herbalife
3 distributors in January of 2014 (Vasko) or June of 2013 (Molnar), long before the
4 certification of the settlement class on December 2, 2014. While Plaintiffs use the
5 term “Active” in their Reply, neither Vasko nor Molnar aver that they were
6 “Active” Herbalife distributors when the class was certified. If they had done so
7 they would have been contradicting their sworn Declarations and the allegations of
8 the Amended Complaint.
9
10
11

12 Notably, Herbalife did not file any declaration on this issue. In Herbalife
13 parlance, the word “Active” has a very specific meaning: in order to be “Active”
14 the distributor must have purchased (“generated”) 2500 volume points of Herbalife
15 product in one year. Amended Complaint, Exhibit A (Dkt 78-1) (Herbalife
16 statements of average gross compensation for U.S. Supervisors in 2011, 2010,
17 2009 and 2008). There is no evidence that either Vasko or Molnar purchased any
18 Herbalife products in the year prior to this Court’s order certifying the settlement
19 class. There is no evidence that either of them were operating as Herbalife
20 distributors when the class was certified. There is no evidence that either of them
21 intended to resume operating as Herbalife distributors in the future.⁷ In fact, all of
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27

28 ⁷ The absence of any evidence that Molnar or Vasko intends to resume operating as Herbalife distributors distinguishes this case from those cited in Plaintiffs’ Reply,

1 the evidence compels a finding that both Molnar nor Vasko had ceased operating
2 as Herbalife distributors many months before the class was certified and that
3 neither of them had any intention of operating as Herbalife distributors in the
4 future.
5

6 Since both Molnar and Vasko had ceased operating their Herbalife
7 distributorships prior to the certification of the settlement class, "[their] claims for
8 prospective relief became moot because [they] could no longer benefit from such
9 relief." *Slayman*, 765 F.3d at 1048. "[W]here, as here, the plaintiff's claim
10 becomes moot before the district court certifies the class, the class action normally
11 also becomes moot." *Id.*
12
13

14 As noted above, in their most recent declarations Molnar and Vasko do not
15 aver that they are still "Active" Herbalife distributors; rather, they claim that they
16 are have "remained continuously" Herbalife distributors. Neither Molnar nor
17 Vasko explain how they can have "remained continuously" Herbalife distributors
18 despite their prior allegations and declarations that they have ceased operating as
19 Herbalife distributors. There may be a clue in the Amended Complaint, ¶9, which
20 states that "Molnar is still registered as an Herbalife distributor although she is not
21 active". It may be that both Molnar and Vasko were still "registered" as Herbalife
22
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27 p. 7 nn. 5 & 6, where the plaintiffs averred that they might purchase defendants'
28 falsely advertised products in the future.

1 distributors when the class was certified. But, whatever being “registered” means,
2 it does not mean that they were “active” distributors with a stake in Herbalife’s
3 future operations.
4

5 If Molnar and Vasko were “registered” Herbalife distributors, but not active,
6 would they have standing to sue for injunctive relief? No. An inactive
7 distributor, who has ceased operations and desires to return her inventory for a
8 refund, cannot possibly “demonstrate that [she] has suffered or is threatened with a
9 concrete and particularized harm, coupled with a sufficient likelihood that [she]
10 will again be wronged in a similar way.” *Bates v. United Parcel Service, Inc.*, 511
11 F.3d 974, 985 (9th Cir. 2007). The fact that Molnar and Vasko may appear on a
12 list of inactive Herbalife distributors does not give them any cognizable stake in
13 Herbalife’s future operations. The Ninth Circuit has refused to find standing
14 where the plaintiff has merely a “symbolic” grievance. In *Carroll v. Nakatani*, 342
15 F.3d 934, 941-42 (9th Cir. 2003), the Ninth Circuit held that a plaintiff lacked
16 standing to challenge racial preferences in a government loan program where the
17 plaintiff filed only a “symbolic, incomplete application” and did not demonstrate
18 an “ability to compete” for the loan. *See also Beal v. Lifetouch, Inc.*, 2012 U.S.
19 Dist. LEXIS 122350 (C.D.Cal. 2012), *9 (“Even if Plaintiff did have standing as a
20 shareholder, the injury to Plaintiff’s financial interests as a result of Defendants’
21 employment practices is not the same type of injury suffered by current
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employees.”). Similarly, here, Molnar and Vasko’s supposed status as “registered” Herbalife distributors is an empty formality that cannot be found sufficient to give them Article III standing to sue for injunctive relief.

