

1 Paul A. Levin (State Bar No. 229077)  
 2 plevin@themrlg.com  
 3 MORTGAGE RECOVERY LAW GROUP, LLP  
 4 550 North Brand Boulevard, Suite 1100  
 5 Glendale, California 91203  
 6 Telephone: (818) 630-7900 / Fax: (818) 630-7920  
 7 Etan Mark (admitted *pro hac*)  
 8 etan@markmigdal.com  
 9 Donald J. Hayden (admitted *pro hac*)  
 10 don@markmigdal.com  
 11 MARK MIGDAL & HAYDEN  
 12 80 SW 8<sup>th</sup> Street, Suite 1999  
 13 Miami, Florida 33130  
 14 Telephone: (305) 374-0440

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

MICHAEL LAVIGNE, *et al.*,  
 Plaintiffs,  
 vs.  
 HERBALIFE LTD., *et al.*,  
 Defendants.

CASE NO. 2:18-cv-07480-JAK (MRWx)  
 [Related Case 2:13-cv-02488-BRO-RZ]

**PLAINTIFFS’ NOTICE OF  
 MOTION; MOTION FOR  
 PRELIMINARY APPROVAL OF  
 CLASS ACTION SETTLEMENT  
 AND MEMORANDUM OF POINTS  
 AND AUTHORITIES**

Date: August 15, 2022  
 Time: 8:30 A.M.  
 Crtrm.: 10B

Courtroom 10B

**1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**2 PLEASE TAKE NOTICE** that Plaintiffs Patricia Rodgers, Jennifer Ribalta,  
**3** and Izaar Valdez (“Plaintiffs”) will move the Court for an order, pursuant to Federal  
**4** Rule of Civil Procedure 23(e), granting preliminary approval of the proposed class  
**5** action Stipulation of Settlement<sup>1</sup> entered into by Plaintiffs and Defendant Herbalife  
**6** International of America, Inc. (“Herbalife,” together with Plaintiffs, the “Parties”), on  
**7** Monday August 15, 2022, at 8:30 a.m., or at such other time as may be set by the  
**8** Court, at First Street Courthouse, 350 W. First Street, Courtroom 10B, Los Angeles,  
**9** CA 90012, before the Honorable John A. Kronstadt, United States District Judge for  
**10** the Central District of California, consistent with the following:

- 11** (a) Granting preliminary approval of the proposed Settlement Agreement  
**12** entered into between the Parties;
- 13** (b) Determining that the Court, at the final approval stage, will likely certify  
**14** the Settlement Class as defined in the Settlement Agreement pursuant to  
**15** Federal Rule of Civil Procedure 23(b)(3);
- 16** (c) Appointing Plaintiffs as Class Representatives of the proposed  
**17** Settlement Class;
- 18** (d) Appointing the law firms of Mark Migdal & Hayden (“MM&H”) and  
**19** Mortgage Recovery Law Group, LLP (“MRLP”) as Class Counsel for  
**20** the proposed Settlement Class;
- 21** (e) Approving the Parties’ proposed notice program, including the proposed  
**22** “Notice of Class Action Settlement” Long Form (“Long Form”), and  
**23** directing that notice be disseminated consistent with the notice program  
**24**  
**25**

**26** <sup>1</sup> See Stipulation of Settlement. ECF No. 383 (hereinafter the “Settlement  
**27** Agreement”).

1 set forth by A.B. Data as the Claims Administrator;<sup>2</sup>

- 2 (f) Appointing A.B. Data as Claims Administrator and directing A.B. Data  
3 to carry out the duties and responsibilities of the Claims Administrator  
4 as specified in the Settlement Agreement;
- 5 (g) Staying all non-settlement related proceedings in the above-captioned  
6 case pending final approval of the Settlement Agreement; and
- 7 (h) Setting a Fairness Hearing and certain other dates in connection with the  
8 final approval of the Settlement Agreement.

9 This Motion is based on this Notice of Motion and Motion, the accompanying  
10 Memorandum of Points and Authorities, the Settlement Agreement, the Declaration  
11 of Etan Mark with supporting exhibits, the Declaration of Eric Miller, the Declaration  
12 of Rachel Weintraub, all papers and records on file in this matter, and such other  
13 matters as the Court may consider.

14 DATED: May 27, 2022

Mark Migdal & Hayden

15 By: /s/ Etan Mark

16 Etan Mark

17 Attorneys for Plaintiffs Patricia Rodgers,  
18 Jennifer Ribalta, and Izaar Valdez

19  
20  
21  
22  
23  
24  
25  
26  
27 <sup>2</sup> See generally Declaration of Eric Miller (“Miller Decl.”) (providing details of the  
28 notice plan, hereinafter the “Notice Program”).

**TABLE OF CONTENTS**

1

2 TABLE OF CONTENTS ..... iv

3 TABLE OF AUTHORITIES ..... vii

4 MEMORANDUM OF POINTS AND AUTHORITIES ..... 1

5

6 **I. INTRODUCTION ..... 1**

7 **II. LITIGATION HISTORY ..... 4**

8       A. Procedural History ..... 4

9       B. Discovery ..... 5

10       C. Settlement ..... 6

11 **III. SUMMARY OF SETTLEMENT TERMS ..... 7**

12       A. Class Definition ..... 7

13       B. Settlement Fund Payments ..... 7

14       C. Corporate Reforms ..... 8

15       D. *Cy Pres* ..... 8

16       E. Release ..... 9

17       F. Proposed Schedule of Events ..... 10

18 **IV. ARGUMENT ..... 10**

19       A. The Settlement Class Should be Certified for Settlement Purposes. .... 10

20           i. The Requirements of Rule 23(a) are satisfied. .... 12

21               1. Numerosity is satisfied. .... 12

22               2. Commonality is satisfied. .... 12

23               3. Typicality is satisfied. .... 13

24               4. Adequacy of representation is satisfied. .... 14

25                   a. Plaintiffs are adequate ..... 14

26

27

28

1                   b. Plaintiffs’ Counsel is adequate..... 15

2           ii.   Class certification is appropriate under Rule 23(b)(3)..... 15

3                   1. Common questions of law or fact predominate over

4                   individual issues. .... 15

5                   a. The RICO claims will turn on common proof. .... 15

6                   b. The UCL claims will turn on common proof. .... 16

7                   c. The negligent misrepresentation claims will turn

8                   on common proof. .... 17

9                   d. Herbalife’s defenses are susceptible to classwide

10                   resolution and their affirmative defenses are not

11                   dispositive. .... 17

12                   e. Classwide damages are determinable. .... 17

13                   2. Class treatment is a superior method of adjudication. .... 18

14   B. The Proposed Settlement is Fundamentally Fair, Adequate, and

15   Reasonable..... 19

16                   1. The Class Representatives and Class Counsel have

17                   adequately represented the class. .... 21

18                   2. The Settlement Agreement was negotiated at arm’s

19                   length. .... 21

20                   3. The meaningful, well-tailored relief provided for the

21                   Class is adequate and appropriate for this case. .... 23

22                   a. The Proposed Settlement is within the range of

23                   reasonableness. .... 24

24                   b. The provisional *cy pres* award relates to the

25                   nature of Plaintiffs’ lawsuit, the objectives of

26                   California’s Unfair Competition Law, and the

27                   interests of the Absent Class Members. .... 25

28                   c. The costs, risks, and delay from trial and appeal

                    show that the recovery contained in the

                    Settlement is adequate. .... 26

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

d. The proposed method of distributing relief on behalf of the Settlement Class is effective. ....28

e. There are no other agreements required to be identified under Rule 23(e)(3). ....29

C. The Court should approve the proposed program for class notice. ....30

1. The proposed method of providing notice is the best notice practicable under the circumstances. ....30

2. The contents of the notice are clear and appropriate and should be approved. ....32

**V. CONCLUSION.....33**

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Acosta v. Trans Union, LLC</i> , 243 F.R.D. 377 (C.D. Cal. 2007).....	19
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	10, 11
<i>Cedric Kushner Promotions, Ltd. v. King</i> , 533 U.S. 158 (2001).....	16
<i>Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tele. Co.</i> , 83 Cal.Rptr.2d 548 (1999).....	16
<i>Chan v. Sutter Health Sacramento Sierra Region</i> , No. LACV1502004JAKAGR, 2016 WL 7638111 (C.D. Cal. June 9, 2016)...	10, 13
<i>Chavez v. Blue Sky Nat. Beverage Co.</i> , 268 F.R.D. 365 (N.D. Cal. 2010) .....	17
<i>Churchill Vill., L.L.C. v. Gen. Elec.</i> , 361 F.3d 566 (9th Cir. 2004) .....	32
<i>Cohen v. Trump</i> , 303 F.R.D. 376 (S.D. Cal.) .....	16
<i>Eisen v. Carlisle &amp; Jacquelin</i> , 417 U.S. 156 (1974).....	30
<i>Ellis v. Costco Wholesale Corp.</i> , 657 F.3d 970 (9th Cir. 2011) .....	14
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998) .....	passim
<i>Hendricks v. StarKist</i> , No. 13-00729, 2015 WL 4498083 (N.D. Cal. July 23, 2015).....	30
<i>In re Abbot Labs. Norvir Anti-trust Litig.</i> , No. 04-1511, 2007 WL 1689899 (N.D. Cal. June 11, 2007) .....	12
<i>In re Bluetooth Headset Prod. Liab. Litig.</i> , 654 F.3d 935 (9th Cir. 2011) .....	22, 23
<i>In re Google Referrer Header Privacy Litig.</i> , 869 F.3d 737 (9th Cir. 2017) .....	25
<i>In re NASDAQ Market Makers Antitrust Litigation</i> , 176 F.R.D. 99 (S.D.N.Y. 1997).....	24
<i>In re Pet Food Prods. Liab. Litig.</i> , 629 F.3d 333 (3d Cir. 2010) .....	14
<i>In re Snap Inc. Sec. Litig.</i> , 334 F.R.D. 209 (C.D. Cal. 2019).....	12

