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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 FINAL APPROVAL OF CLASS ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: October 16, 2023
Time: 8:30 AM
Courtroom: 10B

Assigned to Hon. John A. Kronstadt

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on October 16, 2023, at 8:30am, or as soon thereafter as the parties may be heard, Plaintiffs Patricia Rodgers, Jennifer Ribalta and Izaar Valdez ("**Plaintiffs**") will move, and hereby move, this Court for the relief as follows:

1. To grant final approval of the Class Action Settlement Agreement (ECF No. 383) between Plaintiffs and Defendant Herbalife International of America, Inc., as fair, reasonable, and adequate;

2. To permanently certify under Federal Rule of Civil Procedure 23(a) & (b)(3) the Class conditionally certified by the Court when granting the previous motion for preliminary approval, *see generally*, Order Re Plaintiff's Motion for Preliminary Approval of Class Action Settlement (ECF No. 396);

3. To confirm the appointment of the named Plaintiffs as Settlement Class Representative and Plaintiffs' attorneys as Settlement Class Counsel;

4. To approve the motion for attorneys' fees, reimbursement of expenses, and service awards, pursuant to the separate motion papers previously filed with the Court (ECF Nos. 392, 399);

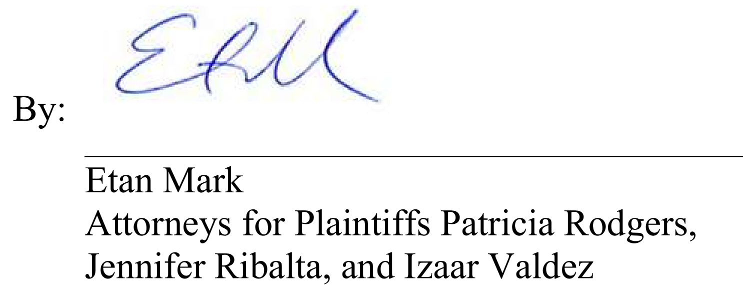
5. To approve payment of administration fees to the Settlement Administrator;

6. To enter judgment accordingly, finally approve the plan of allocation contained in Section 4 of the Settlement (ECF No. 383) and retain continuing jurisdiction over the implementation of the settlement.

This Motion is based on the accompanying memorandum of points and authorities; the Declaration of Eric Miller of A.B. Data, attached hereto as an Exhibit; the Third Declaration of Etan Mark, attached hereto as an Exhibit; the First Declaration of Etan Mark and the exhibits attached thereto (ECF No. 392-1), the Second Declaration of Etan Mark and the exhibits thereto (attached as an Exhibit to

this motion), the Declaration of Jason Jones (ECF No. 392-2), the Declaration of Patricia Rodgers (ECF No. 392-3), the Declaration of Jennifer Ribalta (ECF No. 392-4), the Declaration of Izaar Valdez (ECF No. 392-5), the Court's files and records in this matter, argument of counsel, and such other and further matters as the Court may consider.

DATED: September 8, 2023 Mark Migdal & Hayden



By: ______________________________

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Patricia Rodgers, Jennifer Ribalta and Izaar Valdez (“**Plaintiffs**”) seek final approval of the $12,500,000.00 non-reversionary, class-action settlement to resolve claims that the Court preliminarily approved on April 6, 2023. *See* Preliminary Approval Order (the “**PAO**”), ECF No. 396. The Stipulation for Settlement (ECF No. 383, hereinafter the “**Settlement**”) resolves claims against Defendant Herbalife International of America, Inc. (“**Herbalife**”) for alleged misrepresentations regarding Herbalife’s Circle of Success Event System.

The Settlement provides an excellent result for the class in a hotly contested litigation. The Settlement not only requires Herbalife to pay $12,500,000.00 into a non-reversionary fund, but it also requires Herbalife to implement a series of corporate reforms to directly address the actions complained about in the underlying lawsuit.

