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18 **UNITED STATES DISTRICT COURT**

19 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

20 **MICHAEL LAVIGNE, *et al.*,**
21 **Plaintiffs,**

22 **vs.**

23 **HERBALIFE LTD., *et al.*,**
24 **Defendants.**

CASE NO. 2:18-cv-07480-JAK (MRWx)

[Related Case 2:13-cv-02488-BRO-RZ]

**PLAINTIFFS' NOTICE OF
MOTION; MOTION FOR FINAL
APPROVAL OF CLASS COUNSEL'S
ATTORNEY FEES,
REIMBURSEMENT OF EXPENSES
AND SERVICE AWARDS**

Date: October 16, 2023

Time: 9:30 AM

Courtroom: 10B

Assigned to Hon. John A. Kronstadt

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that Plaintiffs Patricia Rodgers, Jennifer Ribalta
4 and Izaar Valdez (“Plaintiffs”) will move the Court for an order, pursuant to Rules
5 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure (1) for an award of
6 attorneys’ fees of \$4,166,666 in accordance with Ninth Circuit precedent; (2)
7 reimbursement for incurred expenses; and (3) to grant service awards for the class
8 representatives.

9 Specifically, the Class requests that the Court:

10 1. Grant counsel’s request for a payment of \$4,166,666 of the
11 \$12,500,000.00 settlement fund (“Settlement Fund”), which the Court has
12 preliminarily approved. *See* ECF No. 396 (order preliminarily approving class action
13 settlement).

14 2. Grant counsel’s request for a payment of \$337,926.03 to reimburse
15 incurred litigation costs and expenses.

16 3. Grant counsel’s request for service awards for the named plaintiffs of the
17 additional Settlement Fund. Specifically, awards of \$30,000 for Plaintiff Patricia
18 Rodgers; \$30,000 for Plaintiff Jennifer Ribalta; and \$18,000 for Plaintiff Izaar
19 Valdez.

20 The Class’s motion is based on this Notice of Motion and Motion, the
21 accompanying Memorandum of Points and Authorities, the First Declaration of Etan
22 Mark and the exhibits attached thereto (ECF No. 392-1), the Second Declaration of
23 Etan Mark and the exhibits thereto (attached as an Exhibit to this motion), the
24 Declaration of Jason Jones (ECF No. 392-2), the Declaration of Patricia Rodgers
25 (ECF No. 392-3), the Declaration of Jennifer Ribalta (ECF No. 392-4), the
26 Declaration of Izaar Valdez (ECF No. 392-5), the Court’s files and records in this
27 matter, argument of counsel, and such other and further matters as the Court may
28 consider.

1 DATED: June 19, 2023

Mark Migdal & Hayden

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By:

Etan Mark
Attorneys for Plaintiffs Patricia Rodgers,
Jennifer Ribalta, and Izaar Valdez

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Over the past six years, Counsel for the Settlement Class Members¹ and the
4 named Plaintiffs have expended thousands of hours working to obtain a meaningful
5 monetary and non-monetary recovery for the Settlement Class Members. The journey
6 has been long and arduous, spanning courts in the Southern District of Florida, Central
7 District of California, and the Eleventh Circuit Court of Appeals, the taking of dozens
8 of fact depositions, reviewing, producing, and exchanging hundreds of thousands of
9 pages of discovery, deposing forty witnesses (including eight experts), and fully
10 briefing and attending hearings on motions to compel arbitration, dismiss pleadings,
11 strike pleadings, exclude expert testimony, compel discovery, and summary
12 judgment.

13 For many of these hurdles, a stumble would have been the death knell to this
14 class and this case. Yet Class Counsel was able to secure evidence and present
15 arguments which provided a path to class wide recovery and relief. In addition to
16 establishing a non-reversionary common settlement fund of \$12,500,000, Herbalife
17 will be substantially modifying its corporate policies to directly address some of the
18 underlying causes of the harm that has occurred here.

19 Plaintiffs and their Class Counsel now seek a final award of: (1) \$4,166,666 for
20 fees (33 1/3% of the Settlement Fund); (2) \$337,926.03 to fully reimburse incurred
21 litigation costs and expenses; and (3) service awards for the named plaintiffs in the
22 amount of \$30,000 for Plaintiffs Patricia Rodgers and Jennifer Ribalta and \$18,000
23 for Plaintiff Izaar Valdez.

24 The Court has already determined Plaintiffs' cost request to be reasonable. *See*
25 *Order Regarding Plaintiffs' Motion for Preliminary Approval Of Class Action*

26
27 _____
28 ¹ Capitalized terms used herein are defined with reference to the Settlement Agreement.

1 Settlement (ECF No. 396, the “April 6 Order”), 52. The Court has also determined
2 that the hourly rates proposed by Class Counsel are reasonable, *id.* at 33, and that an
3 appropriate lodestar for this case is \$3,935,807, *id.* at 41-51. Finally, the Court
4 preliminarily approved:

- 5 - a fee award in the range of \$3.125 million to \$4,166,166 (*id.* at 51)
- 6 - a service award of \$20,000 to \$30,000 for Plaintiffs Rodgers and Ribalta and a
7 service award of \$12,000 to \$18,000 for Plaintiff Valdez (*id.* at 23-24).

8 The requested fee is consistent with other decisions in this Circuit under either
9 the percentage-of-recovery method or lodestar cross-check for similarly complex
10 class action cases. Even under the Court’s reduced lodestar, Class Counsel is seeking
11 a 1.058 multiplier, well below the three to four times multiplier commonly awarded
12 in complex commercial class action cases. As to the specific service award requests,
13 the amounts sought reflect not only the hundreds of hours devoted in service to
14 prosecuting this action, but also the extraordinary adverse impact this litigation has
15 had on the lives of each class representative, including being cut-off from friends and
16 other close personal relationships.