1 *In re Volkswagen*,  
 2 2017 WL 672727 .....passim  
 3 *In re Yahoo Mail Litig.*,  
 4 308 F.R.D. 577 (N.D. Cal. 2015) ..... 12  
 5 *J.R. v. Oxnard Sch. Dist.*,  
 6 2019 WL 4438243 (C.D. Cal. July 30, 2019) ..... 14, 15  
 7 *Jordan v. County of Los Angeles*,  
 8 669 F.2d 1311 (9th Cir. 1982) ..... 12  
 9 *Lane v. Facebook, Inc.*,  
 10 696 F.3d 811 (9th Cir. 2012) .....25, 28  
 11 *Leyva v. Medline Indus. Inc.*,  
 12 716 F.3d 510 (9th Cir. 2013) ..... 17  
 13 *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011),  
 14 663 F.3d .....22, 25  
 15 *Negrete*,  
 16 238 F.R.D..... 17  
 17 *O’Connor v. Uber Techs., Inc.*,  
 18 No. 13-03826, 2019 WL 1437101 (N.D. Cal. Mar. 29, 2019)..... 19, 20  
 19 *Officers for Justice v. Civil Serv. Comm’n of City and Cty. of San Francisco*,  
 20 688 F.2d 615 (9th Cir. 1982) ..... 19  
 21 *Philips Petroleum Co. v. Shutts*,  
 22 472 U.S. 797 (1985).....30  
 23 *Pulaski & Middleman, LLC v. Google, Inc.*,  
 24 802 F.3d 979 (9th Cir. 2015) ..... 16, 17  
 25 *Rodriguez v. Hayes*,  
 26 591 F.3d 1105 (9th Cir. 2010) ..... 13  
 27 *Rodriguez v. W. Publ’g Corp.*,  
 28 563 F.3d 948 (9th Cir. 2009) .....26, 27  
*Schlieser v. Sunrise Senior Living Mgmt. Inc.*,  
 No. LACV1900443JAKPLAX, 2021 WL 6752320 (C.D. Cal. July 6, 2021)..... 12,  
 13, 19  
*Sciortino v. PepsiCo, Inc.*,  
 No. 14-00478, 2016 WL 3519179 (N.D. Cal. June 28, 2016) ..... 21  
*Valentino v. Carter-Wallace, Inc.*,  
 97 F.3d 1227 (9th Cir. 1996) ..... 18  
*Wal-Mart Stores, Inc. v. Dukes*,  
 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) ..... 11, 13  
*Wang v. Chinese Daily News, Inc.*,  
 737 F.3d 538 (9th Cir. 2013) ..... 11  
*Yousefian v. 21st Century Ins. Co.*,  
 CV101077JAKMANX, 2012 WL 12878314 (C.D. Cal. Mar. 8, 2012) ..... 24



1 *Zinser v. Accufix Research Inst., Inc.*,  
 2 253 F.3d 1180 (9th Cir. 2001) ..... 18

3 **Statutes**

4 18 U.S.C. § 1962..... 1  
 5 California Business and Professional Code Section 17200..... 1

6 **Rules**

7 Fed. R. Civ. P. 23(a) ..... 11, 12  
 8 Fed. R. Civ. P. 23(b)(3)(D)..... 19  
 9 Fed. R. Civ. P. 23(c)(2)(B) ..... 32  
 10 Federal Rule of Civil Procedure 23(b)(3).....ii, 3, 15, 18  
 11 Federal Rule of Civil Procedure 23(e).....ii, 19  
 12 Rule 23 ..... 19, 33  
 13 Rule 23 (a)(3)..... 13  
 14 Rule 23(a) and Rule 23(b)(3)..... 12  
 15 Rule 23(a)(1)..... 12  
 16 Rule 23(a)(2)..... 12  
 17 Rule 23(a)(4)..... 14, 15  
 18 Rule 23(b) ..... 11  
 19 Rule 23(e)(1)(B) ..... 20  
 20 Rule 23(e)(2)..... 20  
 21 Rule 23(e)(2)(C)(i)-(iv) ..... 23  
 22 Rule 23(e)(3)..... 20

18 **Other Authorities**

19 4 Newberg on Class Actions § § 11.22 ..... 24  
 20 *v. 24*..... 16

21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs submit this Memorandum of Points and Authorities in support of their  
4 Motion for Preliminary Approval of the Settlement, which provides for a non-  
5 reversionary settlement of \$12.5 million in compromise of disputed claims against  
6 Herbalife under 18 U.S.C. § 1962 (“RICO”), California Business and Professional  
7 Code Section 17200 *et seq.* (“California’s Unfair Competition Law”), and California  
8 common law. The Settlement Class is comprised of U.S. Herbalife distributors who  
9 purchased tickets to two or more Herbalife Events<sup>3</sup> on or after January 1, 2009. The  
10 crux of Plaintiffs’ allegations<sup>4</sup> is that Herbalife misrepresented the value of Herbalife  
11 Events, which caused them, as well as the proposed Settlement Class Members,  
12 damage.

13 The Settlement Agreement was achieved after over four years of litigation  
14 fought in two districts including a contested motion to compel arbitration, contested  
15 motion to dismiss, contested motion for class certification, contested motion for  
16 summary judgment, several contested discovery hearings, dozens of fact witness  
17 depositions, eight expert depositions, over a year of arm’s-length settlement  
18 negotiations, and two separate mediations with separate mediators, the latter of which  
19 extended over several months under the direction of a retired judge of this District  
20 and ultimately culminated in a mediator’s proposal that both sides accepted. The  
21 proposed Settlement seeks to reimburse proposed Settlement Class Members for  
22 alleged harm caused by purchasing tickets to two or more Herbalife Events and to  
23 protect them through non-monetary relief in the form of meaningful corporate

24 \_\_\_\_\_  
25 <sup>3</sup> Capitalized terms used herein are defined with reference to the Settlement  
26 Agreement.

27 <sup>4</sup> The allegations referenced herein are based on Plaintiffs’ allegations as set forth in  
28 their Amended Class Action Complaint (ECF No. 202) (the “First Amended  
Complaint”).

1 reforms.

2 First, the Settlement Agreement calls for a \$12.5 million settlement fund to be  
3 distributed, after the deduction of settlement administration expenses, litigation  
4 expenses, service awards, and attorney’s fees, to putative Settlement Class Members  
5 based on claims submitted in accordance with a Court-approved plan. If there are  
6 insufficient funds available to satisfy all Settlement Class claims, then claims shall be  
7 paid proportionately. To the extent any funds remain after all claims are paid, any  
8 remaining funds shall be distributed to the Consumer Federation of America (the “Cy  
9 *Pres* Recipient”).

10 Second, the Settlement Agreement also provides for significant non-monetary  
11 relief in the form of meaningful corporate reforms by Herbalife. The Settlement  
12 Agreement requires Herbalife to make the following changes and keep them in place  
13 for no less than three years: (a) amend its U.S. Rules of Conduct and Distributor  
14 Policies to indicate that U.S. event attendance is not mandatory and does not guarantee  
15 financial success; (b) amend its U.S. Rules of Conduct and Distributor Policies to  
16 indicate that representations made by distributors that U.S. event attendance is  
17 mandatory or that it guarantees financial success are prohibited; (c) require U.S.  
18 Herbalife Corporate Event flyers, and the portion of Herbalife’s website promoting  
19 U.S. Success Training Seminar (“STS”) events, to include a disclaimer that U.S. event  
20 attendance is not mandatory and does not guarantee financial success; (d) amend its  
21 U.S. Rules of Conduct and Distributor Policies to provide that ticket purchases for  
22 U.S. Herbalife Corporate Events shall be refundable via the company’s existing  
23 buyback procedure pursuant to its Gold Standard Guarantee; (e) allow distributors to  
24 cancel their U.S. Herbalife Corporate Event ticket purchases within 24 hours of  
25 purchase; and (f) preclude Herbalife distributors from purchasing more than two  
26 tickets per distributorship for any given U.S. Herbalife Corporate Event.

27 In light of the risks of continuing litigation—which may not yield any recovery  
28 for Plaintiffs and the proposed Settlement Class Members—the Settlement

1 Agreement is deserving of preliminary approval because it provides the immediate  
2 benefits of significant individual monetary payments and non-monetary relief in the  
3 form of corporate reforms to serve and promote the interests of Settlement Class  
4 Members. This is an excellent recovery for the proposed Settlement Class Members.  
5 The Settlement is fair, adequate, and reasonable as described further herein.

6 Furthermore, Plaintiffs have devised a robust Notice Program to advise  
7 Settlement Class Members of this litigation and the Settlement Agreement using  
8 direct notice. As part of the Settlement Agreement, Herbalife has agreed to provide  
9 the contact information for *all U.S. Herbalife distributors* during the Class Period  
10 (defined as “the period beginning January 1, 2009, through and including the date the  
11 Preliminary Approval Order is entered”), providing a direct means to disclose to  
12 proposed Settlement Class Members their legal rights and options, including their  
13 objection and exclusion rights. As the Settlement Class is defined as, “[a]ll U.S.  
14 Herbalife distributors who purchased tickets to at least two Herbalife Events during  
15 the Class Period,” direct notice to all persons who were distributors during the Class  
16 Period encompasses the entire universe of potential Settlement Class Members (the  
17 Settlement Class Members represent a much smaller subset of the group receiving  
18 notice).

19 Plaintiffs propose that A.B. Data serve as the Claims Administrator. A.B. Data  
20 is experienced in this line of work. *See* Curriculum Vitae of Eric Miller and Profile of  
21 A.B. Data’s Background and Capabilities, attached as Exhibits 1 and 2 to the  
22 Declaration of Eric Miller.