Since preliminary approval, the Court-appointed Settlement Administrator, A.B. Data, disseminated the Court-approved Settlement notice directly to the Settlement Class Members (as defined in Section 1.17 of the Settlement) using contact information provided to them by Herbalife. *See* Declaration of Eric Miller (the “**Miller Decl.**”) at ¶¶ 2-3. Pursuant to the Court’s Preliminary Approval Order and Order Re Joint Stipulation Re: Hearing on Final Approval of Class Action Settlement and Other Class Deadlines (ECF No. 397), the Settlement Notice (as defined in Section 1.12 in the Settlement) informed Class Members that they had until August 4, 2023, to object to or opt-out of the settlement.

The Notice Program, providing direct notice to all current and former distributors during the Class Period, was over-inclusive and an extraordinary success. Herbalife provided A.B. Data with contact information and records for their entire database of distributors during the Class Period, constituting over two million distributors. *See id.* at ¶ 3. This was done to ensure coverage of the entire class, as

Herbalife does not keep track of attendance at non-corporate events. A.B. Data e-mailed the E-mail Notice to 2,347,562 e-mail addresses. *See id.* at ¶ 6. 597,183 e-mails were returned undeliverable (bounce-backs), with postcard notices being sent to 596,611 potential Settlement Class Members for whom mailing addresses were available. *Id.* at ¶ 7. There was only a single objection to the Settlement but, as noted below, that objection appears to be non-substantive and instead seeks reimbursement of fees and costs from Herbalife that have nothing to do with the claims at issue in this action (in fact, the sole objector submitted a claim as a Class Member). *Id.* at ¶ 15. There were also only three Class Members that opted out, one of which submitted a claim (rendering that claimant's request for exclusion void pursuant to the terms of the Settlement). *Id.* at ¶ 14.

A preliminary analysis also confirms the success of the Notice Program. A.B. Data estimates that the number of qualified claimants will be between 4,009 and 37,643. Miller Decl. at ¶ 23. The range of ticket expenditures claimed by those claimants is $5,726,383.00 to $10,685,336.00. *Id.* at ¶ 23. A.B. Data has just begun its assessment of the claims but has preliminarily confirmed the validity of 4,009 claimants and $5,726,383.00 of valid claims. *Id.* at ¶ 19.

Aside from the widespread support from the Class, the Settlement satisfies all the criteria for approval under Federal Rule of Civil Procedure 23. As also demonstrated in Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (ECF No. 384), the Settlement presents a beneficial result for the class in relation to the potential value of the claims, the delays of further litigation, and the complexities and risks of the case. Accordingly, Plaintiffs request the Court grant final approval of the Settlement.[1]

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[1] Plaintiffs have separately moved for an award of reasonable attorneys' fees and costs, as well as service awards. ECF Nos. 392 and 399.

II. BACKGROUND

a. Litigation

This case was originally filed as a putative class action in the United States District Court for the Southern District of Florida on September 18, 2017, naming Herbalife entities and forty-five of Herbalife's top distributors as defendants (the "**Individual Defendants**"). ECF No. 1.[2] The Florida Court trifurcated this action by sending some claims against Herbalife to arbitration, sending the remaining claims against Herbalife to the Central District of California, and keeping the claims as to the Individual Defendants in the Southern District of Florida. ECF No. 106 (the "Order Re: Arbitration"). The Individual Defendants appealed Judge Cooke's order to the Eleventh Circuit Court of Appeals (USCA Case Number 18-14048-JJ), but after briefing and oral argument, the Eleventh Circuit affirmed the Order Re: Arbitration.