17 For these reasons and as further discussed below, Plaintiffs respectfully request
18 that the Court grant the Motion.

19 **II. BACKGROUND**

20 **a. Summary of Litigation**

21 This case was filed on September 18, 2017.

22 Since that time, the work put in by Class Counsel is borne out by the time
23 records summary attached as exhibits to Plaintiffs’ Motion for Class Counsel’s
24 Attorney Fees, Reimbursement of Expenses and Service Awards (“Initial Fee
25 Motion,” ECF No. 392), but the following points are worth emphasizing:

- 26 • The Settlement fully and completely resolves two intertwined matters: *Lavigne,*
27 *et al. v. Herbalife Ltd.*, Case No. 1:17-23429-MGC (S.D. Fla.) (the “Florida
28 Action”) and this action. These actions involve the same Herbalife Events, and

1 claims brought on behalf of the same class that the Parties seek to certify
2 through a settlement here. The absence of a contractual relationship (and
3 accompanying venue provision) between Plaintiffs and certain individual
4 Defendants resulted in the bifurcation of the case on August 23, 2018. *See*
5 Florida Action at ECF No. 106. The Florida Action is now stayed; the Parties
6 intend to dismiss the Florida Action should this Court finally approve the
7 Parties’ proposed class Settlement. *See* Florida Action, ECF No. 235; Initial
8 Declaration of Etan Mark, available at ECF No. 392-1 (the “Initial Mark
9 Decl.”) at ¶ 4.

10 **Case Dispositive Filings**

- 11 • Class Counsel staved off several case dispositive filings, including a motion to
12 compel arbitration [Florida Action ECF No. 62] and multiple motions to
13 dismiss in this action and the Florida Action. *Id.*
- 14 • In the Florida Action, after the motion to compel arbitration was denied, the
15 Defendants appealed that order to the 11th Circuit Court of Appeals. The matter
16 was briefed and argued, and the 11th Circuit Court of Appeals affirmed the trial
17 court. ECF No. 106 (the “Order Re: Arbitration”).
- 18 • The day before Herbalife filed its second Motion to Dismiss, Plaintiffs filed
19 their Motion to Certify Class (“Class Certification Motion”) which was also
20 briefed and argued before the Court. *See* ECF Nos. 207, 218, 234, and 261. *Id.*
- 21 • While the Second Motion to Dismiss and Class Certification Motion were
22 pending, the Parties extensively briefed Herbalife’s Motion for Summary
23 Judgment (ECF No. 322) and collectively briefed eight separate *Daubert*
24 motions. *See* ECF Nos. 323-338, 341-349. *Id.*
- 25 • After the Eleventh Circuit issued its mandate in August 2020, the parties in
26 that action engaged in two rounds of briefing on the Individual Defendants’
27 Motion to Dismiss and had oral argument before Judge Cooke on that motion
28

1 to dismiss. At the time of Settlement, Plaintiffs were in the process of
2 amending their complaint. *Id.*

3 **Discovery**

- 4 • The Defendants produced more than 400,000 pages of documents in the cases.
5 Initial Mark Decl. at ¶ 4. Mr. Jones, counsel for the Plaintiffs, spent hundreds
6 of hours reviewing these documents, watching videos, and investigating the
7 allegations in painstaking detail. *See* Jones Decl. at ¶¶ 4, 6.
- 8 • Forty depositions were taken. Initial Mark Decl. at ¶ 4.
- 9 • In the California Action, Plaintiffs had seven separate discovery hearings
10 before Magistrate Judge Michael R. Wilner (ECF Nos. 176, 190, 191, 206,
11 221, 253, and 288); there were also seven discovery hearings before Magistrate
12 Judge Goodman in the Southern District of Florida. *Id.*
- 13 • Both sides collectively designated eight experts. Each prepared an expert
14 report and each was deposed. *Id.*

15 **Mediations**

- 16 • The Parties engaged in two mediations. *Id.* at ¶ 5.
- 17 • First, on August 17, 2020, the Parties attended a mediation, conducted
18 virtually, with the Hon. Suzanne Segal (Ret.). Second Declaration of Etan
19 Mark, attached hereto as an exhibit (the “Second Mark Decl.”) at ¶ 4.
20 Ultimately, the Parties reached an impasse. *See* ECF No. 278.
- 21 • On May 27, 2021, the Parties engaged in a second mediation with the Hon. S.
22 James Otero (Ret.). Second Mark Decl. at ¶ 5. This second mediation was in-
23 person. *Id.* at ¶ 6. Following the mediation, the Parties’ settlement negotiations
24 continued over five months. *Id.* at ¶ 7.
- 25 • The Parties ultimately accepted a mediator’s proposal to resolve the matter
26 and, through counsel, reached the proposed Settlement Agreement (ECF No.
27 383).
- 28

1 **b. The Settlement**

2 The Settlement Agreement provides two separate and meaningful benefits to
3 the Class.

4 First, Herbalife has agreed to pay \$12.5 million into a Settlement Fund—none
5 of which will revert to Herbalife absent termination or rescission of the Settlement
6 Agreement—to be used for the payment of Settlement Class claims, any approved
7 attorney’s fees, expense reimbursement, any approved Plaintiff service awards,
8 dissemination of class notice, the administrative costs of the Settlement, and, if funds
9 remain, approved *cy pres* distributions. *See generally* Settlement Agreement.

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

28

1 **c. The Court’s Preliminary Order**

2 On May 27, 2022, Plaintiffs filed their Motion for Preliminary Approval of
3 Class Action Settlement (the “Motion for Preliminary Approval,” ECF No. 384). On
4 October 21, 2022, Plaintiffs filed their Initial Fee Motion. ECF No. 392. On April 6,
5 2023, the Court granted the Motion for Preliminary Approval. ECF No. 396. Below
6 is a summary of the Court’s preliminary rulings:

- 7 - An award above the 25% benchmark for class action settlements in the
8 Ninth Circuit may be warranted. *Id.* at 26.
- 9 - The rates of each attorney and professional were reasonable. *Id.* at 33.
- 10 - Counsel’s proposed lodestar of \$4,564,849 (9,840 hours) may be adjusted
11 to \$3,935,806.50 (8,536.8 hours). *Id.* 42-51. This reflected a reduction in the
12 lodestar of \$629,043.00. *Id.* at 42.
- 13 - A fee award in the range of \$3.125 million to \$4,166,166. *Id.* at 51. This
14 reflected a range of 25% to 33.33% of the Settlement Fund.
- 15 - An award of \$337,926.05 in litigation costs. *Id.* at 51-52.
- 16 - A service award of \$20,000 to \$30,000 for Plaintiffs Rodgers and Ribalta
17 and a service award of \$12,000 to \$18,000 for Plaintiff Valdez. *Id.* at 23-24.