IV. This Court’s Failure to Make an Independent Evaluation of Plaintiffs’ Claims was Clear Error

In its Order this Court states that “[a]lthough Plaintiffs’ failure to provide the Court with other documentary evidence prevents the Court from arriving at its own independent estimate of the value of Plaintiffs’ case, the Court does not find this failure to be fatal given the objective third party evaluations supporting the settlement’s fairness and reasonableness..” Order, p. 37. While the parties’ use of mediators may be helpful, it does not excuse this Court from making its own evaluation of the value of plaintiffs’ claims. *See, e.g. Chavez v. Lumber Liquidators, Inc.*, 2015 U.S. Dist. LEXIS 60789 at *14 (N.D.Cal. May 8, 2015) (“the Court notes that the parties have not provided enough information about the potential value of the class' claims if they are taken to verdict. This information is important because the damages the class may receive at trial are an important factor in assessing the amount offered in the settlement”); *Nicholas Millan v. Cascade Water Services, Inc.*, 2015 U.S. Dist. LEXIS 15412, *33 (E.D.Cal. 2015) (“However, the lack of percipient facts presented in the Motion makes the value of the claims difficult to assess. Thus, the parties are advised that, should they decide

1 to seek approval of the settlement again, they should include information detailing
2 the value of the claims”); *Lusby v. Gamestop Inc.*, 297 F.R.D. 400, 416 (N.D. Cal.
3 2013) (“Plaintiff did not submit any information that would enable the Court to
4 determine that the settlement falls within the range of possible approval, including
5 information establishing the maximum recovery Plaintiff could have obtained if
6 the action were concluded on the merits in his favor”).
7
8

9 The evaluation of Plaintiffs’ claims is important not only for determining
10 whether the settlement is fair, reasonable and adequate, but also for providing
11 information to class members concerning the claims they will be releasing if they
12 do not opt out or object to the settlement. For instance, in *Gonzalez v. USF*
13 *Reddaway, Inc.*, Case No. 5:10-CV-01514-AHM-OP (C.D.Cal.), Judge Matz
14 denied preliminary approval because the parties had failed to include any
15 information about the anticipated claims amount in the class notice; in their
16 amended motion the plaintiffs revised the notice to include the minimum and
17 maximum amount that could be awarded to each class member, as well as
18 including each class member’s unique “claim share” in each class notice.
19

20 Plaintiff’s Notice of Amended Motion and Motion for Preliminary Approval of
21 Class Action Settlement, ¶¶10-11 (Brooks Decl., Exhibit D).
22

23
24
25
26 **V. Recent Evidence Demonstrates That Herbalife Is Unable or Unwilling to**
27 **Police Itself**
28

1 In its Order this Court rejected Objectors' arguments that there was no
2 enforcement mechanism for the corporate reforms included in the Settlement
3 Stipulation. Order, p. 39. Following the issuance of the Order, new evidence has
4 come to light that justifies Objectors' concerns and warrants reconsideration. On
5 June 25, 2015, the New York Post reported that it had viewed a 2005 video in
6 which Herbalife's CEO, Michael Johnson, giving a speech to high level Herbalife
7 distributors, admitted that:
8

- 9
10 • Success in Herbalife is a "lottery ticket" with few making it to the top
11 ranks
12
- 13 • Herbalife distributors had sometimes engaged in "false promises, claims,
14 in hopes for product, for money, for recruiting, for customers, for
15 pyramiding."
16
- 17 • The recruiting that had made the top ranks of Herbalife distributors
18 multimillionaires would always be the "most vital part of our
19 bloodstream"
20
- 21 • Sales tactics that "top dog" Herbalife distributors used had sometimes led
22 people "down a false road" where \$4,000 would buy any "instant
23 distributorship."
24
- 25 • "When the credit card bill comes, the spouse says, 'How are we going to
26 pay this? You didn't sell this stuff. It's in the garage. It's in the pantry.
27
28

1 What are we going to do?”

- 2 • “You guys [top level Herbalife distributors] gotta do things right because
- 3 Rich [Goudis, then Herbalife’s CFO] and I have one major job ... to stay
- 4 out of jail.” Johnson said “We go to the gray-bar hotel together if you
- 5 don’t operate with ethics.”
- 6
- 7
- 8 • Johnson called lead generation the “source of many evils” that put people
- 9 “in debt up to their ears.”

10 *See* Brooks Decl., ¶3 and Exhibit B.⁸ Undersigned counsel has not seen the video,

11 which is not publicly available, but the reported statements confirm many of the

12 allegations of the complaint, and suggest that Herbalife was experiencing

13 considerable frustration in policing its high level distributors.

14

15 Fast forward ten years, and on July 10, 2015, the St. Louis Post-Dispatch

16 reported on a Herbalife distributor convention - an “Extravaganza” – being held at

17 the America’s Center in St. Louis. *See* Brooks Decl., ¶4 and Exhibit C. The

18 reporter interviewed several newly recruited Herbalife distributors:

- 19
- 20 • Brian Couvillon traveled from Orlando, Fla., to the Herbalife convention
- 21 because he says he believes in the product and the company’s

22

23

24

25

26 ⁸ Available at <http://nypost.com/2015/06/25/video-reveals-herbalife-boss-saw-pyramiding-signs-early-on/> On the following day the New York Post reported

27 that the Pershing Square hedge fund has called for Herbalife to release the video,

28 which is not publicly available. *See* <http://nypost.com/2015/06/26/herbalife-foe-ackman-demands-release-of-pyramiding-video/>

1 compensation structure. ... Couvillon, who has been pursuing Herbalife
2 sales for the past seven months on a part-time basis, is in a level the
3 company calls "Future Millionaire."