23 For all of the reasons set forth herein, Plaintiffs respectfully request the Court  
24 grant preliminary approval of the proposed class action Settlement and determine that  
25 it will likely be able to certify a class as defined in the Settlement Agreement pursuant  
26 to Federal Rule of Civil Procedure 23(b)(3).

27  
28

1           **II. LITIGATION HISTORY**

2                   **A. Procedural History**

3           This case was originally filed as a putative class action in the United States  
4 District Court for the Southern District of Florida on September 18, 2017. ECF No.  
5 1.<sup>5</sup> The Florida Action originally named three Herbalife entities and forty-five of  
6 Herbalife’s top distributors as defendants (the “Individual Defendants”). Herbalife  
7 and the Individual Defendants jointly moved to compel this entire action to arbitration  
8 or, in the alternative, transfer the matter to the Central District of California. ECF Nos.  
9 63, 64, 65. After extensive briefing and oral argument, nearly a year after this case  
10 was initiated, the Honorable Marcia G. Cooke trifurcated this action by sending some  
11 claims against Herbalife to arbitration, sending the remaining claims against Herbalife  
12 to the Central District of California, and keeping the claims as to the Individual  
13 Defendants in the Southern District of Florida. ECF No. 106 (the “Order Re:  
14 Arbitration”). The Individual Defendants appealed Judge Cooke’s order to the  
15 Eleventh Circuit Court of Appeals (USCA Case Number 18-14048-JJ), but after  
16 briefing and oral argument, the Eleventh Circuit affirmed the Order Re: Arbitration.

17           Concurrent with the Florida litigation, Plaintiffs and Herbalife engaged in  
18 extensive litigation here in the Central District of California. In late 2018, Herbalife  
19 moved to dismiss the entire action and the parties engaged in briefing and the Court  
20 held oral argument on the motion. *See* ECF Nos. 142, 151, 152, and 163. The Court  
21 ultimately dismissed Plaintiffs’ initial complaint without prejudice and afforded them  
22 leave to amend. *See* ECF No. 196. Plaintiffs then filed the First Amended Complaint,  
23 ECF No. 202. That was followed by another motion to dismiss (the “Second Motion  
24 to Dismiss”), which was also briefed and argued before the Court in early 2020. *See*

25  
26 \_\_\_\_\_  
27 <sup>5</sup> The style of the Florida Action was *Lavigne, et al. v. Herbalife Ltd.*, Case No. 1:17-  
28 23429-MGC (S.D. Fla.) (the “Florida Action”). The style has since changed due to  
amendment of parties and Court orders discussed herein.

1 ECF Nos. 208, 219, 222, and 261. The day before Herbalife filed the Second Motion  
2 to Dismiss, Plaintiffs filed their Motion to Certify Class (“Class Certification  
3 Motion”) which was also briefed and argued before the Court. *See* ECF Nos. 207,  
4 218, 234, and 261. While the Second Motion to Dismiss and Class Certification  
5 Motion were pending, the parties extensively briefed Herbalife’s Motion for  
6 Summary Judgment (ECF No. 322) and collectively filed eight separate *Daubert*  
7 motions, each of which were fully briefed. *See* ECF Nos. 323-338, 341-349. Herbalife  
8 ultimately withdrew its Second Motion to Dismiss (ECF No. 350), answered the First  
9 Amended Complaint (ECF No. 352), and the parties subsequently fully briefed  
10 Plaintiffs’ Motion to Strike Herbalife’s Affirmative Defenses (ECF No. 359).

11       Once the Eleventh Circuit issued its mandate, Plaintiffs also engaged in  
12 litigation in the Florida Action. In that case, Plaintiffs filed an amended pleading,  
13 engaged in two rounds of briefing on the Individual Defendants’ Motion to Dismiss,  
14 and had oral argument before Judge Cooke on that motion to dismiss. Plaintiffs also  
15 engaged in discovery in that action, discussed in further detail in the next section.

16       The scope of the two actions is essentially the same: they both involve claims  
17 regarding the same Herbalife Events, and they both involve claims brought on behalf  
18 of the same class that the parties seek to certify through a settlement here. Therefore,  
19 the parties to the Florida Action moved to stay that case pending final approval of a  
20 classwide settlement here, with the intention of dismissing the Florida Action should  
21 this Court finally approve the parties’ proposed class Settlement. Judge Cooke  
22 granted the motion to stay and administratively closed the Florida Action. Declaration  
23 of Etan Mark (“Mark Decl.”) at Exhibits (Joint Motion to Stay Action) 2 and 3 (Order  
24 Granting Motion to Stay).

### 25       **B. Discovery**

26       Plaintiffs expended thousands of hours and hundreds of thousands of dollars  
27 engaging in discovery in the California and Florida Actions. In the California Action  
28 alone, Plaintiffs had seven separate discovery hearings before Magistrate Judge

1 Michael R. Wilner (ECF Nos. 176, 190, 191, 206, 221, 253, and 288), took thirteen  
2 separate full-day fact depositions, an additional four expert depositions, and defended  
3 an additional eight depositions. Still just in the California Action, Plaintiffs have  
4 reviewed hundreds of thousands of pages of discovery, drafted correspondence  
5 related to discovery disputes, and have met and conferred with parties and non-parties  
6 to try and narrow discovery disputes to avoid judicial intervention. Mark Decl., ¶ 14.

7 The parties also engaged in extensive expert discovery. Both sides collectively  
8 designated eight experts. Each prepared an expert report and each was deposed.  
9 Among other things, Herbalife presented expert survey evidence showing that 88.7%  
10 of Herbalife distributors found “value” in Herbalife Event attendance, and expert  
11 correlation evidence showing that there is a positive, statistically significant  
12 relationship between attending Herbalife Events and distributor earnings. Plaintiffs  
13 presented rebuttal experts opining, among other things, that there is no such  
14 correlation and that event attendance does not lead to “success” in the Herbalife  
15 business opportunity. *Id.*

16 Plaintiffs separately and additionally engaged in extensive discovery in the  
17 Florida Action including taking eight party depositions, defending three depositions,  
18 and participating in seven separate discovery hearings before Magistrate Judge  
19 Goodman in the Southern District of Florida. Plaintiffs also reviewed hundreds of  
20 thousands of additional pages of documents produced in the Florida Action by parties  
21 and non-parties. *Id.*

### 22 **C. Settlement**

23 The Parties engaged in two separate full-day mediations. First, on August 17,  
24 2020, the Parties attended a mediation, conducted virtually, with the Hon. Suzanne  
25 Segal (Ret.). Ultimately, the Parties reached an impasse. *See* ECF No. 278.

26 On May 27, 2021, the Parties engaged in a second mediation with the Hon. S.  
27 James Otero (Ret.). This second mediation was in-person. Following the mediation,  
28 the Parties continued to engage in extensive arm’s-length settlement negotiations,

1 which spanned over five months. In the end, the Parties both accepted a mediator’s  
2 proposal to resolve the matter and, through counsel, reached the proposed Settlement  
3 Agreement concurrently filed herewith.

### 4 **III. SUMMARY OF SETTLEMENT TERMS**

#### 5 **A. Class Definition**

6 The Settlement Agreement provides for a single Settlement Class, defined as  
7 follows:

8 All U.S. Herbalife distributors who purchased tickets to at least two  
9 Herbalife Events during the Class Period, excluding: (1) past and  
10 present members of Herbalife’s President’s Team or above (including  
11 past and present members of Herbalife’s Chairman’s Club and  
12 Founder’s Circle) to the extent those individuals were members of  
13 Herbalife’s President’s Team or above throughout the Class Period,  
14 including their spouses, heirs, predecessors, successors,  
15 representatives, alter egos, or assigns; and (2) any U.S. Herbalife  
16 distributors who have previously executed a release of the claims that  
17 are the subject matter of this litigation.

18 Settlement Agreement ¶ 1.16.

#### 19 **B. Settlement Fund Payments**

20 Herbalife has agreed to pay \$12.5 million into a Settlement Fund—none of  
21 which will revert to Herbalife absent termination or rescission of the Settlement  
22 Agreement—to be used for the payment of Settlement Class claims, any approved  
23 attorney’s fees, expense reimbursement, any approved Plaintiff service awards,<sup>6</sup>  
24 dissemination of class notice, the administrative costs of the Settlement, and, if funds  
25

26 <sup>6</sup> For a host of reasons, including that this Settlement involved fulsome discovery in  
27 two pending cases (including depositions in each case), in a separate motion,  
28 Plaintiffs’ Counsel will request that Plaintiffs Patricia Rodgers, Izaar Valdez, and  
Jennifer Ribalta each receive a service award of \$30,000 each.



1 remain, approved *cy pres* distributions. *See generally* Settlement Agreement.

2 **C. Corporate Reforms**

3 Herbalife has agreed to non-monetary relief in the form of meaningful  
4 corporate reforms to protect the Settlement Class Members. Specifically, Herbalife  
5 has agreed to make the following changes and keep them in place for no less than  
6 three years: (a) amend its U.S. Rules of Conduct and Distributor Policies to indicate  
7 that U.S. event attendance is not mandatory and does not guarantee financial success;  
8 (b) amend its U.S. Rules of Conduct and Distributor Policies to indicate that  
9 representations made by distributors that U.S. event attendance is mandatory or that  
10 it guarantees financial success are prohibited; (c) require U.S. Herbalife Corporate  
11 Event flyers, and the portion of Herbalife’s website promoting U.S. STS events, to  
12 include a disclaimer that U.S. event attendance is not mandatory, and does not  
13 guarantee financial success; (d) amend its U.S. Rules of Conduct and Distributor  
14 Policies to provide that ticket purchases for U.S. Herbalife Corporate Events shall be  
15 refundable via the company’s existing buyback procedure pursuant to its Gold  
16 Standard Guarantee; (e) allow distributors to cancel their U.S. Herbalife Corporate  
17 Event ticket purchases within 24 hours of purchase; and (f) preclude Herbalife  
18 distributors from purchasing more than two tickets per Distributorship for any given  
19 U.S. Herbalife Corporate Event.