18 **d. Notice to the Class**

19 Consistent with the Court’s April 19, 2023 Order (ECF No. 398), the Class
20 Administrator launched the Settlement Website on May 5, 2023 and disseminated the
21 Notice of Settlement to the Class on May 19, 2023. *See* Second Mark. Decl. at ¶ 9.
22 The Notice of Settlement explained:

23 Class Counsel’s attorneys’ fee request will not exceed 33 1/3 % of the
24 Settlement Amount of \$12,500,000, or \$4,166,667. Additionally, Class
25 Counsel will seek reimbursement of their out-of-pocket litigation
26 expenses as part of their application for attorney’s fees, which will be
27 posted on www.HerbalifeClassActionSettlement.com at least 14 days
28 before the objection deadline.

1 Class Counsel will also ask the Court to approve service award
2 payments not to exceed thirty thousand dollars (\$30,000) to each of the
3 individual Class Representatives, who are Patricia Rodgers, Jennifer
4 Ribalta, and Izaar Valdez.

5 *Id.* at ¶ 10. As of the filing of this motion, no objection has been filed. *Id.* at ¶ 11.²

6 **e. Attorneys’ Fees Subsequent to Preliminary Approval**

7 After filing its Motion for Class Counsel’s Attorney Fees, Reimbursement of
8 Expenses and Service Awards (“Initial Fee Motion,” ECF No. 392) Class Counsel has
9 incurred attorney fees to notice the class and will expend time to prepare a motion for
10 final approval and attend hearing on final approval.

11 **III. ARGUMENT**

12 **a. Attorneys’ Fees**

13 **i. Methods of evaluating attorneys’ fees in common fund cases.**

14 “In a certified class action, the court may award reasonable attorney’s fees and
15 nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ.
16 P. 23(h). Where a settlement produces a common fund for the benefit of the entire
17 class there are two methods of calculating attorneys’ fees: (1) the percentage of
18 recovery method, and (2) the lodestar/multiplier method. *In re Bluetooth Headset*
19 *Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). The Court can choose either
20 method and/or conduct a cross-check using both methods. *Resnick v. Frank (In re*
21 *Online DVD Rental Antitrust Litig.)*, 779 F.3d 934, 949 (9th Cir. 2015); *see also*
22 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); April 6 Order
23 (citing *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010)).
24 Under the percentage method, the court may award class counsel a percentage of the
25 common fund recovered for the class. *Id.* at 942. Under the lodestar method, courts

26
27
28 ² If any objections are filed after this motion is filed, Class Counsel will notify the
Court and respond to those objections before the Final Hearing.

1 multiply the number of hours the prevailing party reasonably expended on the
2 litigation by a reasonable hourly rate and, if appropriate, can apply a multiplier to the
3 lodestar. *Bluetooth*, 654 F.3d at 941.

4 Courts in this circuit routinely hold that “the best way to guard against a
5 windfall is first to examine whether a percentage represents too high a multiplier of
6 counsel’s lodestar.” *Edwards v. Nat’l Milk Producers Fed’n*, 11-CV-04766-JSW,
7 2017 WL 3616638, at *9 (N.D. Cal. June 26, 2017), *objections overruled*, 11-CV-
8 04766-JSW, 2017 WL 3623734 (N.D. Cal. June 26, 2017), *aff’d sub nom. Edwards v.*
9 *Andrews*, 846 Fed. Appx. 538 (9th Cir. 2021), *and aff’d sub nom.* Selection of either
10 the lodestar or percentage of fund method with using either method as a cross check
11 yields a reasonable fee of \$4,166,666.

12 **ii. Percentage of Fund**

13 **1. A one-third fee is reasonable under the “Percentage of**
14 **the Fund” method.**

15 The benchmark percentage of 25 percent of the total settlement award may be
16 adjusted when warranted. *Carlin v. Dairy America, Inc.*, 380 F.Supp.3d 998, 1019
17 (E.D. Cal. 2019) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir.
18 1998)). To determine whether an upward adjustment is appropriate the following five
19 factors should be considered: (1) the results achieved for the class; (2) the complexity
20 of the case and the risk of and expense to counsel of litigating it; (3) the skill,
21 experience, and performance of counsel on both sides; (4) the contingent nature of the
22 fee; and (5) fees awarded in comparable cases. See *id.* at *Vizcaino v. Microsoft Corp.*,
23 290 F.3d 1043, 1048-50 (9th Cir. 2002).

24 The Court considered Class Counsel’s arguments raised regarding the
25 *Vizcaino* factors in its Initial Fee Motion stating “an award above the 25% benchmark
26 may be warranted. Whether to do so, as well as the amount of the increase, are matters
27 that are considered in connection with the lode-star cross-check analysis.” April 6
28 Order at p. 26.

1 In an abundance of caution, Class Counsel briefly revisit each of the *Vizcaino*
2 factors to explain how each factor weighs in favor of awarding the requested
3 \$4,166,666, which amounts to 33.33% of the Settlement Fund.

4 *a. Counsel Obtained an Exceptional Result for the*
5 *Plaintiffs.*

6 “The overall result and benefit to the class from the litigation is the most critical
7 factor in granting a fee award.” *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036,
8 1046 (N.D. Cal. 2008).

9 For the reasons argued in Herbalife’s Motion for Summary Judgment (ECF No.
10 322) and Herbalife’s Response in Opposition to Plaintiff’s Motion to Certify the Class
11 (ECF No. 218), this litigation was fraught with risk, with the constant specter that the
12 Court would not certify the class due to (according to Herbalife) the predominance of
13 individual issues over common ones.

14 Aside from the risks associated with the class not being certified, there was a
15 possibility of large swaths of the damages sought in this action being excluded based
16 on statutes of limitations defenses, whether damages for non-Herbalife corporate
17 events (or “STS” events) could be obtained, the applicability of the *Bostick* release,
18 the contention that the vast majority of Herbalife distributors reported recognizing
19 “value” from events, and the conclusions of Herbalife’s correlation expert that there
20 is a statistically positive correlation between those who attend events and the amount
21 of money they earn pursuing the Herbalife opportunity. *See generally* ECF No. 218.
22 If, for example, STS event damages could not be proven and the Plaintiffs were held
23 to a four-year statute of limitations from when they first discovered their injury (which
24 Herbalife argued was at the time they realized they were losing money), then the
25 maximum recoverable damages for the Plaintiffs was \$21MM. ECF. No. 322 at 21.;
26 Initial Mark Decl. at ¶ 6. As such a settlement of 12.5MM, which was the product of
27 a mediator’s proposal, is an outstanding result.