Concurrent with the Florida litigation, Plaintiffs and Herbalife engaged in extensive litigation here in the Central District of California. In California, the parties fully briefed two motions to dismiss (ECF Nos. 142, 151, 152, 163, 208, 219, 222, and 261), a motion for class certification (ECF Nos. 207, 218, 234, and 261), eight separate *Daubert* motions (ECF Nos. 323-338, 341-349), and a motion to strike affirmative defenses (ECF Nos. 359-361). Also in the California Action, Plaintiffs had seven separate discovery hearings before Magistrate Judge Michael R. Wilner (ECF Nos. 176, 190, 191, 206, 221, 253, and 288), took thirteen separate full-day fact depositions, an additional four expert depositions, and defended an additional eight depositions, along with reviewing hundreds of thousands of pages of discovery. Declaration of Etan Mark, available at ECF No. 4, at ¶ 14. Plaintiffs separately engaged in extensive discovery in the Florida Action including taking eight party depositions, defending three depositions, reviewing hundreds of thousands of

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[2] The style of the Florida Action was *Lavigne, et al. v. Herbalife Ltd.*, Case No. 1:17-23429-MGC (S.D. Fla.) (the "Florida Action").

1 additional pages of documents produced in the Florida Action by parties and non-
2 parties, and participating in seven separate discovery hearings before Magistrate
3 Judge Goodman in the Southern District of Florida. *Id*. at ¶ 5.

4 **b. Settlement**

5 The Parties engaged in two separate full-day mediations. First, on August 17,
6 2020, the Parties attended a mediation, conducted virtually, with the Hon. Suzanne
7 Segal (Ret.). Ultimately, the Parties reached an impasse. *See* ECF No. 278.

8 On May 27, 2021, the Parties engaged in a second mediation with the Hon. S.
9 James Otero (Ret.). This second mediation was in-person. Following the mediation,
10 the Parties continued to engage in extensive arm's-length settlement negotiations,
11 which spanned over five months. In the end, the Parties both accepted a mediator's
12 proposal to resolve the matter and, through counsel, reached the proposed Settlement
13 Agreement concurrently filed herewith.

14 **c. CAFA Notice**

15 On June 6, 2022, ten days after the Parties filed their Stipulation for Settlement,
16 A.B. Data complied with the requirements of 28 U.S.C. § 1715(b) by sending the
17 required documents "upon the appropriate State official of each State in which a class
18 member resides and the appropriate Federal official." Miller Decl. at ¶¶ 9-11.

19 **d. Preliminary Approval Order**

20 On April 6, 2023, the Court entered the PAO granting Plaintiffs' Motion for
21 Preliminary Approval. In its 53-page Order, the Court held that the Settlement
22 Agreement satisfied each of the Rule 23(a) factors, each of the Rule 23(e) factors, and
23 the pertinent factors set forth in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th
24 Cir. 1998). PAO at pp. 11-23.

25 The Court also preliminary approved: (1) service awards in the range of
26 $20,000 to $30,000 for Plaintiffs Rodgers and Ribalta, PAO at p. 24, (2) an service
27 award in the range of $12,000 to $18,000 for Plaintiff Valdez, *id.*; (3) an attorney fee
28 award in the range of $3.125 million to $4,166,166, *id.* at p. 51; and (4) and an award

of litigation costs of $337,926.05, *id.* at 52. The Court also approved A.B. Data as Settlement Administrator. *Id.*

III. THE CLASS NOTICE SATISFIES DUE PROCESS

The Court-appointed Class Action Administrator, A.B. Data, took all necessary steps to effectuate the notice requirements as set forth in the Settlement Agreement and as approved in the PAO.

The Settlement Class is defined as "all U.S. Herbalife distributors who purchased tickets to at least two Herbalife Events during the Class Period" and excludes certain levels of distributors and distributors who previously executed a release of claims at issue in this litigation. PAO at p. 4. Herbalife maintained information regarding class members that attended two or more Corporate Events, which includes approximately 80,000 distributors. Miller Decl. at ¶ 3. Herbalife did not maintain data, however, for putative class members that attended events that were not run by Herbalife, events that nonetheless qualified as "Herbalife Events" under the Settlement Class definition. To ensure all possible class members were reached, Herbalife agreed to provide the names, mailing addresses, and e-mail addresses for all U.S. Herbalife Distributors during the Class Period, regardless of whether they attended any event, totaling 2,841,430 Herbalife Distributors. *Id.* at ¶ 3. Herbalife separately agreed to provide specific attendance and sales information for those distributors that attended events facilitated by Herbalife. *Id*. This enabled A.B. Data to provide direct notice to the millions of individuals who were active Herbalife distributors between 2009 and 2022, without limiting the notice to those that attended an event. *Id*.