20 **D. Cy Pres**

21 After payment of Settlement-related administrative expenses, Court-approved  
22 attorneys’ fees, litigation expenses, approved Plaintiff service awards, class notice,  
23 and payments of any proper claims by Settlement Class Members, any remaining  
24 funds (if any) will be distributed to the *cy pres* recipient recommended by the  
25 Plaintiffs and approved by the Court. *See* Settlement Agreement ¶ 4.1.

26 The Settlement Agreement requires that the Court supervise the distribution of  
27 any amounts remaining in the Net Settlement Fund after distribution to Settlement  
28 Class Members to the *cy pres* recipient. *Id.*

1 Plaintiffs, with Herbalife’s agreement, recommend Consumer Federation of  
2 America as the proposed *cy pres* recipient.

3 Consumer Federation of America is an appropriate *cy pres* recipient because it  
4 is a national consumer protection agency focused on documenting consumer  
5 complaints, identifying unfair and deceptive fees and practices, and focusing on  
6 telemarketing tactics that negatively impact consumers. The type of work performed  
7 by Consumer Federation of America is precisely the type of alleged unfair and  
8 deceptive trade practice Plaintiffs sought to remedy by filing this action. *See*  
9 Declaration of Rachel Weintraub (“Weintraub Decl.”). Consumer Federation of  
10 America was also previously approved by this Court as the *cy pres* recipient in  
11 *Bostick, et al. v. Herbalife International of America, Inc., et al.*, Case No. 2:13-cv-  
12 02488 (C.D. Cal.), a case in which Herbalife was alleged to have made misleading  
13 statements regarding the likelihood of success in pursuing the Herbalife business  
14 opportunity.

15 **E. Release**

16 In exchange for the relief described herein, and upon entry of a final order  
17 approving this Settlement Agreement, Plaintiffs and Settlement Class Members will  
18 release Herbalife and any non-Settlement Class Member distributor who spoke at,  
19 presented at, planned, or promoted any Herbalife Event or sold tickets to any  
20 Herbalife Event during the Class Period (“Released Parties”) from any claims,  
21 demands, rights, liabilities, suits, or causes of action, known or unknown, that were  
22 or could have been asserted in the Action that are based upon, arise out of, or relate  
23 to Herbalife Events, whether organized by Herbalife or independent distributors. *See*  
24 Settlement Agreement at Section 8. This section summarizes the nature of the release  
25 provided in the Settlement Agreement, but the full release can be found in Section 8  
26 of the Settlement Agreement.

**F. Proposed Schedule of Events**

Consistent with the provisions of the Settlement Agreement, Plaintiffs respectfully propose the following schedule for the various Settlement events:

Notice of Settlement to be Disseminated	Within 45 days after entry of the Court’s Preliminary Approval Order
Class Administrator will launch Settlement Website	Within 30 days after entry of the Court’s Preliminary Approval Order
Class Counsel’s motion for attorneys’ fees, costs, and service awards	Within 75 days after entry of the Court’s Preliminary Approval Order
Objection and Opt Out Deadline	120 days after entry of the Court’s Preliminary Approval Order
Submit a Claim	120 days after entry of the Court’s Preliminary Approval Order
Parties to file a written response to any comment or objection filed by a class member	30 days before Final Approval Hearing
Class Counsel’s motion for final approval	30 days before Final Approval Hearing
Claims Administrator to submit an affidavit of compliance with notice requirements	14 days before Final Approval Hearing
Final Approval Hearing	Not less than 180 days after entry of the Preliminary Approval Order, or as soon thereafter as is convenient for the Court

**IV. ARGUMENT**

**A. The Settlement Class Should be Certified for Settlement Purposes.**

According to this Court, “[t]he first step in a preliminary approval process is to determine whether a class can be certified.” *Chan v. Sutter Health Sacramento Sierra Region*, No. LACV1502004JAKAGR, 2016 WL 7638111, at \*3 (C.D. Cal. June 9, 2016) (Kronstadt, J.). Further, “[s]ettlement is relevant to a class certification.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997). Specifically:

Confronted with a request for settlement-only class certification, a

1 district court need not inquire whether the case, if tried, would present  
2 intractable management problems, *see* Fed. Rul. Civ. P. 23(b)(3)(D), for  
3 the proposal is that there be no trial. But other specifications of the  
4 Rule—those designed to protect absentees by blocking unwarranted or  
5 overbroad class definitions—demand undiluted, even heightened,  
6 attention in the settlement context. Such attention is of vital importance,  
7 for a court asked to certify a settlement class will lack the opportunity,  
8 present when a case is litigated, to adjust the class, informed by the  
9 proceedings as they unfold.

10 *Id.* at 620 (internal citations omitted).

11 As to class certification in general, as this court has noted:

12 Class certification under Rule 23 is a two-step process. First, a plaintiff  
13 must demonstrate that the requirements of Rule 23(a) are met: “One or  
14 more members of a class may sue or be sued as representative parties  
15 on behalf of all members only if: (1) the class is so numerous that  
16 joinder of all members is impracticable; (2) there are questions of law  
17 or fact common to the class; (3) the claims or defenses of the  
18 representative parties are typical of the claims or defenses of the class;  
19 and (4) the representative parties will fairly and adequately protect the  
20 interests of the class.” Fed. R. Civ. P. 23(a). “Class certification is  
21 proper only if the trial court has concluded, after a ‘rigorous analysis,’  
22 that Rule 23(a) has been satisfied.” *Wang v. Chinese Daily News, Inc.*,  
23 737 F.3d 538, 542-43 (9th Cir. 2013) (quoting *Wal-Mart Stores, Inc. v.*  
24 *Dukes*, 564 U.S. 338, 351, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)).

25  
26 Second, the plaintiff must also establish that one of the bases for  
27 certification in Rule 23(b) is satisfied.  
28

1 *In re Snap Inc. Sec. Litig.*, 334 F.R.D. 209, 215 (C.D. Cal. 2019).

2 Plaintiffs contend, and Herbalife does not dispute, for settlement purposes only,  
3 that the proposed Settlement Class meets the requirements for class certification under  
4 Rule 23(a) and Rule 23(b)(3).

5 **i. The Requirements of Rule 23(a) are satisfied.**

6 *1. Numerosity is satisfied.*

7 The numerosity requirement is satisfied when the class is “so numerous that  
8 joinder of all parties is impracticable.” *Id.* at 226 (quoting Rule 23(a)(1)). While there  
9 is no fixed rule, numerosity is generally presumed when the potential number of class  
10 members reaches forty. *See Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319  
11 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982). “Where ‘the exact  
12 size of the class is unknown, but general knowledge and common sense indicate that  
13 it is large, the numerosity requirement is satisfied.’” *In re Abbot Labs. Norvir Anti-*  
14 *trust Litig.*, No. 04-1511, 2007 WL 1689899 at \*6 (N.D. Cal. June 11, 2007) quoting  
15 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS*  
16 §3.3 (4TH ED. 2002).

17 Here, numerosity is readily established. Through discovery, Herbalife has  
18 agreed to produce a detailed list of all Herbalife Event ticket purchases made by  
19 Settlement Class Members within its records. *See Miller Decl.*, ¶ 7. That list contains  
20 just over 80,000 unique distributors. *Id.*

21 *2. Commonality is satisfied.*

22 Rule 23(a)(2) requires that there be one or more questions common to the class.  
23 *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1018 (9th Cir. 1998). Plaintiffs “need  
24 only show the existence of a common question of law or fact that is significant and  
25 capable of classwide resolution.” *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 592 (N.D.  
26 Cal. 2015) (citations omitted). Further, “[a]ll questions of fact and law need not be  
27 common to satisfy the rule.” *Schlieser v. Sunrise Senior Living Mgmt. Inc.*, No.  
28 LACV1900443JAKPLAX, 2021 WL 6752320, at \*8 (C.D. Cal. July 6, 2021)

1 (Kronstadt, J.) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.  
2 1998)). Especially in settlement classes, “[i]n assessing commonality, ‘even a single  
3 common question will do.’” *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.  
4 338, 359 (2011) (internal quotation marks omitted)). The essence of the First  
5 Amended Complaint is that Herbalife misrepresented the value of Herbalife Events.  
6 Plaintiffs contend that their claims present the following common questions of law  
7 and fact:

- 8 (1) Whether Herbalife misrepresented that events guarantee success;
- 9 (2) Whether Herbalife misrepresented that event attendance was required;
- 10 and
- 11 (3) Whether Herbalife misrepresented that event attendance was correlated  
12 with financial success.

13 The commonality standard is therefore readily met here. *See Volkswagen*, 2017  
14 WL 672727, at \*12, quoting *Hanlon*, 150 F.3d at 1019. (“The existence of shared  
15 legal issues with divergent factual predicates is sufficient, as is a common core of  
16 salient facts coupled with disparate legal remedies within the class.”)

17 *3. Typicality is satisfied.*

18 The typicality requirement is satisfied when the “representative parties’ claims  
19 [are] ‘typical of the claims or defenses of the class.’” *Volkswagen*, 2017 WL 672727,  
20 at \*13 quoting Rule 23 (a)(3). The typicality requirement “is permissive and requires  
21 only that the representative's claims are reasonably coextensive with those of absent  
22 class members; they need not be substantially identical.” *Rodriguez v. Hayes*, 591  
23 F.3d 1105, 1124 (9th Cir. 2010).