28 In addition to the significant monetary recovery obtained here, Herbalife has

1 also agreed to substantial injunctive relief that drastically alters Herbalife’s corporate
2 policies as it pertains to events and the event system. Initial Mark Decl. at ¶ 9.

3 As alleged in the Amended Complaint, Plaintiffs contend in this action that
4 Herbalife’s Circle of Success is premised on a combination of emotional manipulation
5 and peer pressure; coupled with statements guaranteeing financial success or
6 statements in which attendees are told attendance is “mandatory.” See ECF No. 202
7 at ¶¶ 1, 4, 5, 7. Specific examples of high-level distributors stating that event
8 attendance is mandatory or directly correlating event attendance to financial success
9 within Herbalife are referenced throughout the Amended Complaint and in the
10 Plaintiffs’ briefing. See Initial Mark Decl. at ¶ 10. Moreover, “a primary focus of each
11 event is aggressively encouraging distributors to attend future events – and using
12 hard-selling tactics to get participants to purchase their non-refundable tickets on
13 site.” ECF No. 339 at 10-11; Initial Mark Decl. at ¶ 11.

14 The injunctive relief obtained here directly mitigates these alleged tactics. As a
15 result of the Settlement, Herbalife is required to amend its corporate policies to state
16 that event attendance is not mandatory, to state that event attendance does not
17 guarantee financial success, to include disclaimers on all event promotional materials,
18 and to amend its policies to allow for a refund for any ticket purchases within 24 hours
19 of purchase. See ECF No. 282 at ¶ 5.1.1 – ¶ 5.1.5; Initial Mark Decl. at ¶ 12.

20 It is impossible to place a monetary value on this hard-fought injunctive relief.
21 In considering, however, the requested upward adjustment in Counsel’s fees, “courts
22 should consider the value of the injunctive relief obtained as a ‘relevant circumstance’
23 in determining what percentage of the common fund class counsel should receive as
24 attorneys’ fees.” *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003).

25 *b. Counsel Have Taken Significant Risks Prosecuting*
26 *This Litigation.*

27 Counsel assumed a significant risk in undertaking this litigation. See Initial
28 Mark Decl., ¶ 20. Counsel committed their time, money, and energy to the prosecution

1 of a multi-year, multi-district litigation against more than 20 defendants represented
2 by three separate sets of law firms. *See id.* Class Counsel have expended millions of
3 dollars of their time and incurred hundreds of thousands of dollars in expenses, all on
4 a purely contingent basis. *See id.* Counsel have turned away other case opportunities
5 over the last six years to dedicate the time and resources needed to prosecute the
6 Class’s claims. *Id.*

7 *c. Advancing the Litigation to this Point and Obtaining*
8 *the Settlements Has Required Professional Skill.*

9 The docket and the procedural history in this this case demonstrate Class
10 Counsel’s expertise and the Class’s successes to date. Counsel have done much to
11 prosecute the Class’s claims effectively and efficiently. Defendants have hired
12 excellent defense counsel to defend them against the Class’s claims. *See Barbosa v.*
13 *Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 449 (E.D. Cal. 2013) (“The quality of
14 opposing counsel is important in evaluating the quality of Class Counsel’s work”).
15 Indeed, Class Counsel has litigated this case to a successful conclusion despite
16 multiple motions to dismiss, a motion for summary judgment, an opposition to class
17 certification, motions to disqualify experts and 40 depositions.

18 *d. Awards in Similar Complex Cases Demonstrate That*
19 *Class Counsel Seek a Reasonable Fee Award.*

20 It is challenging to assess the requested fee award compared to a likely recovery
21 because many potentially dispositive questions remained unresolved – putting aside
22 whether the class would be certified at all.

23 Although it is hard to predict which of the different damages outcomes was
24 “most likely,” certainly one very possible outcome was an assessment of \$38 million
25 in damages against Herbalife, which represented the damages of all events, including
26 STS events, limiting claims to those arising four years prior to the filing of the lawsuit
27 and excluding those distributors who signed arbitration agreements. Under that
28 scenario, a \$12.5 million settlement represents a 32.8% recovery of the \$38 million

1 of damages for any distributor who attended his/her first event after August 2013
2 which is four years prior to the filing of the complaint. Courts in the Ninth Circuit
3 have awarded 33% of attorneys' fees from the common fund to lawyers who obtained
4 settlement amounts that comprised similar percentage shares of claimed amount of
5 damages. *See, e.g., Syed v. M-I, L.L.C.*, No. 1:12-cv-01718-DAD-MJS, 2017 WL
6 3190341, at *4, 6-8 (E.D. Cal. July 26, 2017) (awarding one-third in fees when the
7 common fund represents 35% of damages); *Torres v. Pick-A-Part Auto Wrecking*, No.
8 1:16-cv-01915-DAD-BAM, 2018 WL 3570238, at *5, 7 (E.D. Cal. July 23, 2018)
9 (awarding one-third in fees when the common fund represents between 5% and 44%
10 of damages); *Carter v. San Pasqual Fiduciary Tr. Co.*, No. SACV 15- 1507 JVS
11 (JCGx), 2018 WL 6174767, at *4 (C.D. Cal. Feb. 28, 2018) (awarding one-third in
12 fees when the common fund represents 35% of damages); *Boyd v. Bank of Am. Corp.*,
13 No. SACV 13-0561-DOC (JPRx), 2014 WL 6473804, at *9-12 (C.D. Cal. Nov. 18,
14 2014) (awarding one-third in fees when the common fund represents 36% of
15 damages); *Moreyra v. Fresenius Med. Care. Holdings, Inc.*, No. SACV 10-517 JVS
16 (RZx), 2013 WL 12248139, at *3- 4 (C.D. Cal. Aug. 7, 2013) (awarding one-third in
17 fees when the common fund represents 32% of damages). Indeed, "California courts
18 routinely award attorneys' fees of one-third of the common fund." *Beaver v. Tarsadia*
19 *Hotels*, No. 11-cv-01842-GPC-KSC, 2017 WL 4310707, at *9 (S.D. Cal. Sep. 28,
20 2017). Moreover, "[d]istrict courts in this circuit have routinely awarded fees of one-
21 third of the common fund or higher after considering the particular facts and
22 circumstances of each case." *Id.* at *10. *See also Smith v. CRST Van Expedited, Inc.*,
23 No. 10-cv1116-IEG (WMC), 2013 WL 163293, at *5 (S.D. Cal. Jan. 14, 2013)
24 ("Under the percentage method, California has recognized that most fee awards based
25 on either a lodestar or percentage calculation are 33 percent.").