On April 11, 2023, a list containing the name, address, email address, and distributor information in Defendants' records for 2,841,430 U.S. Herbalife distributors during the Class Period was transmitted by Herbalife to A.B. Data. *Id*. In addition, Defendant provided the Claims Administrator with a file containing information about Herbalife Corporate Events and those potential Settlement Class

1 Members who attended each Event. *Id.* Consistent with the Court's April 19, 2023
2 Order (ECF No. 398), A.B. Data launched the Settlement Website on May 5, 2023
3 and disseminated the Notice of Settlement to the Class on May 19, 2023. *Id.* at ¶ 12.
4 In total, A.B. Data sent 2,347,562 e-mails and 1,168,408 postcards. *Id.* at ¶¶ 6-7. Of
5 the 2,347,562 e-mails, 597,183 bounced back, but 596,611 of those distributors
6 received postcards. *Id.* at ¶ 7.

7 A.B. Data also spent considerable resources informing putative Class Members
8 and addressing any concerns. A.B. Data regularly updated the Settlement Website
9 with pertinent filings shortly after those papers were filed with the Court. *Id.* at ¶ 12.
10 A.B. Data also maintained a toll-free number and e-mail address, fielding thousands
11 of questions in English and Spanish and responding to queries directed to Class
12 Counsel. *Id.* at ¶ 12. When initial filings appeared to be low, on July 6, 2023 A.B.
13 Data also sent reminder notices to certain class members that attended ten (10) or
14 more Corporate Events. *Id.* at ¶ 8.

15 **IV. THE CLAIMS PROCESS WAS SUCCESSFUL**

16 The Claims Process was a success.

17 As noted above, between 2009 and 2022, there were over 2.8 million
18 individuals that distributed products for Herbalife. *See* Miller Decl. at ¶ 3. That
19 number does **not** reflect the size of the Settlement Class. To the contrary, the
20 Settlement Class is a fractional subset of those 2.8 million individuals that paid for
21 tickets to two or more Herbalife events. Herbalife did not require attendance at any
22 event to be eligible to be a Herbalife distributor; to wit, the Complaint alleges that
23 Herbalife induced distributors to pay for and attend events they were not otherwise
24 required to attend. Herbalife maintains records of all U.S. distributors who pay for
25 and attend the Corporate Events that comprise the more expensive and time-
26 consuming events within the "Circle of Success" event life cycle. 79,701 distributors
27 attended two or more Corporate Events during the Class Period. Miller Dec. at ¶ 3.
28 Because it is possible (although very unlikely) that Herbalife distributors attended

events run by distributors without attending Herbalife Corporate Events, notice was provided to all 2.8 million Herbalife Distributors regardless of whether they attended a Corporate Event (indeed, the named plaintiffs, whom the Court has preliminarily held are representative of the class, all attended both corporate and distributor-run events). In other words, all Herbalife distributors who could conceivably be Class Members received direct notice of their potential eligibility to participate in the Settlement.

A.B. Data has received a total of 164,790 claims. *Id.* at ¶ 17. Of those claims, A.B. Data was able to quickly eliminate the following groups of claimants:

- 8,263 claimants sought more than $750.00 for a single event despite no single event costing that much.
- Of those remaining, 44,241 only claimed paying for one event and therefore do not meet the Class Definition (which is limited to distributors attending two or more events).
- Of those remaining, 74,636 were suspected to be fraudulent claims.[3]

Id. at ¶¶ 16-24.