- 4 • Another "Future Millionaire" is Antwoine Love, 39 of Dalton, Ga., a
5 father of 14 children with a 15th on the way. Love said he got involved
6 with selling Herbalife products full-time a month ago...
- 7 • Though Love has not made a significant profit selling Herbalife and has
8 yet to recruit a downseller, "the guy who got me into this market makes
9 \$7,000 a month," Love said.

10 The use of terms like "future millionaire" and testimonial earnings claims are
11 exactly the sorts of deceptive practices alleged in the Amended Complaint, and in
12 Michael Johnson's 2005 speech. The conduct at last week's Herbalife
13 Extravaganza in St. Louis indicates that Michael Johnson's warnings to Herbalife's
14 high level distributors have been ignored, and that Herbalife is not serious about
15 enforcing them. The ink is barely dry on this Court's final approval order and
16 Herbalife has already demonstrated that it cannot or will not police itself. It is
17 simply not realistic for this Court to take an active role in the enforcement of rules
18 governing the conduct of hundreds of thousands of Herbalife distributors across the
19 country, when Herbalife itself clearly can't do the job. The Court should
20 reconsider its approval of Herbalife's "corporate reforms."

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4
5 **VII. CONCLUSION**

6 For the reasons set forth above and in the Objectors' previous submissions,
7
8 Objectors respectfully request that the Court vacate its Final Judgment and Order
9 of Dismissal.
10

11
12 Dated: July 15, 2015
13

14 s/Douglas M. Brooks
15 Douglas M. Brooks
16 60 Thoreau Street, No. 219
17 Concord, MA 01742
18 (781) 424-6737
19 dmbrooks@brooks-law.net
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am over the age of eighteen (18) and not a party to the within action. I am employed in the law firm of Cohen McKeon LLP, 1910 West Sunset Boulevard, Suite 440, Los Angeles, California 90026.

On July 15, 2015, I used the Central District of California's Electronic Case Filing System, with the ECF account registered to Michael L. Cohen, to file the following document(s):

OBJECTORS' MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

The ECF system is designed to send an e-mail message to all parties in the case, which constitutes service. The Parties served by e-mail in this case are found on the Court's Electronic Mail Notice List.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 15, 2015, at Los Angeles, California.

/S/ ROBIN GRIER
Robin Grier

1 Douglas M. Brooks (*pro hac vice*)

2 dmbrooks@brooks-law.net

3 60 Thoreau Street, No. 219

4 Concord, MA 01742

5 Telephone: (781) 424-6737

6 *Attorney for Objectors*

7 **IN THE UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
9

10
11 DANA BOSTICK, *et al.*,

12 Plaintiffs,

13 vs.

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

16 Defendants.
17

**Case No. 2:13-CV-02488-BRO-
RZ**

**DECLARATION OF DOUGLAS
M. BROOKS IN SUPPORT OF
MOTION FOR
RECONSIDERATION**

Hon. Beverly Reid O'Connell

1 I, Douglas M. Brooks, hereby declare as follows:

2 1. I, Douglas M. Brooks, am an attorney duly admitted to practice by the Board
3 of Bar Overseers in the Commonwealth of Massachusetts and counsel for the
4 Objectors Elvia Acosta, Silvia C. Arias, Sabas Avila, Miguel Calderon, Felipe
5 Colon, Elizabeth Correa, Maria Cutzal, Juana Estala, Jose G. Garcia, Valentina
6 Leon, Rossina Martinez, Gilberto Melchor Sanchez, Yader A. Pastran, Susana
7 Perez, Eric Rodensky, Jose Tafoya, Olivia Torres, Julia Ulloa, Martil Palma
8 Vallecillo (collectively referred to herein as "Objectors"). I make this declaration
9 upon my own personal knowledge, except those matters stated on information and
10 belief, and as to those matters, I believe them to be true. If called upon to testify to
11 the matter set forth herein, I could and would, testify thereto competently under
12 oath.
13
14
15
16

17 2. Attached hereto as Exhibit A is a copy of an email I received from Brent
18 Wilkes on May 18, 2015.
19

20 3. Attached hereto as Exhibit B is a copy of an article from the on-line edition
21 of the New York Post, dated June 25, 2015, entitled "Video reveals Herbalife boss
22 saw 'pyramiding' signs early on."
23

24 4. Attached hereto as Exhibit C is a copy of an article from the on-line edition
25 of the St. Louis Post-Dispatch, dated July 10, 2015, entitled "St. Louis Herbalife
26 convention draws thousands of dreamers."
27
28

1 5. Attached hereto as Exhibit D is a copy of Plaintiff's Notice of Amended
2 Motion and Motion for Preliminary Approval of Class Action Settlement filed in
3 *Gonzalez v. USF Reddaway, Inc.*, Case No. 5:10-CV-01514-AHM-OP (C.D.Cal.).
4

5
6 I declare under penalty of perjury under the laws of the United States of
7 America that the foregoing is true and correct. Executed on July 15, 2015.
8

9 s/Douglas M. Brooks

10 Douglas M. Brooks
11 60 Thoreau Street, No. 219
12 Concord, MA 01742
13 (781) 424-6737
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am over the age of eighteen (18) and not a party to the within action. I am employed in the law firm of Cohen McKeon LLP, 1910 West Sunset Boulevard, Suite 440, Los Angeles, California 90026.