26 An award of 33 1/3% is also typical in RICO class action claims in this circuit.
27 *See, e.g., Perez v. DirecTV Group Holdings, LLC*, 816CV01440JLSDFM, 2023 WL
28 1931376, at *7 (C.D. Cal. Jan. 23, 2023), *appeal dismissed sub nom. Perez v.*

1 *DirectTV, LLC*, 23-55131, 2023 WL 3391488 (9th Cir. Mar. 30, 2023) (approving
2 one-third in fees noting that “given the complexities inherent in litigating RICO
3 claims,” a recovery representing 12.7% of the class members’ maximum potential
4 recovery “represents a superior results”); *Carlin v. DairyAmerica, Inc.*, 380 F. Supp.
5 3d 998, 1029 (E.D. Cal. 2019) (approving fee award of 33.3% of the total Settlement
6 Fund for RICO class action, noting “the complexity of this suit is evident”).

7 Class Counsel’s request is thus consistent with recognized “market rates,” *i.e.*,
8 rates typically awarded in similar contingency fee cases in this District and across the
9 United States, see *Vizcaino*, 290 F.3d at 1050, particularly in light of the posture of
10 the litigation and the state of the Class’s evidence here.

11 *e. Counsel Undertook a Significant Financial and*
12 *Resource Burden in Prosecuting the Class’s Claims*

13 Counsel have invested significant amounts of time, money, and resources in
14 this case for over five years, as shown in their time and expense records. Class
15 Counsel’s time submissions illustrate the point. Initial Mark Decl., ¶ 4. This litigation
16 has required a significant devotion of Class Counsel for the past few years including
17 the discovery, motion practice, case management and mediation efforts made since
18 September 2017. Initial Mark Decl., ¶ 4.

19 **iii. Lodestar**

20 The Court held that whether to deviate from the Ninth Circuit’s 25%
21 benchmark and by how much hinged on a lode-star cross-check analysis. In its Initial
22 Fee Petition, Class Counsel submitted a lodestar of \$4,564,849.00 which was a result
23 of 9,840 recorded hours. See April 6 Order at 26-42. After a comprehensive, 9-page
24 analysis, the Court found a downward adjustment to that lodestar in the amount of
25 \$629,043 was warranted, reducing the lodestar to \$3,935,807 constituting 8,536.8
26 hours. *Id.* at 42-51.

1 Even with the adjusted lodestar,³ counsel’s request for 1/3 of the settlement
2 fund would still lead to a modest 1.058 multiplier of the adjusted lodestar. The Court
3 should apply the 1.058 multiplier and award the \$4,166,166.00 in fees sought by Class
4 Counsel.

5 **1. Legal Standard**

6 “The lodestar figure is calculated by multiplying the number of hours the
7 prevailing party reasonably expended on the litigation (as supported by adequate
8 documentation) by a reasonable hourly rate for the region and for the experience of
9 the lawyer.” *In re Bluetooth Headset Prods.*, 654 F.3d at 941. After the lodestar
10 amount is determined, a trial court “may adjust the lodestar upward or downward
11 using a ‘multiplier’ based on factors not subsumed in the initial calculation of the
12 lodestar.” *Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir.
13 2000). Such factors “‘includ[e] the quality of representation, the benefit obtained for
14 the class, the complexity and novelty of the issues presented, and the risk of
15 nonpayment.” *Stetson v. Grissom*, 821 F.3d 1157, 1166–67 (9th Cir. 2016) (quoting
16 *In re Bluetooth Headset Prods.*, 654 F.3d at 941–42).

17 A lodestar cross-check may be used to ensure that class counsel has done the
18 work necessary to justify the fee sought. *Vizcaino*, 290 F.3d at 1050. “[T]he lodestar
19 cross-check calculation need entail neither mathematical precision nor bean-counting.
20 The district courts may rely on summaries submitted by the attorneys and need not
21 review actual billing records.” *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07
22 (3d Cir. 2005)) (citation omitted).

23 **2. Counsel’s hourly rates are reasonable.**

24 The general principle for determining the reasonableness of hourly rates is that
25 they “are to be calculated according to the prevailing market rates in the relevant
26 _____

27 ³ Class Counsel reaffirms to the Court that they indeed worked all of the hours that
28 were adjusted (*see* Mark Decl. at 13) and reaffirms that all of those hours were
necessary to the success of the case (*see* Mark Decl. at 13).

1 community.” *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984); *Wilbur v. City of Mount*
2 *Vernon*, 2014 WL 11961980, at *1 (W.D. Wash. Apr. 15, 2014) (quoting *Dang v.*
3 *Cross*, 422 F.3d 800, 813 (9th Cir. 2005)).

4 Here, the Court has already found that Class Counsel’s “discounted rates are
5 reasonable in light of the experience of counsel as well as the amounts charged by
6 other counsel who have performed similar work in this District in class action
7 matters.” April 6 Order at 33. It is worth noting, however, that those rates are
8 significantly less than those typically approved by this Court in petitions for fees in
9 class action cases. *See e.g., Lim v. Transforce, Inc., et al.*, Case No. 2:19-cv-04390-
10 JAK-AGR, ECF No. 209 (Order Re: Final Approval), pp. 20-30 (approving rates
11 ranging from \$690 to \$1,105 for senior attorneys); *Alfred v. Pepperidge Farm*,
12 LACV1407086JAKX, 2022 WL 17066171, at *16 (C.D. Cal. Mar. 4, 2022)
13 (approving rates ranging from \$690 to \$925 for senior attorneys); *Jimenez v. Allstate*
14 *Ins. Co.*, LACV1008486JAKFFMX, 2021 WL 4316961, at *11 (C.D. Cal. Sept. 16,
15 2021) (approving rates ranging from \$700 to \$900 for senior attorneys).