What remained was 37,643 individual claimants seeking reimbursement for $10,685.336.00 in paid tickets to a total of 96,230 events. *Id.* at ¶ 22. A.B. Data's initial analysis has confirmed the validity of 4,009 individual claimants seeking reimbursement of $5,726,383.00 for 52,969 events. *Id.* at ¶ 19. The claims administration process will assess the validity of the remaining 33,634 claims with an additional $4,958,953.00 in paid tickets. *Id.* at ¶ 23.

The claims rate is well within the range of those approved in this Circuit. The data provided by Herbalife reflects that 79,701 distributors attended two or more Corporate Events. *Id.* at ¶ 3. A.B. Data has already confirmed that 4,009 of the 79,701

[3] As noted in Eric Miller's Declaration, A.B. Data had a series of safeguards in place to identify and eliminate fraudulent claims submitted by automated bots. Miller Decl. at ¶ 21.

distributors (who attended at least two corporate events) submitted valid claims, with the number potentially increasing to as high as 37,643 claimants. *Id.* at ¶ 19. This yields a claims rate of at least 5.03% for Herbalife Distributors that attended two or more Corporate Events.[4] Even at the lowest end of that spectrum, the claims rate is well within the range of settlements approved in this Circuit. *See, e.g.*, *Shuman v. SquareTrade Inc.*, 20-CV-02725-JCS, 2023 WL 2311950, at *4 (N.D. Cal. Mar. 1, 2023) (approving claims rate of about 6%, but collecting cases approving settlements with claims rates of 2-4.5%); *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 599 (N.D. Cal. 2020) (approving claims rate of 0.83%) (citing *Bostick v. Herbalife Int'l of Am., Inc.*, No. CV 13-2488 BRO, 2015 WL 12731932, at *27 (C.D. Cal. May 14, 2015)); *Theodore Broomfield v. Craft Brew Alliance, Inc.*, 2020 WL 1972505, at *7 (N.D. Cal. Feb. 5, 2020) (approving settlement with response rate of "about two percent"); *Rhom v. Thumbtack, Inc.*, 16-CV-02008-HSG, 2017 WL 4642409, at *6 (N.D. Cal. Oct. 17, 2017) (approving response rate of 3.5%); *Tait v. BSH Home Appliances Corp.*, No. SACV100711DOCANX, 2015 WL 4537463, at *8 (C.D. Cal. Jul. 7, 2015) (approving a class settlement where the response rate was 3%, observing that this result was likely "realistic"); *Touhey v. United States*, No. EDCV 08-1418-VAP, 2011 WL 3179036, at *7–8, (C.D. Cal. Jul. 25, 2011) (approving a class action settlement where the response rate was approximately 2%,

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[4] Although there is no data regarding the number of Class Members that attended exclusively STS events, the overwhelming majority of Herbalife Distributors that attended STS events went on to attend Corporate Events as well. *See* Mark Decl. at ¶ 7. Regardless, even assuming that all U.S.-based Distributors that attended only one Corporate Event are part of the Settlement Class, an unlikely assumption, the claims rate would still be at least 2.7%. *See* Miller Decl. at ¶ 3 (providing data for individuals that attended any Herbalife Corporate Event, including those that attended only one). However, the low end of these claims rate ranges assumes that none of the remaining 33,634 claims to be vetted by A.B. Data were valid claims, a highly unlikely assumption given the fact that A.B. Data has already applied several layers of filters to those claims.

citing the low number of objections and agreement's overall fairness).