24 Here, the typicality requirement is met. The Named Plaintiffs’ claims are  
25 typical of the claims of the whole class, as they arise from the purchase of tickets to  
26 the same universe of Herbalife Events. *See Chan*, 2016 WL 7638111, at \*6 (holding  
27 that because named plaintiffs’ claims arise from the “same factual basis” as the entire  
28 class’s claims, typicality was satisfied). The Named Plaintiffs’ claims are therefore

1 “based on the same pattern of [alleged] wrongdoing as those brought on behalf of  
2 [Settlement] Class Members.” *In re Volkswagen*, 2017 WL 672727, at \*13.

3  
4 *4. Adequacy of representation is satisfied.*

5 Rule 23(a)(4) requires that the “representative parties will fairly and adequately  
6 protect the interests of the class.” *J.R. v. Oxnard Sch. Dist.*, 2019 WL 4438243, at \*28  
7 (C.D. Cal. July 30, 2019) (citing Fed. R. Civ. P. 23(a)(4)). “Resolution of two  
8 questions determines legal adequacy: (1) do the named plaintiffs and their counsel  
9 have any conflicts of interest with other class members and (2) will the named  
10 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?”  
11 *Id.* (citing *Hanlon v. Chrysler Corporation*, 150 F.3d 1011, 1020 (9th Cir. 1998)).  
12 Adequate representation depends on, among other factors, an absence of antagonism  
13 between representatives and absentees, and a sharing of interest between  
14 representatives and absentees.” *Id.* (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d  
15 970, 985 (9th Cir. 2011)). Here, the representative Plaintiffs and counsel will fairly  
16 and adequately represent the class.

17 *a. Plaintiffs are adequate*

18 The representative Plaintiffs all suffered similar injuries from purchasing event  
19 tickets and attending Herbalife Events. Each Plaintiff purchased tickets to and  
20 attended multiple Herbalife Events. Named Plaintiffs and their counsel are unaware  
21 of any conflicts of interest with other Settlement Class Members. Named Plaintiffs’  
22 claims are essentially identical to those of other Settlement Class Members, as they  
23 all purchased tickets to a finite universe of Herbalife Events. That the amount spent  
24 on tickets or the specific events attended may vary across the class does not preclude  
25 a finding of adequacy. *See In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 346 (3d  
26 Cir. 2010) (rejecting claim of inadequacy and noting that “varied relief among class  
27 members with differing claims in class settlements is not unusual”).

28 The representative Plaintiffs, moreover, have actively pursued this litigation  
and fully understand their duties as representatives of the plaintiff class. Accordingly,

1 Plaintiffs are adequate class representatives.

2 b. Plaintiffs' Counsel is adequate

3 "The conclusion is the same as to proposed class counsel." *Oxnard*, 2019 WL  
4 4438243, at \*28. As noted above, counsel have vigorously prosecuted this action  
5 throughout the five years that it has been pending. *See id.* Moreover, Class Counsel  
6 have substantial experience in handling class actions and complex litigation, and have  
7 sufficient resources to aggressively prosecute the case, as demonstrated thus far. *See*  
8 Mark. Decl., ¶¶ 2-10. Accordingly, there is no basis to contest the adequacy of Class  
9 Counsel to represent Plaintiffs interests.

10 **ii. Class certification is appropriate under Rule 23(b)(3).**

11 Certification is proper under Rule 23(b)(3) "whenever the actual interests of  
12 the parties can be served best by settling their differences in a single action." *Hanlon*,  
13 150 F.3d at 1022. Rule 23(b)(3) calls for the court to conduct two separate inquiries:  
14 a) do the issues common to the class "predominate" over the issues that may be unique  
15 to individual class members, and b) is the class mechanism "superior" to other  
16 methods available for adjudicating the controversy. Both tests are satisfied here.

17 *I. Common questions of law or fact predominate over*  
18 *individual issues.*

19 Predominance is established under Rule 23(b)(3) where "questions of law or  
20 fact common to class members predominate over any questions affecting only  
21 individual members." Fed. R. Civ. P. 23(b)(3). "When common questions present a  
22 significant aspect of the case and they can be resolved for all members of the class in  
23 a single adjudication, there is a clear justification for handling the dispute on a  
24 representative, rather than individual basis." *Id.* (citing *Hanlon*, 150 F.3d at 1022).

25 a. The RICO claims will turn on common proof.

26 Plaintiffs allege their injuries resulted from a common course of conduct to  
27 which all members of the class were subjected. "Common issues frequently  
28 predominate in RICO actions that allege injury as a result of a single fraudulent



1 scheme.” *Friedman v. 24 Hour Fitness USA, Inc.*, Case No. CV 06-6282 AHM (CTx),  
2 at \*12 (C.D. Cal. Aug. 25, 2009). Representative Plaintiffs must show that they were  
3 harmed by Herbalife’s: (1) conduct (2) of an enterprise (3) through a pattern (4) of  
4 racketeering activity. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001).  
5 Each of these elements will be proved through an examination of Herbalife’s conduct  
6 rather than through an individualized inquiry into the actions of class members.

7 Plaintiffs allege that they and the Settlement Class Members attended a series  
8 of events because they wanted to learn how to succeed with the Herbalife business  
9 opportunity and they were told that attending events was a necessary and critical  
10 component of that success. *See* Mark Decl. ¶ 11; *see also Cohen v. Trump*, 303 F.R.D.  
11 376, 385 (S.D. Cal.) (“Courts have found that reliance can be established on a  
12 classwide basis where the behavior of plaintiffs and class members cannot be  
13 explained in any way other than reliance upon the defendant’s conduct.”)

14 b. The UCL claims will turn on common proof.

15 Plaintiffs’ UCL claims likewise may be resolved on a classwide basis. The  
16 UCL broadly prohibits “any unlawful, unfair, or fraudulent business act or practice.”  
17 *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979 (9th Cir. 2015). It is a  
18 “broad remedial statute” that prohibits wrongful business conduct “in whatever  
19 context such activity might occur.” *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d  
20 718, 731 (9th Cir. 2007) (internal citation omitted). It prohibits “unfair competition,”  
21 which is defined broadly and is written in the disjunctive to proscribe any act that is  
22 (1) unlawful, (2) unfair, (3) fraudulent, *or* (4) in violation of section 17500 (false or  
23 misleading advertisements). *Id.* (citing *Cel-Tech Commc'ns, Inc. v. Los Angeles*  
24 *Cellular Tele. Co.*, 83 Cal.Rptr.2d 548, 565 (1999)). Although each prong is a  
25 separate theory of liability, Plaintiffs have substantial evidence of violations under  
26 each prong.

27 Plaintiffs allege that Herbalife’s common misrepresentations and actions across  
28 the Settlement Class caused the Named Plaintiffs and Settlement Class Members to

1 purchase tickets to and attend events that they would never have attended had they  
2 known the event content was devoid of the benefits that Herbalife allegedly claimed  
3 Plaintiffs would receive. *See* Amended Complaint, ¶¶ 22, 59-60, 105, 107, 111-114.

4 c. The negligent misrepresentation claims will turn on  
5 common proof.

6 Plaintiffs’ negligent misrepresentation claims will turn on the issue of whether  
7 or not Herbalife had any reasonable grounds to believe that its repeated statements  
8 regarding Herbalife Events were true. If, as Plaintiffs allege, Herbalife had no  
9 reasonable ground to believe that event attendance would lead to financial success in  
10 the Herbalife business opportunity, then the essential element of the negligent  
11 misrepresentation claims will be proven for all members of the prospective class.

12 d. Herbalife’s defenses are susceptible to classwide  
13 resolution and their affirmative defenses are not  
14 dispositive.

15 Herbalife’s defenses are equally amenable to classwide resolution. With respect  
16 to RICO and the negligent misrepresentation claims, the defenses that Herbalife’s  
17 representations were not false, were immaterial, were incapable of inducing  
18 reasonable reliance, or were mere puffery, may be resolved on a classwide basis.

19 e. Classwide damages are determinable.

20 Finally, Plaintiffs’ individual damages are not an impediment to class  
21 certification. First, courts have found that where questions of liability predominate,  
22 individual damages issues generally will not prevent certification. *See Negrete*, 238  
23 F.R.D. at 494; *Pulaski*, 802 F.3d 979. “At class certification, plaintiff must present a  
24 likely method for determining class damages, though it is not necessary to show that  
25 his method will work with certainty at this time.” *Chavez v. Blue Sky Nat. Beverage*  
26 *Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) (internal citations and quotations omitted).  
27 Here, Plaintiffs propose using records of ticket purchases to Herbalife Events to  
28 calculate damages for each Settlement Class Member in the same way. *See Leyva v.*

1 *Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) (“damage calculations alone  
2 cannot defeat certification.”) (citations omitted). Thus, as to each of Plaintiffs’  
3 claims, issues common to the Settlement Class predominate over any issues that may  
4 be unique to individual Settlement Class Members.

5                                   2. *Class treatment is a superior method of adjudication.*

6           A class action is the superior method of adjudicating this action. The superiority  
7 inquiry “requires [a] determination of whether the objectives of the particular class  
8 action procedure will be achieved in the particular case.” *Hanlon*, 150 F.3d at 1023.  
9 “Where classwide litigation of common issues will reduce litigation costs and  
10 promote greater efficiency, a class action may be superior to other methods of  
11 litigation.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).  
12 This determination is guided by consideration of four non-exclusive factors listed in  
13 Rule 23(b)(3), including the interest of class members in individually controlling  
14 prosecution of separate actions; the extent and nature of any pending litigation  
15 concerning the controversy; the desirability of litigating the claims in the particular  
16 forum where the class action is filed; and difficulties likely to be encountered in  
17 managing the class action. Damages associated with event attendance, *i.e.*, the cost  
18 of event tickets, are unlikely to rise to a level where individual litigation becomes  
19 practical for persons of average, or less than average, means. This factor weighs in  
20 favor of finding superiority. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180,  
21 1190 (9th Cir. 2001).