16 Moreover, the rates proposed in support of Class Counsel’s fee application
17 were never raised to take into account market adjustments or inflation. For example,
18 the current hourly rates for Etan Mark, Josh Migdal, and Yaniv Adar are each at least
19 fifteen (15%) higher than those sought in this fee petition. *See* Second Mark Decl. at
20 ¶ 12.

21 Given the heavily discounted rates proposed by Plaintiff’s counsel and the
22 modest nature of those rates when compared to similar fee awards in putative class
23 actions, Counsel’s proposed hourly rates are “below the prevailing market rates in the
24 relevant community.” *Blum*, 465 at 895 n. 11.

25 **3. Class Counsel’s fee request is reasonable even under the**
26 **Court’s adjusted lodestar of \$3,935,806.50.**

27 The total amount of attorneys’ fees supporting the initial fee petition was
28 \$4,564,848.50. ECF No. 392-1 at ¶ 4. The Court found a downward adjustment to

1 that lodestar in the amount of \$629,043 was warranted, reducing the lodestar to
2 \$3,935,807. April 6 Order at 42-51.

3 As mentioned above, Class Counsel reaffirms to the Court that all of the hours
4 billed were necessary to the prosecution of this case. *See* Second Mark Decl. at 13. In
5 response to certain issues raised in the April 6 Order, Class Counsel further submits:

- 6 - The time necessary to resolve many of the tasks in this litigation was
7 increased substantially due the bifurcation of the claims in two separate
8 judicial districts. *Id.* at 14. Herbalife and the Individual Defendants were
9 material witnesses in both the California and Florida Actions, yet any
10 discovery sought in either action had the added layer of complexity of
11 dealing with non-parties. *Id.* at 15. For example, to obtain testimony from
12 the Individual Defendants (parties in the Florida Action) in the California
13 Action, Class Counsel had to initiate a Rule 45 miscellaneous action in the
14 Southern District of Florida to secure their testimony and documents as non-
15 parties. Similarly, to obtain evidence from Herbalife in the Florida Action,
16 Class Counsel had to treat Herbalife as a non-party and navigate through
17 Rule 45 in those proceedings. *Id.* at 16.
- 18 - Similarly, the time necessary to obtain discovery was enhanced due to
19 aggressive positions taken by defense counsel in both the Florida and
20 California Actions. *Id.* at 17. For example, defense counsel in both actions
21 initially refused to produce any documents while their motions to dismiss
22 were pending (despite the absence of a stay). *Id.* at 18. Documents that were
23 ultimately produced were only done so after dozens of hours meeting,
24 conferring, and corresponding and, in many instances, briefing and arguing
25 motions to compel. *Id.* at 19.
- 26 - Further complicating discovery in this case was the need for travel and
27 litigation in foreign jurisdictions. *Id.* at 20. Class Counsel traveled to several
28 in-person depositions and litigated discovery disputes not only in the

1 Southern District of Florida and the Central District of California, but also
2 the Middle District of Florida and the Western District of Oklahoma. *Id.* at
3 21.

4 - Regarding the utilization of 11 attorneys in this matter, Class Counsel notes
5 the following on this point:

6 ○ Two of the attorneys (Levin and Gibbs) were hired as local counsel
7 given the involuntary transfer of the case to the Central District of
8 California. *Id.* at 22. Those two attorneys billed less than 2% of the
9 recorded hours on the case. *Id.* at 23.

10 ○ The duration and size of the litigation required Mark Migdal &
11 Hayden to utilize different attorneys at different stages of the
12 litigation. *Id.* at 24. For example, Don Hayden and Lara Grillo
13 expended the bulk of their hours dealing with the arbitration issues at
14 both the trial and appellate levels. *Id.* at 25. Niki Namazi, a more
15 junior attorney, expended the bulk of her hours managing written
16 discovery. *Id.* at 26. Josh Migdal spent the bulk of his time on
17 reviewing certain dispositive filings and leading settlement efforts.
18 *Id.* at 27.

19 Ultimately each attorney played a specific and strategic role and a substantial effort
20 was made to avoid duplication of efforts in a case that was handled entirely on
21 contingency. *Id.* at 28.

22 - The Court substantially reduced the number of hours expended taking and
23 defending depositions in its adjusted lodestar, but Class Counsel wants to
24 stress that these fees were incurred taking and defending **forty** depositions,
25 including eight expert depositions. *Id.* at 29. Most of the fact depositions
26 taken by Class Counsel involved thousands of pages being produced weeks
27 (and sometimes days) before the scheduled deposition, making preparations
28 for those depositions complicated and extremely time-consuming. *Id.* at 30.

1 multiplier); *McMorrow v. Mondelez Int'l, Inc.*, 17-CV-02327-BAS-JLB, 2022 WL
2 1056098, at *8 (S.D. Cal. Apr. 8, 2022) (1.54 multiplier).

3 Further, the lodestar determined by the Court did not consider the difference in
4 rates between Class Counsels' rates in their location and the district where fees are
5 sought. In *Carlin v. DairyAmerica, Inc.*, the Court substituted in prevailing rates for
6 attorneys in the district where fees were sought (Fresno) in conducting its lodestar
7 check. 380 F. Supp. 3d 1023. Here, the blended rate in the Court's proposed lodestar
8 (\$461) is considerably less than prevailing rates in the Greater Los Angeles Area. *See*
9 *supra* at pp 18-19. If the Court substitutes in prevailing rates for attorneys in Los
10 Angeles, as the Court did in *Carlin*, then the multiplier needed to award the fees
11 sought would be a negative multiplier. *See, e.g., Rosado v. Ebay Inc.*, No. 5:12-
12 CV04005-EJD, 2016 WL 3401987, at *8 (N.D. Cal. June 21, 2016) (conducting
13 a lodestar cross-check and finding that a negative multiplier "strongly suggests the
14 reasonableness of the negotiated fee").

15 **a. The Court should grant class counsel \$337,926.05 for litigation costs.**

16 Counsel may obtain reimbursement for costs from a common fund settlement.
17 *In re Am. Apparel, Inc. S'holder Litig.*, 2014 WL 10212865, at *28 (C.D. Cal. Jul. 28,
18 2014).