Finally, the success of the Claims Process is apparent when compared with the claims rate in Herbalife's last class action, *Bostick*, 2015 WL 12731932. *Bostick* similarly involved Herbalife providing the names, mailing addresses, and e-mail addresses for its distributors at the time. *Id.* at *6. In response to the notice program in *Bostick*, only 7,457 out of 1,533,339 class members eligible for relief[5] filed a claim for relief, equating "to a response rate of less than 1%." *Id.* at *27. The *Bostick* Settlement also received 687 requests for exclusion and 20 objections, two of which were withdrawn. *Id.* at *7. The *Bostick* Court approved the less than 1% claims rate, noting, "Under these circumstances, and given the low number of objections and requests for exclusion, the Court finds that the low response rate here comports with Rule 23 and does not per se demonstrate the Settlement Agreement's inadequacy." *Id.* at *27. Here, the significantly higher number of claims, significantly lower number of exclusions, and the lack of a substantive objection weigh even more heavily in favor of approving the Settlement relative to the *Bostick* case.

V. ARGUMENT

a. The Settlement Class Satisfies Rules 23(a) and 23(b)(3)

The Court has already carefully analyzed the Settlement Agreement through the lens of the factors set forth in Rules 23(a) and 23(b)(3) in the PAO. As noted above, the Court has already determined that the Settlement Agreement satisfies Rule 23(a)'s numerosity requirement, PAO at p. 11, satisfies Rule 23(a)'s commonality requirement, *id.* at p. 12, satisfies Rule 23(a)'s typicality requirement, *id.* at p. 14, and Rule 23(a)'s adequacy requirement is satisfied for the purposes of conditional certification of the Settlement Class, *id.* at p. 15. Similarly, in the PAO the Court determined that the Settlement Agreement satisfies Rule 23(b)(3)'s predominance

[5] In *Bostick*, there were over 1.5 million class members. *Id.* at *6. Here, because eligibility for class relief is limited to only those distributors that attended two or more events, the size of the putative class is only a fraction of the class size in *Bostick*.

requirement, *id.* at 17, and Rule 23(b)(3)'s superiority requirement, *id.*

As there has not been any material change in circumstances that would warrant any of the 23(a) or 23(b)(3) requirements to be revisited, the Court should adopt the rationale set forth in the PAO and similarly conclude that the requirements of Rules 23(a) and 23(b)(3) have been satisfied for purposes of finally approving the Settlement Agreement.

b. Final Approval of the Class Action Settlement should be granted.

i. Legal Standard

Rule 23(e) requires a two-step process in considering whether to approve the settlement of a class action. First, a court must make a preliminary determination whether the proposed settlement "is fundamentally fair, adequate, and reasonable." *Acosta v. Trans Union*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003)). In the second step, which occurs after preliminary approval, notification to class members, and the compilation of information as to any objections by class members, a court determines whether final approval of the settlement should be granted.

In evaluating the fairness, a court must consider "the fairness of a settlement as a whole, rather than assessing its individual components." *Lane v. Facebook, Inc.*, 696 F.3d 811, 818-19 (9th Cir. 2012). A court is to consider and evaluate several factors as part of its assessment of a proposed settlement. The following non-exclusive factors are among those that may be considered during both the preliminary and final approval processes:

(1) the strength of the plaintiff's case;

(2) the risk, expense, complexity, and likely duration of further litigation;

(3) the amount offered in settlement;

(4) the extent of discovery completed and the stage of the proceedings;

(5) the experience and view of counsel;

(6) any evidence of collusion between the parties; and

(7) the reaction of the class members to the proposed settlement.

See In re Mego Fin. Sec. Litig., 213 F.3d 454, 458-60 (9th Cir. 2000) (internal citation omitted).

Each factor does not necessarily apply to every settlement, and other factors may be considered. For example, courts often consider whether the settlement is the product of arms-length negotiations. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution").

The recently amended Fed. R. Civ. P. 23(e) provides further guidance as to the requisite considerations in evaluating whether a proposed settlement is fair, reasonable and adequate. A court must consider whether:

(A) the class representatives and class counsel have adequately represented the class;

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

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

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

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

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3);[1] and

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

Fed. R. Civ. P. 23(e)(2).