On July 15, 2015, I used the Central District of California's Electronic Case Filing System, with the ECF account registered to Michael L. Cohen, to file the following document(s):

DECLARATION OF DOUGLAS M. BROOKS IN SUPPORT OF
MOTION FOR RECONSIDERATION

The ECF system is designed to send an e-mail message to all parties in the case, which constitutes service. The Parties served by e-mail in this case are found on the Court's Electronic Mail Notice List.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 15, 2015, at Los Angeles, California.

/S/ ROBIN GRIER
Robin Grier

EXHIBIT A

From: **Brent Wilkes** bwilkes@lulac.org
Subject: FW: Herbalife Class Action Settlement Notice
Date: May 18, 2015 at 10:46 PM
To: dmbrooks@brooks-law.net



Doug,

I meant to send this to you earlier. I received the notice below in my spam folder and it is a miracle that I noticed it. I received no other notification about my potential membership in the Bostick class. I use Gmail which automatically filters out messages it likely considers to be spam.

I also receive daily messages from Herbalife since I am a current distributor. None of them go to my spam folder.

It would seem that an email that is likely being flagged for spam is inadequate notice to the class. It also seems like this might have been deliberate since Herbalife knows full well how to deliver an email to me without having it being flagged as spam.

In case you plan to appeal, I thought this might be helpful.

Brent A. Wilkes

National Executive Director
League of United Latin American Citizens
1133 19th Street, NW | Suite 1000 | Washington, DC 20036
(202) 833-6130 | FAX (202) 833-6135
BWilkes@LULAC.org | www.LULAC.org | [vCard](#)

From: Bostick v. Herbalife Claims Administrator [mailto:Administrator@ggmail.com]
Sent: Tuesday, December 30, 2014 8:04 AM
To: bwilkes@lulac.org
Subject: Herbalife Class Action Settlement Notice

Claim #: 11496987501
To: Brent A Wilkes
From: *Bostick v. Herbalife* Claims Administrator
Subject: Herbalife Settlement

If you were an Herbalife Distributor or Member at Any Time Between April 1, 2009 and December 2, 2014, You Could Get Benefits from a Class Action Settlement.

Records show that you are a current or former Herbalife distributor. A lawsuit was filed against Herbalife International of America, Inc.; Herbalife International, Inc.; and Herbalife, Ltd. (collectively, "Herbalife") over its business model, alleging the Herbalife operates a pyramid scheme. Herbalife denies that it did anything wrong. The Settlement includes \$15 million for cash awards, \$2.5 million for product returns, and a legal commitment from Herbalife that it will change or preserve recent changes to certain business practices. Go to www.HerbalifeClassActionSettlement.com for more information and to file a claim online.

Who's Included? You are included in the Settlement if at any time between April 1, 2009, and December 2, 2014 you had a valid agreement of distributorship or membership with Herbalife.

What Can You Get? You may be eligible to return unused and unopened Herbalife products (excluding International Business Packs and Mini-International Business Packs) purchased more than one year prior to the deadline for submitting Claim Forms and may receive in exchange, the actual amount you paid for each returned product. Even if you are unable to return products, you may be eligible to receive a cash payment for losses on Herbalife product purchases incurred in pursuing the Herbalife business opportunity.

How to Get Benefits? You must submit a Claim Form to get benefits. The Claim Form is available at www.HerbalifeClassActionSettlement.com or by calling 1-877-651-4185. You can submit a Claim Form online or by mail. The deadline to submit a Claim Form is **February 3, 2015**.

Your Other Rights. If you do nothing, your rights will be affected. If you do not want to be legally bound by the Settlement, you must exclude yourself from the Settlement. The deadline to exclude yourself is **March 24, 2015**. If you do not exclude yourself you will be unable to sue Herbalife for any claim relating to the lawsuit. If you stay in the Settlement, you may object to it by **March 24, 2015**. The Court will hold a hearing on **May 11, 2015**, to consider whether to approve the Settlement and award attorneys' fees. The Plaintiffs' attorneys anticipate seeking attorneys' fees of 30% of the total Settlement value in an amount not to exceed \$5,250,000 and costs of approximately \$200,000 for pursuing this case. Any awarded attorneys' fees and costs will be paid from the Cash Settlement Fund. You can appear at the hearing, but you don't have to. You can hire your own attorney at your own expenses to appear or speak for you at the hearing.