19 Reasonable reimbursable litigation expenses include those for document
20 production, experts and consultants, depositions, translation services, travel, mail, and
21 postage costs.⁵ Under the common fund doctrine, plaintiffs' counsel should receive
22 reimbursement of all reasonable out-of-pocket expenses and costs in prosecution of
23

24 ⁵ *See, e.g., In re Media Vision Technology Securities Litigation*, 913 F. Supp. 1362,
25 1366 (N.D. Cal. 1996) (court fees, experts/consultants, service of process, court
26 reporters, transcripts, deposition costs, computer research, photocopies, postage,
27 telephone/fax); *Thornberry v. Delta Air Lines, Inc.*, 676 F.2d 1240, 1244 (9th Cir.
28 1982) (travel, meals and lodging), remanded on other grounds, 461 U.S. 952(1983);
Mauss v. NuVasive, Inc., Case No. 13cv2005 JM (JLB), 2018 WL 6421623, at *8-9
(S.D. Cal. Dec. 6, 2018) (online research, press release and newswires).

1 the claims and in obtaining a settlement. *See generally Vincent v. Hughes Air W., Inc.*,
2 557 F.2d 759 (9th Cir. 1977).

3 Counsel requests the amount of \$337,926.03 to reimburse incurred litigation
4 costs and expenses that have not been reimbursed. Initial Mark Decl., ¶ 22. The Court
5 has already found the costs submitted are reasonable. April 6 Order at 52. Class
6 Counsel respectfully requests that the Court enter a final order approving these costs.

7 **b. The Court should grant service awards to the named Plaintiffs in**
8 **light of their substantial contributions to the litigation.**

9 Class Counsel seeks service awards for the three named class representatives:
10 \$30,000.00 for Patricia Rodgers, \$30,000.00 for Jennifer Ribalta, and \$18,000.00 for
11 Izaar Valdez. Service awards are “fairly typical in class action cases.” *Rodriguez v.*
12 *West Publishing*, 563 F.3d 948, 958 (9th Cir. 2009). Service awards are particularly
13 appropriate when the litigation is “complicated” and “took up quite a bit of the class
14 representatives’ time.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 947-
15 48 (9th Cir. 2015); accord *In re Facebook Biometric Info. Priv. Litig.*, 522 F. Supp.
16 3d 617, 633-34 (N.D. Cal. 2021). “In deciding whether such an award is warranted,
17 relevant factors include the actions the plaintiff has taken to protect the interest of the
18 class, the degree to which the class has benefited from those actions, and the amount
19 of time and effort the plaintiff expended in pursuing the litigation.” *Cook v. Niedert*,
20 142 F.3d 1004, 1016 (9th Cir. 1998); accord *Staton v. Boeing Co.*, 327 F.3d 938 (9th
21 Cir. 2003).

22 The named Plaintiffs undertook significant action to protect the interests of the
23 class. Each of the named Plaintiffs maintained close contact with Class Counsel
24 throughout the case, produced thousands of documents during the course of this
25 complex litigation, Ms. Ribalta and Ms. Rodgers were subjected to multiple
26 depositions, and devoted hundreds of hours in assisting Class Counsel in this case,
27 expending a great deal of time and effort. Attached as exhibits to the Initial Fee
28 Petition are the Declarations of Ms. Rodgers, Ms. Ribalta and Ms. Valdez,

1 respectively. *See* Rodgers Decl., ¶¶ 3-10; Ribalta Decl., ¶¶ 3-10; and Valdez Decl. at
2 ¶¶ 3-9. Specifically, Ms. Ribalta and Ms. Rodgers have both attested to spending
3 between 250-300 hours on this case, while Ms. Valdez spent approximately 180
4 hours. *See also* Initial Mark Decl. at ¶¶ 17-18.

5 Counsel is mindful that the requested incentive award is atypically high.
6 However, as all three have attested, over the past five years, this litigation has had a
7 significant negative impact on their lives and their relationships, including being cut-
8 off from friends and other close personal relationships. *See* Rodgers Decl., ¶ 4; Ribalta
9 Decl., ¶ 4; and Valdez Decl. at ¶ 4; Initial Mark Decl. at ¶¶ 17-18. This, coupled with
10 the time and assistance each Plaintiff provided, including in some cases having to
11 travel to miss work to travel to Los Angeles (Ms. Ribalta and Ms. Valdez), the trauma
12 of losing a spouse during the litigation (Ms. Rodgers), enduring two, separate full-day
13 depositions (Ms. Ribalta and Ms. Rodgers), and spending many, many hours
14 collecting and reviewing documents, warrants this atypically high incentive award.
15 *See* Rodgers Decl., ¶¶ 3-10; Ribalta Decl., ¶¶ 3-10; and Valdez Decl. at ¶¶ 3-9.

16 The Court has already preliminarily approved incentive awards in the range of
17 \$20,000 to \$30,000 for Plaintiffs Rodgers and Ribalta and \$12,000 to \$18,000 for
18 Plaintiff Valdez. April 6 Order at p. 24. As noted by the Court, these service awards
19 would result in hourly rates of \$100-120 for each named Plaintiff. *Id.* at 23. Such rates
20 are regularly approved in this Circuit. *See, e.g., Etter v. Thetford Corp.*,
21 CV1406759JLSRNBX, 2016 WL 11745096, at *21 (C.D. Cal. Oct. 24, 2016)
22 (approving service awards of one hundred dollars per hour); *In re Am. Apparel, Inc.*
23 *S'holder Litig.*, CV1006352MMMJCGX, 2014 WL 10212865, at *31 (C.D. Cal. July
24 28, 2014) (\$120 hour).

25 While the requested incentive awards and hourly rates are atypically high, each
26 of the class representatives not only made contributions to the class typical of other
27 class representatives, they also had the added burden of being ostracized by and
28 isolated from their friends and family for being one of the select few to stand up and

1 do something about the harms alleged in this action. This atypical burden warrants
2 atypical relief, warranting service awards at the highest end of each proposed range.

3 **IV. CONCLUSION**

4 For the reasons set forth above, Counsel requests the Court grant its request
5 for payment of \$4,166,666 in attorneys’ fees, \$337,926.03 in reimbursable costs, and
6 \$78,000 in service awards.