22           Other than the related case pending in the Southern District of Florida (which  
23 involves essentially the same claims brought on behalf of the same class and which is  
24 stayed and administratively closed pending final approval of the proposed Settlement  
25 here), Plaintiffs know of no other pending litigation which concerns the members of  
26 the Settlement Class or the controversy at issue. Herbalife’s headquarters are in this  
27 district; it is a practical and efficient forum in which to concentrate claims against the  
28 company.

1 The fourth superiority factor considers “the likely difficulties in managing a  
2 class action.” Fed. R. Civ. P. 23(b)(3)(D). Plaintiffs have proposed an identifiable  
3 class of individuals whose ticket expenditures can largely be calculated from  
4 Herbalife’s own records. Plaintiffs also have proposed a direct Notice Program that  
5 captures every Settlement Class Member and a clear process for making claims such  
6 that Settlement Class Members will know upon checking the Settlement Website to  
7 access the Claim Form what their event ticket expenditures were. Classwide  
8 resolution of the common issues presented will reduce costs, promote efficiency, and  
9 be superior to other methods of litigation.

10 **B. The Proposed Settlement is Fundamentally Fair, Adequate, and**  
11 **Reasonable.**

12 “Fed. R. Civ. P. 23(e) requires a two-step process in considering whether to  
13 approve the settlement of a class action.” *Schlieser v. Sunrise Senior Living Mgmt.*  
14 *Inc.*, No. LACV1900443JAKPLAX, 2021 WL 6752320, at \*11–12 (C.D. Cal. July 6,  
15 2021) (Kronstadt, J.). First, “a court must make a preliminary determination whether  
16 the proposed settlement ‘is fundamentally fair, adequate, and reasonable.’” *Id.*  
17 (quoting *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007)). Then,  
18 “[i]n the second step, which occurs after preliminary approval, notification to class  
19 members, and the compilation of information as to any objections by class members,  
20 a court determines whether final approval of the settlement should be granted.” *Id.*  
21 At the preliminary stage, “the settlement need only be *potentially fair*.” *Id.* at \*12  
22 (quoting *Acosta*, 243 F.R.D. at 386) (emphasis in original).  
23 “This is due, in part, to the policy preference for settlement, particularly in the  
24 context of complex class action litigation.” (citing *Officers for Justice v. Civil Serv.*  
25 *Comm'n of City and Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)).

26 Recent amendments to Rule 23, which took effect on December 1, 2018,  
27 “provide new guidance on the ‘fair, adequate, and reasonable’ standard at the  
28 preliminary approval stage.” *O’Connor v. Uber Techs., Inc.*, No. 13-03826, 2019 WL

1 1437101, at \*4 (N.D. Cal. Mar. 29, 2019). Specifically, the amendments clarify that  
2 “preliminary approval should only be granted where the parties have ‘show[n] that  
3 the court will likely be able to ... approve the proposal under [the final approval factors  
4 in] Rule 23(e)(2)...” *Id.* quoting Rule 23(e)(1)(B) (emphasis in original). These  
5 factors take into account whether:

6 (A) the Class Representatives and Class Counsel have adequately  
7 represented the class;

8 (B) the proposal was negotiated at arm’s length;

9 (C) the relief provided for the class is adequate, taking into account:

10 (i) the costs, risks, and delay of trial and appeal;

11 (ii) the effectiveness of any proposed method of  
12 distributing relief to the class, including the method of  
13 processing class member claims;

14 (iii) the terms of any proposed award of attorney’s fees,  
15 including timing of payment;<sup>7</sup> and

16 (iv) any agreement required to be identified under Rule  
17 23(e)(3); and

18 (D) the proposal treats class members equitably relative to each other.

19 *Id.*, quoting Rule 23(e)(2).

20 Here, the proposed Settlement, negotiated by competent counsel who  
21 vigorously represented the interests of the Settlement Class, meets the standards for  
22 preliminary approval.  
23  
24

25 <sup>7</sup> As set forth in the schedule proposed in this Motion, Class Counsel will file its  
26 Motion for attorneys’ fees, costs, and service awards within 75 days of entry of the  
27 Court’s Preliminary Approval Order. Class Counsel’s attorneys’ fee request will not  
28 exceed thirty-three and a third percent (33 1/3 %) of the Settlement Amount of  
\$12,500,000, or \$4,166,667.

1                   **1. The Class Representatives and Class Counsel have**  
2                   **adequately represented the class.**

3           Plaintiffs’ interests are aligned with, and are not antagonistic to, the interests of  
4 the Settlement Class Members. Each of the Plaintiffs has remained committed to  
5 representing the proposed Class in this litigation since 2017, remaining available to  
6 and in touch with Class Counsel, and submitting information, declarations, and other  
7 evidence, including electronic devices for forensic imaging and sitting for  
8 depositions. *See* Mark Decl., ¶ 12. And, as discussed in more detail above, Class  
9 Counsel has committed all necessary time, expertise, and resources to vigorously  
10 litigating this action for more than four years. *See id.*, ¶ 13.

11                   **2. The Settlement Agreement was negotiated at arm’s length.**

12           This factor “examines...the means by which the parties arrived at settlement.”  
13 *Volkswagen*, 2017 WL 672727, at \*16 quoting *Sciortino v. PepsiCo, Inc.*, No. 14-  
14 00478, 2016 WL 3519179, at \*4 (N.D. Cal. June 28, 2016) (internal quotations  
15 omitted). Specifically, “[p]reliminary approval is appropriate if the proposed  
16 settlement is the product of serious, informed, non-collusive negotiations.” *Id.*

17           Here, Plaintiffs have conducted a meaningful investigation and analyzed and  
18 evaluated the merits of the claims made against Herbalife, including having the  
19 benefit of the Court’s ruling on Herbalife’s initial motion to dismiss, extensive  
20 briefing on Plaintiffs’ Motion for Class Certification and Herbalife’s Motion for  
21 Summary Judgment, the results of dozens of fact and expert depositions, and the  
22 benefit of reviewing hundreds of thousands of documents produced in this and related  
23 actions. Furthermore, the Parties engaged in extensive arm’s-length settlement  
24 negotiations, which spanned over five months and included two mediation sessions  
25 before two separate respected and skilled mediators, one of which ultimately resulted  
26 in the proposed Settlement Agreement. *See* Mark Decl., ¶ 14. Thus, Plaintiffs had the  
27 necessary information to properly assess the value of the Settlement Class’s claims  
28 and the value of this Settlement Agreement to the Settlement Class. Based upon that

1 analysis, and recognizing the substantial risks of continued litigation, Plaintiffs  
2 concluded that this Settlement with Herbalife is in the best interest of the Settlement  
3 Class Members.

4 Furthermore, there are no signs of collusion in the Settlement Agreement.<sup>8</sup>  
5 First, the key terms of the Settlement were negotiated with the assistance of a highly  
6 respected mediator and former district judge in this Court, who oversaw the vigorous  
7 and arm's-length nature of the negotiations. Indeed, the final Settlement Agreement  
8 was the result of the Parties' acceptance of a mediator's proposal.

9 Second, given the risks in continuing litigation that threaten the Settlement  
10 Class with little or no relief, *see* Section IV(B)(3)(c), *infra*, the \$12.5 million  
11 Settlement addresses these concerns by providing "the next best compensation use,  
12 *e.g.*, for the aggregate, indirect, prospective benefit of the Class." *Nachshin*, 663 F.3d  
13 at 1038 (internal citations and quotations omitted).

14 Third, Class Counsel will not receive a disproportionate distribution of the  
15 Settlement funds. The Settlement leaves the amount of Class Counsel's fee entirely  
16 in the discretion of the Court and under Plaintiffs' proposed schedule, their fee  
17 petition will be filed well before the deadline for objections, thus providing the  
18

19 <sup>8</sup> Signs of collusion include:

20 (1) when counsel receive a disproportionate distribution of the settlement, or  
21 when the class receives no monetary distribution but class counsel are amply  
22 rewarded, (2) when the parties negotiate a "clear sailing" arrangement  
23 providing for the payment of attorneys' fees separate and apart from class  
24 funds, which carries "the potential of enabling a defendant to pay class counsel  
25 excessive fees and costs in exchange for counsel accepting an unfair settlement  
26 on behalf of the class"; and (3) when the parties arrange for fees not awarded  
27 to revert to defendants rather than be added to the class fund[.]

26 *Volkswagen*, 2017 WL 672727, at \*15; *In re Bluetooth Headset Prod. Liab. Litig.*,  
27 654 F.3d 935, 947 (9th Cir. 2011).

28

1 Settlement Class with a full opportunity to object. And there is no suggestion of  
2 collusion given that the named Plaintiffs also will not receive a disproportionate share  
3 of the recovery. The Settlement leaves the amount of any plaintiff service awards to  
4 the discretion of this Court. Plaintiffs' request for service awards will be made  
5 together with the request for attorneys' fees, affording Settlement Class Members  
6 ample time to object.

7 Fourth, the Settlement Agreement does not create a "clear sailing"  
8 arrangement, as reasonable attorneys' fees will be paid only upon Court approval of  
9 Plaintiffs' petition and no mention is made of Herbalife acquiescing to Plaintiffs'  
10 petition or agreeing not to dispute Plaintiffs' petition. *See generally* Settlement  
11 Agreement; *Compare In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947  
12 (9th Cir. 2011).