For more information or a Claim Form:

1-877-651-4185

www.HerbalifeClassActionSettlement.com

EXHIBIT B



EXCLUSIVE

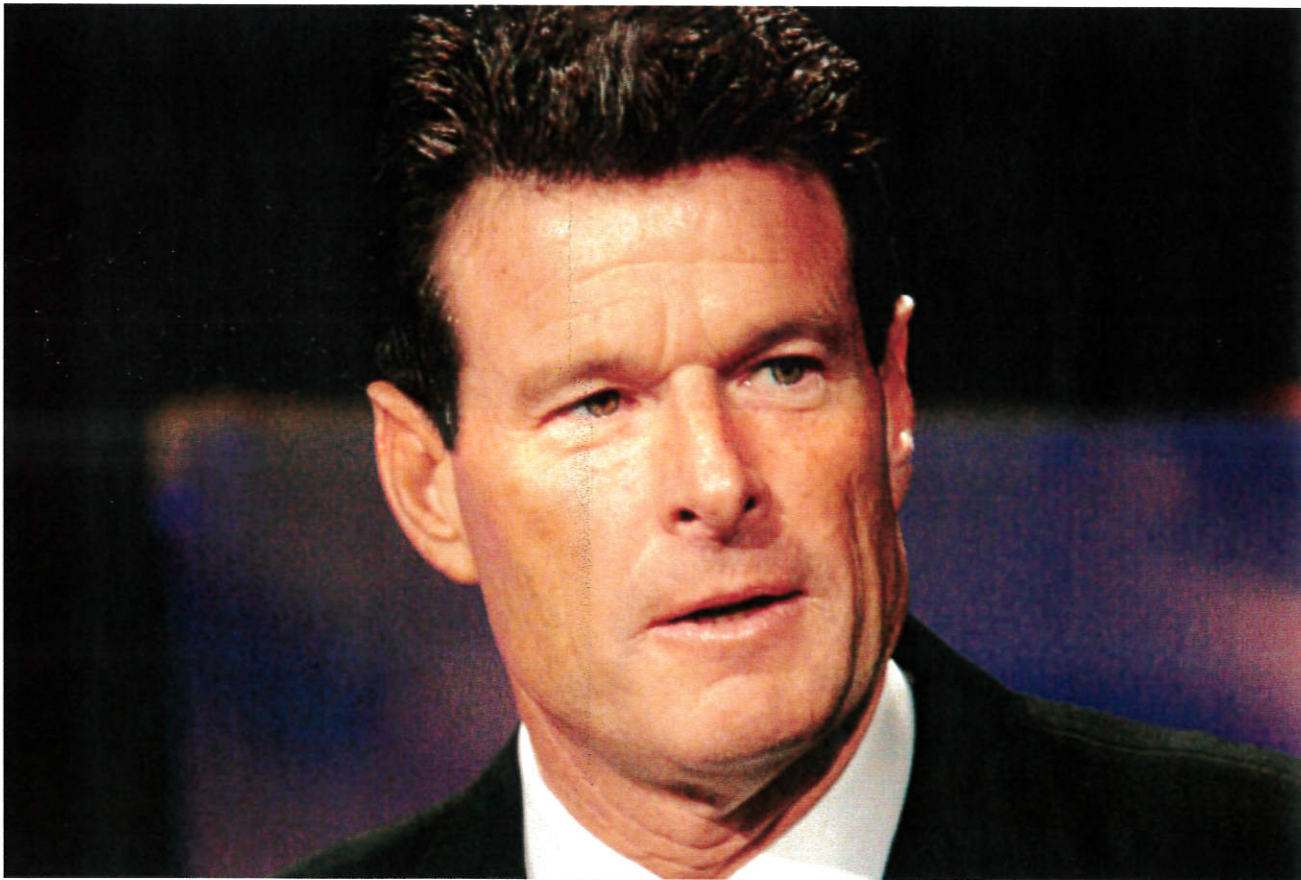
BUSINESS



Video reveals Herbalife boss saw ‘pyramiding’ signs early on

By Michelle Celarier

June 25, 2015 | 9:49pm



Herbalife CEO Michael Johnson

Photo: WireImage

A charismatic CEO crisscrossed a giant stage as he ticked off a litany of criticisms of Herbalife, the diet-shake company whose products are sold through a multilevel marketing network.

Success in Herbalife, he said, was a “lottery ticket,” with few making it to the top ranks. In fact, he said, distributors had sometimes engaged in “false promises, claims, in hopes for product,

But the man bad-mouthing Herbalife that day in 2005 wasn’t Bill Ackman, who famously lobbed a \$1 billion short against the company in 2012 and called it a fraud.

It was none other than Michael Johnson, Herbalife’s CEO, a former Disney executive who had just joined the Los Angeles company and was trying to exhort the troops to clean up their act.

In a video of his speech, a copy of which was viewed by The Post, a tanned and fit Johnson, dressed in a black polo shirt and slacks, gave the impassioned plea for change at the company’s global management retreat in Laguna Beach, Calif.

Johnson’s words during his 71-minute talk — while perhaps just an interesting take on the company at the time — today would likely spark some chatter in light of Ackman’s accusations.

The words could also provide a blueprint for the probe under way by the Federal Trade Commission, the Securities and Exchange Commission and the Department of Justice, legal experts agree.

“It could be a critical document,” said Richard Holwell, a former federal judge now in private practice.

Herbalife, which has denied Ackman’s accusations, has claimed it has taken steps to address some of the issues raised by Johnson.

In the video, an earnest Johnson worked hard to reassure the distributors that the recruiting that had made them multimillionaires would always be the “most vital part of our bloodstream.”

But, he said, sales tactics that “top dog” Herbalife distributors used had sometimes led people “down a false road” where \$4,000 could buy an “instant distributorship.”