7 DATED: June 19, 2023

Mark Migdal & Hayden

8

9

By: 

10

Etan Mark
Attorneys for Plaintiffs Patricia Rodgers,
Jennifer Ribalta, and Izaar Valdez

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12

13

Local Rule 11-6.2 Certificate of Compliance

14

15 The undersigned counsel of record for Plaintiffs certifies that this brief
16 contains 6,690 words which complies with the word limit of L.R. 11-6.1

17

Mark Migdal & Hayden

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19

By: 

20

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11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

14
15 MICHAEL LAVIGNE, *et al.*,
16 Plaintiffs,
17 vs.
18 HERBALIFE LTD., *et al.*,
19 Defendants.

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

**DECLARATION OF ETAN MARK
IN SUPPORT OF PLAINTIFFS'
MOTION FOR FINAL APPROVAL
OF CLASS COUNSEL'S ATTORNEY
FEES, REIMBURSEMENT OF
EXPENSES AND SERVICE
AWARDS**

Assigned to Hon. John A. Kronstadt,
Courtroom 10B

1 I, Etan Mark, declare:

2 1. I have personal knowledge of the facts set forth in this declaration and,
3 if called as a witness, I could and would testify competently about these facts.

4 2. I am a member of the State Bars of New York and Florida and am
5 admitted *pro hac vice* to practice before the Court. I am counsel for Plaintiffs in this
6 matter.

7 3. I am the co-founder of Mark Migdal & Hayden (“MMH”), and I oversee
8 MMH’s litigation efforts in this case.

9 4. On August 17, 2020, the Parties attended a mediation, conducted
10 virtually, with the Hon. Suzanne Segal (Ret.).

11 5. On May 27, 2021, the Parties engaged in a second mediation with the
12 Hon. S. James Otero (Ret.).

13 6. The second mediation was in-person.

14 7. Following the mediation, the Parties’ settlement negotiations continued
15 over five months.

16 8. The Parties ultimately accepted a mediator’s proposal to resolve the
17 matter and, through counsel, reached the proposed Settlement Agreement (ECF No.
18 383).

19 9. Consistent with the Court’s April 19, 2023 Order (ECF No. 398), the
20 Class Administrator launched the Settlement Website on May 5, 2023 and A.B. Data
21 has represented to me that they disseminated the Notice of Settlement to the Class on
22 May 19, 2023.

23 10. The Notice of Settlement explained:

24 Class Counsel’s attorneys’ fee request will not exceed 33 1/3 % of
25 the Settlement Amount of \$12,500,000, or \$4,166,667. Additionally,
26 Class Counsel will seek reimbursement of their out-of-pocket litigation
27 expenses as part of their application for attorney’s fees, which will be
28

1 posted on www.HerbalifeClassActionSettlement.com at least 14 days
2 before the objection deadline.

3 Class Counsel will also ask the Court to approve service award
4 payments not to exceed thirty thousand dollars (\$30,000) to each of the
5 individual Class Representatives, who are Patricia Rodgers, Jennifer
6 Ribalta, and Izaar Valdez.

7 11. As of the filing of this motion, A.B. Data has indicated that no objection
8 has been filed.

9 12. The rates proposed in support of Class Counsel's fee application were
10 never raised to take into account market adjustments or inflation. For example, the
11 current hourly rates for Etan Mark, Josh Migdal, and Yaniv Adar are each at least
12 fifteen (15%) higher than those sought in this fee petition.

13 13. I reaffirm that all of the hours submitted to the Court in support of the
14 Initial Fee Petition were indeed worked and that all of the hours billed and submitted
15 to the Court were necessary to the prosecution of this case.

16 14. The time necessary to resolve many of the tasks in this litigation was
17 increased substantially due the bifurcation of the claims in two separate judicial
18 districts.

19 15. Herbalife and the Individual Defendants were material witnesses in both
20 the California and Florida Actions, yet any discovery sought in either action had the
21 added layer of complexity of dealing with non-parties.

22 16. To obtain testimony from the Individual Defendants (parties in the
23 Florida Action) in the California Action, Class Counsel had to initiate a Rule 45
24 miscellaneous action in the Southern District of Florida to secure their testimony and
25 documents as non-parties. Similarly, to obtain evidence from Herbalife in the Florida
26 Action, Class Counsel had to treat Herbalife as a non-party and navigate through Rule
27 45 in those proceedings.

1 17. The time necessary to obtain discovery was enhanced due to aggressive
2 positions taken by defense counsel in both the Florida and California Actions.

3 18. Defense counsel in both actions initially refused to produce any
4 documents while their motions to dismiss were pending (despite the absence of a
5 stay).

6 19. Documents that were ultimately produced were only done so after
7 dozens of hours meeting, conferring, and corresponding and, in many instances,
8 briefing and arguing motions to compel.

9 20. Further complicating discovery in this case was the need for travel and
10 litigation in foreign jurisdictions.

11 21. Class Counsel traveled to several in-person depositions and litigated
12 discovery disputes not only in the Southern District of Florida and the Central District
13 of California, but also the Middle District of Florida and the Western District of
14 Oklahoma.

15 22. Two of the attorneys (Levin and Gibbs) were hired as local counsel given
16 the involuntary transfer of the case to the Central District of California.

17 23. Those two attorneys billed less than 2% of the recorded hours on the
18 case.

19 24. The duration and size of the litigation required Mark Migdal & Hayden
20 to utilize different attorneys at different stages of the litigation.

21 25. Don Hayden and Lara Grillo expended the bulk of their hours dealing
22 with the arbitration issues at both the trial and appellate levels.

23 26. Niki Namazi, a more junior attorney, expended the bulk of her hours
24 managing written discovery.

25 27. Josh Migdal spent the bulk of his time on reviewing certain dispositive
26 filings and leading settlement efforts.

27 28. Ultimately each attorney played a specific and strategic role and a
28

1 substantial effort was made to avoid duplication of efforts in a case that was handled
2 entirely on contingency.

3 29. The Court substantially reduced the number of hours expended taking
4 and defending depositions in its adjusted lodestar, but Class Counsel wants to stress
5 that these fees were incurred taking and defending **forty** depositions, including eight
6 expert depositions.

7 30. Most of the fact depositions taken by Class Counsel involved thousands
8 of pages being produced weeks (and sometimes days) before the scheduled
9 deposition, making preparations for those depositions complicated and extremely
10 time-consuming.

11 I declare under penalty of perjury under the laws of the United States of
12 America that the foregoing is true and correct. Executed on June 19, 2023, at Miami,
13 Florida.

14
15 

16
17 _____
18 Etan Mark