13 Fifth, no portion of the \$12.5 million Settlement Amount will revert back to  
14 Herbalife.

15 **3. The meaningful, well-tailored relief provided for the Class is**  
16 **adequate and appropriate for this case.**

17 In Plaintiffs' Counsel's estimation, the Settlement represents a strong result for  
18 the Settlement Class. The claims-based payments and corporate reforms set forth in  
19 the Settlement Agreement are meaningful provisions that provide direct benefits to  
20 Settlement Class Members, as well as the public. *See* Section IV(B)(3), *infra*.  
21 Moreover, the Court should grant preliminary approval because the proposed  
22 monetary payments, *cy pres* awards, and non-monetary components account for the  
23 nature of Plaintiffs' lawsuit and the interests of the silent Settlement Class Members,  
24 and because analysis of the Rule 23(e)(2)(C)(i)-(iv) shows that the relief provided for  
25 the Settlement Class is fair, reasonable, and adequate, supporting the conclusion that  
26 the Court will likely grant final approval.



1 a. The Proposed Settlement is within the range of  
2 reasonableness.

3 The purpose of the Court’s preliminary evaluation of the proposed Settlement  
4 is to determine whether it is within “the range of reasonableness,”<sup>9</sup> and thus whether  
5 notice to the class of the terms and conditions of the Settlement, and the scheduling  
6 of a formal fairness hearing, are worthwhile. Preliminary approval should be granted  
7 where “the proposed settlement appears to be the product of serious, informed, non-  
8 collusive negotiations, has no obvious deficiencies, does not improperly grant  
9 preferential treatment to class representatives or segments of the class, and falls within  
10 the range of possible approval.” *In re NASDAQ Market Makers Antitrust Litigation*,  
11 176 F.R.D. 99, 102 (S.D.N.Y. 1997). The proposed Settlement with Herbalife meets  
12 the standard for preliminary approval. The Settlement is entitled to an “initial  
13 presumption of fairness” because it is the result of arm’s-length negotiations among  
14 experienced counsel. 4 Newberg on Class Actions § § 11.22. et seq. (4th ed 2002), at  
15 § 11.41. The monetary consideration - \$12,500,000 – is substantial, particularly in  
16 light of the challenges Plaintiffs would face in prevailing on their claims against  
17 Herbalife, as outlined in Section IV(B)(3)(c) below.

18 The Settlement payment reflects a meaningful portion of the actual damages  
19 alleged to have been suffered by the Settlement Class and directly compensates  
20 Settlement Class Members for their ticket expenditures, subject to *pro rata* reduction  
21 should the total claimed amount exceed the Net Settlement Fund. Weighing the  
22 uncertainty associated with continued litigation against the guaranteed cash payment  
23 and non-monetary relief provided for in the proposed Settlement demonstrates that  
24

25 <sup>9</sup> See, e.g., *Yousefian v. 21<sup>st</sup> Century Ins. Co.*, CV101077JAKMANX, 2012 WL  
26 12878314, at \*2 (C.D. Cal. Mar. 8, 2012) (Kronstadt, J.) (“The class action settlement  
27 set forth in the Agreement, entered into among the Parties and their counsel, is  
28 preliminarily approved as it appears to be proper, to fall within the range of  
reasonableness . . .”)

1 the proposed Settlement is within the range of obtaining final approval as fair,  
2 reasonable, and adequate.

3 b. The provisional *cy pres* award relates to the nature of  
4 Plaintiffs’ lawsuit, the objectives of California’s  
5 Unfair Competition Law, and the interests of the  
6 Absent Class Members.

7 With respect to class action settlements that provide for a *cy pres* remedy, “[t]he  
8 district court’s review... is not substantively different from that of any other class  
9 action settlement,” with one exception. *Lane v. Facebook, Inc.*, 696 F.3d 811, 819-  
10 820 (9th Cir. 2012). In the Ninth Circuit “*cy pres* awards [must] meet a ‘nexus’  
11 requirement by being tethered to the objectives of the underlying statute and the  
12 interests of the silent class members.” *In re Google Referrer Header Privacy Litig.*,  
13 869 F.3d 737, 743 (9th Cir. 2017) (vacated and remanded on other grounds by *Frank*  
14 *v. Gaos*, 139 S. Ct. 1041 (2019)), citing *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039  
15 (9th Cir. 2011). This requirement is satisfied by ensuring that the *cy pres* remedy  
16 ‘account[s] for the nature of the plaintiffs’ lawsuit, the objectives of the underlying  
17 statutes, and the interests of the silent class members....’” *Lane*, 696 F.3d at 819-820  
18 quoting *Nachshin*, 663 F.3d at 1036.

19 Here, the proposal that funds be distributed to a potential *cy pres* recipient  
20 complies with the directives from the Ninth Circuit, because the funds will be used to  
21 promote the interests of vulnerable consumers threatened by deceptive and unfair  
22 trade practices. As noted above, Consumer Federation of America is a consumer  
23 protection agency focused on documenting consumer complaints, identifying unfair  
24 and deceptive fees and practices, and focusing on telemarketing tactics that negatively  
25 impact consumers.<sup>10</sup> *See generally*, Weintraub Decl.

26  
27 <sup>10</sup> More information about Consumer Federation of America can be found at their  
28 website, <https://consumerfed.org/> (last visited May 16, 2022).

1 c. The costs, risks, and delay from trial and appeal show  
2 that the recovery contained in the Settlement is  
3 adequate.

4 Although Plaintiffs are confident in the strength of their claims and their ability  
5 to ultimately prevail at trial, they nevertheless recognize that litigation is inherently  
6 risky. Given the substantial recovery obtained for the Settlement Class, and the  
7 uncertainties that would accompany continued litigation, there is little question that  
8 the proposed Settlement provides an adequate remedy on behalf of the Settlement  
9 Class Members.

10 First, there is a risk that Herbalife might prevail in motion practice, at trial, or  
11 on appeal, resulting in substantial delay or no relief for Settlement Class Members.  
12 For instance, if the litigation were to proceed, Herbalife may prevail in opposing  
13 Plaintiffs’ Motion for Class Certification or on their own Motion for Summary  
14 Judgment, both of which are fully briefed before the Court. While Plaintiffs believe  
15 they would prevail on both motions, success is not guaranteed. *See Rodriguez v. W.*  
16 *Publ’g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (noting that the elimination of “[r]isk,  
17 expense, complexity, and likely duration of further litigation” weighed in favor of  
18 approving settlement).

19 Second, there are substantial arguments that Herbalife made in its summary  
20 judgment motion and that it would present at trial that, if proven true, could undercut  
21 Plaintiffs’ claims. For example, Herbalife presented expert survey evidence opining  
22 that 88.7% of Herbalife distributors found “value” in Herbalife Event attendance, and  
23 expert correlation evidence opining that there is a positive, statistically significant  
24 relationship between attending Herbalife Events and distributor earnings. While  
25 Plaintiffs presented rebuttal evidence, Herbalife’s expert evidence could undermine  
26 Plaintiffs’ ability to recover on behalf of the Settlement Class.

27 Third, the passage of time has created another risk that supports the adequacy  
28 of this Settlement. The Class Period extends back to 2009. By the time of trial,

1 memories of key witnesses may have faded. This presents potential challenges to  
2 distributing a recovery to these Settlement Class Members. *See Rodriguez*, 563 F.3d  
3 at 966 (noting that an “anticipated motion for summary judgment, and . . . [i]nevitable  
4 appeals would likely prolong the litigation, and any recovery by class members, for  
5 years,” which facts militated in favor of approval of settlement).

6 Fourth, the Court may ultimately conclude that the *Bostick* class action  
7 settlement precludes some or all of the relief sought in this action. The central claim  
8 in *Bostick, et al. v. Herbalife International of America, Inc., et al.*, Case No. 2:13-cv-  
9 02488 (C.D. Cal.), was that Herbalife made misleading claims about the likelihood of  
10 success in pursuing the Herbalife business opportunity and success was unattainable.  
11 In 2015, this Court approved a class action settlement in *Bostick* that compensated the  
12 settlement class in the amount of \$17,500,000, primarily in the form of cash rewards  
13 for business opportunity losses. The settlement class period in *Bostick* was April 1,  
14 2009, to December 2, 2014. Herbalife has argued that the *Bostick* settlement covered  
15 broad business opportunity losses allegedly incurred by Herbalife distributors; so the  
16 Settlement Class here is barred from seeking to recover those same losses. Indeed,  
17 two of the Named Plaintiffs, Patricia Rodgers and Izaar Valdez, are *Bostick* settlement  
18 class members. *See* Dkt. 142 at 5-12.

19 The above risks, and others, which could result in the Settlement Class getting  
20 no relief or significantly less relief years down the road, when balanced against the  
21 proposed \$12.5 million recovery and proposed non-monetary relief in the form of  
22 corporate reforms, show that the Settlement is more than adequate.<sup>11</sup>

23 \_\_\_\_\_  
24 <sup>11</sup> The Ninth Circuit has stated that a district court is not required “to find a specific  
25 monetary value corresponding to each of the plaintiff class’s statutory claims and  
26 compare the value of those claims to the proffered settlement award. While a district  
27 court must of course assess the plaintiffs’ claims in determining the strength of their  
28 case relative to the risks of continued litigation...it need not include in its approval  
order a specific finding of fact as to the potential recovery for each of the plaintiffs’  
causes of action. Not only would such a requirement be onerous, it would often be

1 d. The proposed method of distributing relief on behalf  
2 of the Settlement Class is effective.

3 The proposed Settlement provides for making cash payments directly to the  
4 Settlement Class based on information and data provided by Herbalife regarding the  
5 Herbalife Event ticket purchases of each Settlement Class Member. The proposed  
6 Claim Form will indicate the amount spent on Herbalife Event tickets for each  
7 Settlement Class Member. Settlement Class Members will also have an opportunity  
8 to identify additional Herbalife Events for which they purchased tickets that are not  
9 included in Herbalife’s records. If A.B. Data reasonably determines that it needs  
10 further information or documentation to properly process a claim, it will so notify the  
11 claimant in writing. If the claimant fails to correct any deficient conditions identified,  
12 the claim may be rejected in whole or in part. Following the claims deadline set by  
13 the Court, the Claims Administrator will calculate the Net Settlement Fund amount.  
14 The Claims Administrator will then divide the Net Settlement Fund amount by the  
15 total number of Herbalife Event tickets purchased by Authorized Claimants (the “Per  
16 Event Award”). Each Authorized Claimant will be entitled to receive the Per Event  
17 Award for each Herbalife Event for which that Authorized Claimant purchased a  
18 ticket. *See* Settlement Agreement, ¶ 4.2.