“When the credit card bill comes, the spouse says, ‘How are we going to pay this? You didn’t sell this stuff. It’s in the garage. It’s in the pantry. What are we going to do?’ ” Johnson said, noting some of the practices that led to complaints that Herbalife is a pyramid.

Johnson’s speech even contained what several lawyers said was a stunning statement of the new CEO’s fears.

“You guys gotta do things right because Rich [Goudis, then Herbalife’s CFO] and I have one major job ... to stay out of jail,” he said. “We go to the gray-bar hotel together if you don’t operate with ethics.”

Former distributors who have recently filed FTC complaints claim they are still experiencing the same problems Johnson talked about, according to some familiar with the complaints.

For example, Johnson called lead generation the “source of many evils” that put people “in debt up to their ears.” Herbalife banned the sale of leads after Ackman exposed the practice in 2013.

New recruits are still being sold phony sales leads, sources said.

Ackman told The Post he had not seen the video.

FILED UNDER HERBALIFE , MICHAEL JOHNSON



READ NEXT

Subway founder's sister...

PROMOTED STORIES



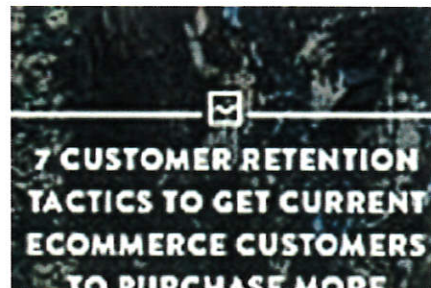
5 Things Salespeople Should Never Say to Prospects

Hoovers



A Miami Concierge Shares His Favorite Hidden Spots [Video]

Paid Post On NYTimes.com

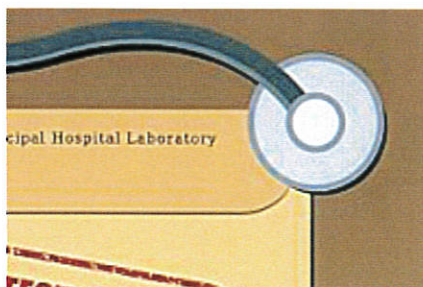


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4 Healthy Beverages You

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Bill Cosby's wife says accusers 'consented' to drugs and sex



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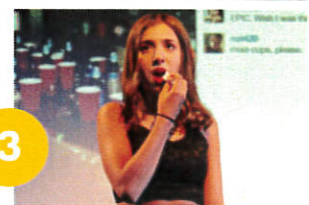
20 years of cleaning up NYC pissed away



1



Bill Cosby's wife says accusers 'consented' to drugs



3

Rich teen's lawyer mom missed deadline to sue over booze arrest



4

Wow, celebrities love showing their butts on Instagram



5

'Little Miss Dangerous' cop resigns after third arrest



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EXHIBIT C



Home / Business / Local

St. Louis Herbalife convention draws thousands of dreamers

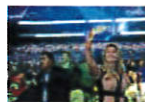


Herbalife, which is holding its "Extravanga" at America's Center in St. Louis, on Friday announced a sponsorship deal with the American Red Cross. Here, a convention attendee, donates blood. (Photo provided by Herbalife)

July 10, 2015 11:00 pm • By Kouichi Shirayanagi

7

Rams don't produce enough tax revenue? Conventions do, commission says



St. Louis Convention & Visitors Commission says 21 conventions will

bring more than 350,000 people downtown, book more than 200,000 hotel ... [Read more](#)

Herbalife, the international multi-level marketing company known for selling shakes, teas and health supplements, is holding its annual sales convention for North American distributors this weekend at the America's Center in downtown St. Louis.

Billed as an "Extravaganza," the event was expected to draw an estimated 25,000 people — most of them independent distributors from around the country — to hear motivational speeches, network and participate in sales seminars.

Though not the city's biggest convention — it's easily eclipsed by the Church of God in Christ's annual Holy Convocation —



it's still significant. The St. Louis Convention & Visitors Commission estimates the Herbalife attendees are booking about 34,000 hotel nights, pumping about \$18 million into the area economy.

But although hotel, restaurant and retail owners are welcoming the infusion of business, Herbalife also is a company that has garnered a great deal of controversy since its founding. The firm has been the subject of investigations by the Federal Trade Commission, the FBI, the Securities Exchange Commission, and the U.S. Department of Justice, as well as attorneys general of New York and Illinois for running what critics say is a veiled pyramid selling scheme.

According to a Herbalife representative, it costs \$90 to join Herbalife. New members receive sample products, and are eligible for a 25 percent discount. The more products they buy, either for personal use or resale, the bigger the discounts they receive, up to 50 percent.

To qualify for the 50 percent discount, a distributor must accumulate 4,000 "volume points," representing about \$3,000 in purchases of Herbalife products.

Herbalife products are not available in retail stores; instead, the products are largely distributed through an informal network of "nutrition clubs."

Based on interviews with convention attendees, the company appears to attract many people new to the retail business but

looking for career changes.

Brian Couvillon traveled from Orlando, Fla., to the Herbalife convention because he says he believes in the product and the company's compensation structure. A biology major in college who is employed as a lab assistant, Couvillon said he had been looking for a different line of work, and he believes in the product.