The factors set forth in Fed. R. Civ. P. 23(e) distill the considerations historically used by federal courts to evaluate class action settlements. *See* Advisory Committee Comments to 2018 Amendments to Rule 23, Subdivision (e)(2). As the comments of the Advisory Committee explain, "[t]he goal of [the] amendment [was] not to displace any factor" that would have been relevant prior to the amendment, but

1 rather to address inconsistent "vocabulary" that had arisen among the circuits and "to
2 focus the court and the lawyers on the core concerns" of the fairness inquiry. *Id.*

3 **ii. Each of the *Hanlon* Factors weigh in favor of final approval.**

4 **1. The strength of Plaintiffs' case and associated risks**
5 **favor final approval of the Settlement.**

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

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

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

Third, the passage of time has created another risk that supports the adequacy of this Settlement. The Class Period extends back to 2009. By the time of trial, memories of key witnesses may have faded. This presents potential challenges to distributing a recovery to these Settlement Class Members. *See Rodriguez*, 563 F.3d at 966 (noting that an "anticipated motion for summary judgment, and . . . [i]nevitable appeals would likely prolong the litigation, and any recovery by class members, for years," which facts militated in favor of approval of settlement).

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

The above risks, and others, which could result in the Settlement Class getting no relief or significantly less relief years down the road, when balanced against the proposed $12,500,000 recovery and proposed non-monetary relief in the form of corporate reforms, show that the Settlement is more than adequate.[6]

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[6] The Ninth Circuit has stated that a district court is not required "to find a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award. While a district court must of course assess the plaintiffs' claims in determining the strength of their

2. The Settlement Amount is fair, reasonable, and adequate.

The monetary consideration - $12,500,000 – is substantial, particularly in light of the challenges Plaintiffs would face in prevailing on their claims against Herbalife, as outlined in the previous section. Nonetheless, the Settlement payment reflects a meaningful portion of the actual damages alleged to have been suffered by the Settlement Class. Herbalife's own data reflects that the total amount of ticket sales for Herbalife Corporate Events during the Class Period was $64,806,158.00. *See* Miller Decl. at ¶ 3. Plaintiffs' damages expert estimated those damages could be as low as $38 million. *See* ECF No. 326-1 at p. 6 (Expert Report of Christian Tregillis). While these estimates do not include potential ticket costs for STS events (which cost a fraction of what Corporate Event tickets do on a per ticket basis), Herbalife's corporate data includes ticket sales for individuals that only attended one event (which are excluded from the Settlement Class). Moreover, Plaintiffs' damages model was hotly contested and criticized by Herbalife. *See, e.g.*, ECF No. 326 (Herbalife's Motion to Exclude Testimony of Plaintiffs' Expert Christian Tregillis). Regardless, applying these estimates, the $12,500,000 reflect between 19.28% and 32.89% of the Settlement Class's potential damages, falling well within ranges found in this circuit to be fair, adequate, and reasonable. *See, e.g.*, *Almanzar v. Home Depot U.S.A., Inc.*, 2:20-CV-0699-KJN, 2023 WL 4373979, at *4 (E.D. Cal. July 6, 2023) (finding 6% of the maximum potential damages amount to be "within the range of possible approval in light of the apparent weaknesses on each of the claims and low likelihood of success on the merits"); *Maciel et al., v. Bar 20 Dairy, LLC*, No. 1:17-cv-00902-

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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 impossible—statutory or liquidated damages aside, the amount of damages a given 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 DAD-SKO, 2021 WL 1813177, at *6 (E.D. Cal. May 6, 2021) (settlement of
2 approximately 3 percent found to be fair and adequate); *Balderas v. Massage Envy*
3 *Franchising, LLC*, No. 12-cv-06327-NC, 2014 WL 3610945, at *5 (N.D. Cal. July
4 21, 2014) (settlement of approximately 5 percent found to be preliminarily fair).
5 Weighing the uncertainty associated with continued litigation and the substantial risks
6 of litigation discussed in the previous section against the guaranteed direct cash
7 payment and non-monetary relief provided for in the Settlement demonstrates that the
8 Settlement is within the range of obtaining final approval as fair, reasonable, and
9 adequate.