19 The proposed Settlement also provides Settlement Class Members with an  
20 opportunity to identify additional Herbalife Events for which the Settlement Class  
21 Member purchased tickets, should Herbalife’s data not reflect such purchases. *Id.*

22 Further, should the total claimed amount exceed the Net Settlement Fund, the  
23 Settlement Agreement provides the Per Event Award shall be reduced according to a  
24 graduated scale set forth in the Settlement, as Herbalife’s expert evidence showed  
25

26 \_\_\_\_\_  
27 impossible—statutory or liquidated damages aside, the amount of damages a given  
28 plaintiff (or class of plaintiffs) has suffered is a question of fact that must be proved  
at trial.” *Lane*, 696 F.3d at 823.

1 that, on the spectrum of event attendance, those who attended the most events were  
2 more likely to be higher-earning distributors. In other words, the graduated scale  
3 seeks to ensure that the bulk of the Net Settlement Fund is apportioned to those  
4 Herbalife distributors who, on balance, were less likely to have found monetary value  
5 in event attendance.

6 Payments made to an Authorized Claimant may exceed the total amount that  
7 the Authorized Claimant spent on tickets to attend Herbalife Events during the Class  
8 Period, up to a total payment ceiling of 150 percent of the total amount spent on tickets  
9 by an Authorized Claimant. *Id.* Plaintiffs propose this increased cap on payments  
10 given that Herbalife does not keep track of event attendance at distributor-run events,  
11 like STSs. Although the Claim Form will invite Settlement Class Members to submit  
12 information regarding additional events they attended, this increased payment cap  
13 ensures that the Settlement Class is fairly compensated for all of their event  
14 attendance.

15 e. There are no other agreements required to be  
16 identified under Rule 23(e)(3).

17 Pursuant to Rule 23(e)(3), Plaintiffs state that there are no other agreements  
18 that would modify any term of the Settlement Agreement. The Settlement Agreement  
19 treats Settlement Class Members equitably relative to each other.

20 Each Settlement Class Member is entitled to the payment based on the number  
21 of event tickets purchased by that individual. As noted above, should the total claimed  
22 amount exceed the Net Settlement Fund, the Settlement Agreement provides the Per  
23 Event Award shall be reduced according to a graduated scale set forth in the  
24 Settlement, as Herbalife's expert evidence showed that, on the spectrum of event  
25 attendance, those who attended the most events were more likely to be higher-earning  
26 distributors. In other words, the graduated scale seeks to ensure that the bulk of the  
27 Net Settlement Fund is apportioned to those Herbalife distributors who, on balance,  
28 were less likely to have found monetary value in event attendance. Finally, the

1 proposed non-monetary relief in the form of corporate reforms benefit all Settlement  
2 Class Members equally in that it will create safeguards to prevent the type of conduct  
3 complained about in this action. As discussed above in Section III(D), the *cy pres*  
4 award, if any, is aimed at deterring the complained about conduct, including unfair  
5 and deceptive fees and practices, in other industries as well.

6 **C. The Court should approve the proposed program for class notice.**

7 If the Class is certified, “the court must direct to class members the best notice  
8 that is practicable under the circumstances, including individual notice to all members  
9 who can be identified through reasonable effort.” *Volkswagen*, 2017 WL 672727, at  
10 \*18 quoting Rule 23(c)(2)(B). Indeed, “the express language and intent of Rule  
11 23(c)(2) leave no doubt that individual notice must be provided to those class  
12 members who are identifiable through reasonable effort.” *Id.*, quoting *Eisen v.*  
13 *Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974). Notice must also comport with the  
14 Due Process Clause of the U.S. Constitution. *See Hendricks v. StarKist*, No. 13-  
15 00729, 2015 WL 4498083, at \*8 (N.D. Cal. July 23, 2015) quoting *Philips Petroleum*  
16 *Co. v. Shutts*, 472 U.S. 797, 812 (1985) (internal citations omitted).

17 Here, Plaintiffs’ proposed method of providing the notice of the Settlement to  
18 the Settlement Class Members satisfies these requirements.

19 **1. The proposed method of providing notice is the best notice**  
20 **practicable under the circumstances.**

21 Because each of the proposed Settlement Class Members is a current or former  
22 Herbalife distributor who provided their contact information (in various forms) as a  
23 condition of becoming an Herbalife distributor, Herbalife has contact information for  
24 each and every member of the Settlement Class. As part of the Settlement, Herbalife  
25 has agreed to provide the contact information (and any other information reasonably  
26 necessary for the Claims Administrator to provide notice) for all individuals who were  
27 Herbalife distributors during the Class Period, or about 2.7 million individuals (the  
28 putative class is a much smaller subset of the group of individuals who will receive

1 notice, as around 80,000 distributors purchased tickets to at least two Herbalife  
2 Corporate Events).<sup>12</sup> Sending notice to this larger group ensures that anyone who  
3 purchased a ticket to an Herbalife Event, including distributor-run events like STSs,  
4 will receive notice. The Claims Administrator will use that data to contact all  
5 prospective Settlement Class Members through email and, if necessary, through First-  
6 Class Mail. Therefore, the proposed Notice Program is more than adequate for this  
7 Settlement Class, and would be executed as follows, subject to Court approval.

8       **Direct Notice:** Claims Administrator will send an email to each and every  
9 person who was a U.S. Herbalife distributor (excluding those distributors who are not  
10 part of the Settlement Class) during the Class Period. The Email Notice will include  
11 a link to the Settlement Website where Settlement Class Members can be and  
12 download the Long Form, Claim Form, and other relevant documents. For any emails  
13 that bounce back, the Claims Administrator will send a copy of the Email Notice in  
14 printed form via First-Class Mail to the last known address of the applicable  
15 individual.

16       **Settlement Website:** The Claims Administrator will create and maintain a  
17 Settlement Website that will go live within 30 days of the entry of an order granting  
18 preliminary approval. The Settlement Website will remain active until at least 30 days  
19 after the effective date of the Settlement Agreement. It will post the Class Action  
20 Complaint, Settlement Agreement, Long Form, Claim Form, and *cy pres* proposals.  
21 It will notify Settlement Class Members of their rights to object or opt out, inform  
22 Settlement Class Members that they should monitor the Settlement Website for  
23 developments, and notify Settlement Class Members that no further notice will be  
24 provided to them once the Court enters the Final Order and Judgment, other than  
25

26 \_\_\_\_\_  
27 <sup>12</sup> Notice will not be sent to those Herbalife distributors who were President's Team  
28 or above throughout the Class Period, as they are excluded from the Settlement Class  
definition.



1 updates on the Settlement Website. Furthermore, the Claims Administrator will  
2 establish an email account and P.O. Box to which Settlement Class Members may  
3 submit questions regarding the Settlement. The Claims Administrator will monitor  
4 the email account and P.O. Box and respond promptly to administrative inquiries from  
5 Settlement Class Members and may direct substantive inquiries to Class Counsel.

6 **2. The contents of the notice are clear and appropriate and**  
7 **should be approved.**

8 The contents of the Proposed Long Form satisfy the requirements of Rule  
9 23(c)(2)(B) because the notice “clearly and concisely” states:

10 (i) the nature of the action; (ii) the definition of the Settlement Class  
11 certified; (iii) the Settlement Class claims, issues, or defenses; (iv) that  
12 a Settlement Class Member may enter an appearance through an  
13 attorney if the member so desires; (v) that the court will exclude from  
14 the Settlement Class any member who requests exclusion; (vi) the time  
15 and manner for requesting exclusion; and (vii) the binding effect of a  
16 class judgment on members under Rule 23(c)(3).

17 *Volkswagen*, 2017 WL 672727, at \*20 quoting Fed. R. Civ. P. 23(c)(2)(B). *See*  
18 *generally* Settlement Agreement, Exhibit A. Furthermore, the Long Form “provides  
19 a summary of the Settlement and clearly explain[s] how Class Members may object  
20 to or opt out of the Settlement, as well as how Class Members may address the Court  
21 at the final approval hearing.” *Volkswagen*, 2017 WL 672727, at \*20; *see id.* quoting  
22 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (“Notice is  
23 satisfactory if it generally describes the terms of the settlement in sufficient detail to  
24 alert those with adverse viewpoints to investigate and to come forward and be  
25 heard.”); *See generally* Settlement Agreement, Exhibit A.

26 In sum, the Settlement Website and Notice Program represent a cross-section  
27 of media and direct notice specifically chosen by the Claims Administrator to directly  
28 target likely Settlement Class Members and attain a wide and cost-effective reach.

1 The format and language of the Long Form has been drafted so that it is in plain  
2 language, is easy to read, and will be readily understood by the Proposed Settlement  
3 Class Members, thus satisfying the requirements of Rule 23 and Due Process.

4 Under the circumstances of this case, the proposed Notice Program constitutes  
5 the best notice practicable. Plaintiffs thus request that the Court direct that the Notice  
6 Program described herein be effectuated.

7 **V. CONCLUSION**

8 For the foregoing reasons, Plaintiffs respectfully request that the Court grant  
9 Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and enter an  
10 Order consistent with the proposed form attached.

11 DATED: May 27, 2022

Mark Migdal & Hayden

12 By: /s/ Etan Mark

13 Etan Mark

14 Attorneys for Plaintiffs Patricia Rodgers,  
15 Jennifer Ribalta, and Izaar Valdez

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28