"I like helping people stay healthy," he said.

Couvillon, who has been pursuing Herbalife sales for the past seven months on a part-time basis, is in a level the company calls "Future Millionaire."

Another "Future Millionaire" is Antwoine Love, 39, of Dalton, Ga., a father of 14 children with a 15th on the way. Love said he got involved with selling Herbalife products full-time a month ago, after having a career "working with music." Selling Herbalife products helps him assist people with their medical problems, he said.

Though Love has not made a significant profit selling Herbalife and has yet to recruit a downseller, "the guy who got me into this makes \$7,000 a month," Love said.

He said he was completely into selling Herbalife, from the moment he woke up until 2 or 3 a.m.

"This is how I eat," Love said.

Not all Herbalife distributors are new to business. Claudia Silva of San Antonio, Texas, owned a Mexican restaurant until a friend suggested she use Herbalife products to help her lose weight. After 18 months of using Herbalife, she says, she lost 120 pounds. So she closed her restaurant, leased out the building and for the past two years has been running a Herbalife nutrition club.

"I have a 15-year-old and now I get to spend more time with my daughter, I am getting out and interacting with people rather than staying in my restaurant all day," Silva said. "I wear the Herbalife gear, and when people see me in the grocery store, they want to know if I can provide them with the products."

In March 2014, Herbalife became the target of a FTC civil investigation. The move came more than a year after the hedge fund Pershing Square, managed by Bill Ackman, published a critical report alleging the company is a pyramid scheme whose primary profit is generated by bringing in more sales distributors rather than by selling more product.

Ackman, who shorted Herbalife stock (meaning, he profits if the stock loses value), accused the company of misleading distributors by selling them commodity products at inflated prices, publishing false sales figures and targeting vulnerable segments of minority communities especially Latinos, to sell products. Federal investigators have looked into Ackman's claims as well as claims that outside contractors used by Ackman's firm may have made false statements to regulators.

The company's stock price initially fell after the announcement of the investigation but rebounded after it initially appeared regulators would not act on Ackman's allegations. Herbalife's backers have included high-profile investors such as Carl Icahn, George Soros and Bill Stiritz, the executive chairman of Brentwood-based Post Holdings.

After the release of Ackman's allegations, Herbalife significantly increased the company's federal lobbying efforts in Washington. Former U.S. Surgeon General Richard Carmona has joined the company's board of directors; former Federal Trade Commissioner Pamela Jones Harbor is the company senior vice president.

On Friday in St. Louis, the company announced its latest public relations effort: a new partnership with the American Red Cross.

Herbalife is donating 280,000 protein bars to blood donation centers nationwide.

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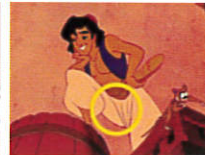
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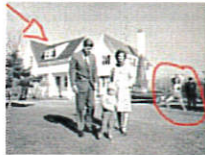
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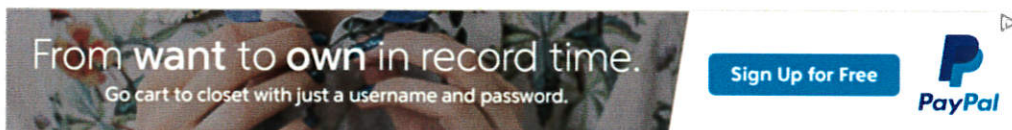
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EXHIBIT D

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20 **UNITED STATES DISTRICT COURT**

21 **CENTRAL DISTRICT OF CALIFORNIA**

22 CHRISTOPHER GONZALES and
23 MARC HOEFNAGELS, individually
24 and on behalf of all others similarly
25 situated,

26 Plaintiffs,

27 v.

28 USF REDDAWAY, INC.,

Defendant.

Case No. 5:10-CV-01514-AHM-OP

**PLAINTIFFS' NOTICE OF
AMENDED MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Judge: Hon. A. Howard Matz

Date: January 23, 2012

Time: 10:00 a.m.

Ctrm: 14

1 **NOTICE IS HEREBY GIVEN** that, on Monday, January 23, 2012, at 10:00
2 a.m., or as soon thereafter as the matter may be heard, in Courtroom 14 of the United
3 States District Court for the Central District of California before the Honorable Judge A.
4 Howard Matz, pursuant to Fed. R. Civ. P. 23(e), Plaintiffs Christopher Gonzales and
5 Marc Hoefnagels (collectively "Plaintiffs") individually and on behalf of all others
6 similarly situated, will and do hereby make an amended motion to this Court for entry of
7 an Order:

8 1. Preliminarily certifying the class for purposes of settlement;

9 2. Preliminarily appointing Plaintiffs Gonzales and Hoefnagels as Class
10 Representatives for purposes of settlement;

11 3. Preliminarily appointing Craig J. Ackermann, Esq. of Ackermann & Tilajef,
12 P.C. and Dylan Pollard, Esq. and Matt Bailey, Esq. of Pollard|Bailey as Class Counsel
13 for purposes of settlement;

14 4. Preliminarily approving the settlement as fair, adequate, and reasonable,
15 based upon the terms set forth in the Parties' Joint Stipulation of Class Action Settlement
16 Agreement ("Settlement Agreement"), including payment by USF Reddaway, Inc.
17 ("USF Reddaway" or "Defendant") of up to the Maximum Settlement Amount ("MSA")
18 of \$1,000,000.00;

19 5. Preliminarily approving Incentive Awards of \$20,000.00 (\$10,000.00 for
20 each Plaintiff) in recognition of their significant service to the Settlement Class;

21 6. Preliminarily approving Plaintiffs' Counsel's request for up to 30% of the
22 MSA as attorneys' fees (said request of which will be fully briefed by way of a separate
23 motion to be heard concurrent with final approval), plus reimbursement of actual
24 litigation costs up to \$30,000.00;

25 7. Appointing CPT Group, Inc., as the third-party Claims Administrator for
26 mailing notices and for claims administration, approving that \$14,000 be deducted from
27 the MSA for the costs of claims administration, and approving that the fees and costs of
28 the claims administrator will be paid from the MSA; and

1 8. Approving the proposed Class Notice, Claim Form, and Request for
2 Exclusion Form, and ordering they be disseminated to the class as provided in the
3 Settlement Agreement.

4 9. This Motion is based upon the supporting Memorandum of Points and
5 Authorities which was filed when Plaintiffs submitted their initial Motion for
6 Preliminary Approval on November 17, 2011, the Declarations of Craig J. Ackermann,
7 Dylan Pollard, Steven Salsberg, Christopher Gonzales and Marc Hoefnagels (also
8 previously submitted to this Court on November 17, 2011), the amended Settlement
9 Agreement, and all of the other Exhibits (as amended) filed herewith. This Motion is
10 made after (a) the Parties met and conferred in compliance with L.R. 7-3 by telephone
11 and email on 11/16/2011 and 11/17/2011; (b) Plaintiffs' filed their original Motion for
12 Preliminary Approval on November 17, 2011 (Docket #27); and (c) at the December 12,
13 2011 hearing of Plaintiffs' original Preliminary Approval Motion, the Court provided the
14 Parties with comments, questions and requested additions/modifications to the Parties'
15 Settlement Agreement and Class Notice that needed to be addressed and made in order
16 to obtain preliminary approval.

17 10. Consistent with the Court's instructions, the Parties have added specific
18 terms and clauses to the Settlement Agreement and Class Notice, which are attached (in
19 redlined format) as **Exhibits 1 and 2** to the Declaration of Devin Coyle in Support of
20 Plaintiff's Amended Motion for Preliminary Approval.

21 11. All of the Court's specific concerns have now been addressed, namely:

22 a. The Class Notice now states the minimum and maximum amounts
23 that can be awarded to each individual member (as well as the estimated amount of each
24 claimant's unique "Claim Share," which will be stated at the top of each Claim Form).

25 b. The Class Notice now instructs class members to get a copy of the
26 Settlement Agreement from the Settlement Administrator instead of from the Court.

27 c. The Parties have chosen a non-profit, the Pepperdine Law School
28 Employment Mediation Clinic, which is now named in the Class Notice.

1 d. All of the release language in the Settlement Agreement is now
2 consistent with the release language in Section 8, which limits the release for the class
3 members to the claims in the lawsuit.

4 e. The Class Notice now presents the class members' "LEGAL
5 RIGHTS AND OPTIONS" in a table format that separates the text more clearly.

6 f. On page 4 of the Class Notice, the instructions on how to object to
7 the settlement now state that objections must be provided directly to the Court (in
8 addition to counsel) in order for the class member to appear at the fairness hearing, and
9 the "placeholder" date of January 24, 2011 has been removed.

10 g. On page 4 of the Class Notice, just after where the Maximum
11 Settlement Amount of \$1,000,000.00 is stated, the Notice now also states the maximum,
12 average and minimum dollar amounts that individual class members can receive.

13 h. The Parties made efforts to simplify the language in Section 2 of the
14 Class Notice, which explains the maximum and minimum amount that the Defendant
15 will pay to the claimants, as well as the *cy pres* provision.

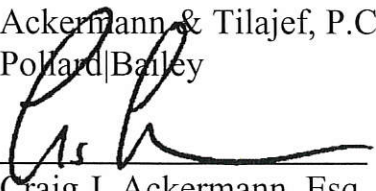
16 12. The Court instructed Plaintiffs to file an Amended Motion on 28 days
17 notice, but indicated that - if the desired changes were made in accordance with the
18 Court's instructions - the Court would vacate the scheduled date set for the Amended
19 Motion hearing and sign the Amended Preliminary Approval Order without the need for
20 a subsequent appearance.

21 13. An Amended Preliminary Approval Order is filed herewith, with the
22 amended Settlement Agreement and "Notice Package" (Class Notice, Claim Form and
23 Request for Exclusion Form) attached thereto for the Court's convenience.

24 Dated: December 21, 2011

Respectfully submitted,
Ackermann & Tilajef, P.C.
Pollard|Bailey

25
26
27 By:


Craig J. Ackermann, Esq.
Attorneys for Plaintiffs and the Settlement Class