10 **3. The extent of discovery completed and stage of the**
11 **proceedings weigh in favor of final approval.**

12 This case was heavily litigated and was essentially trial ready at the time the
13 parties entered into the Settlement Agreement. With regard to discovery, the parties
14 collectively took thirty-six depositions, participated in over twelve discovery
15 hearings, and exchanged hundreds of thousands of pages of documents. *See* Mark
16 Decl. at ¶¶ 4-5. In this action alone, the parties fully briefed a motion to compel
17 arbitration, two separate motions to dismiss, eight *Daubert* motions cross-motions for
18 summary judgment, and a contested motion for class action certification. *Id.* at ¶ 6.

19 Courts are "more likely to approve a settlement if most of the discovery is
20 completed because it suggests that the parties arrived at a compromise based on a full
21 understanding of the legal and factual issues surrounding the case." *Reed v. Bridge*
22 *Diagnostics, LLC*, 821CV01409CJCKES, 2023 WL 4833461, at *9 (C.D. Cal. July
23 27, 2023) (quoting *Adoma v. Univ. of Phx., Inc.*, 913 F. Supp. 2d 964, 977 (E.D. Cal.
24 2012)). Here, the extensive record confirms that Class Counsel had a full
25 understanding of the legal and factual issues surrounding the case before agreeing to
26 the Settlement. This *Hanlon* favor weigh in favor of final approval.

27 **4. Experience and views of counsel.**

28 "In determining whether a settlement is fair and reasonable, the opinions of

counsel should be given considerable weight both because of counsel's familiarity with the litigation and previous experience with cases." *Reed*, 2023 WL 4833461, at *9 (quoting *Slezak v. City of Palo Alto*, 16-CV-03224-LHK, 2017 WL 2688224, at *5 (N.D. Cal. June 22, 2017)). As noted in Class Counsel's Motion for Preliminary Approval and was recognized in the PAO, Plaintiffs' counsel has substantial experience in representative actions like this one. *See* PAO at 15; Motion for Preliminary Approval at 24. Class Counsel believe that the settlement is fair, adequate, and reasonable and should, therefore, be approved. *See* Mark Decl. at ¶ 8; *see also Reed* 2023 WL 4833461, at *9 (holding that experienced class counsel opining on the fairness of the settlement weighs in favor of final approval.

5. There is no evidence of collusion between the parties.

There remain no signs of collusion in the Settlement Agreement.[7] First, the key terms of the Settlement were negotiated with the assistance of a highly respected mediator and former district judge in this Court, who oversaw the vigorous and arm's-length nature of the negotiations. Indeed, the final Settlement Agreement was the result of the Parties' acceptance of a mediator's proposal.

Second, given the risks in continuing litigation that threaten the Settlement Class with little or no relief, the $12,500,000 million Settlement addresses these concerns by providing "the next best compensation use, *e.g.*, for the aggregate, indirect, prospective benefit of the Class." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011) (internal citations and quotations omitted).

Third, Class Counsel will not receive a disproportionate distribution of the Settlement funds. The Settlement leaves the amount of Class Counsel's fee entirely in the discretion of the Court and Class Counsel filed its fee petition well before the

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[7] Signs of collusion include: (1) when counsel receive a disproportionate distribution of the settlement (2) "clear sailing" arrangements; and (3) reversion of settlement funds not awarded. *Volkswagen*, 2017 WL 672727, at *15; *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

deadline for objections, thus providing the Settlement Class with a full opportunity to object. And there is no suggestion of collusion given that the named Plaintiffs also will not receive a disproportionate share of the recovery. The Settlement leaves the amount of any plaintiff service awards to the discretion of this Court.

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

Fifth, no portion of the $12,500,000 million Settlement Amount will revert back to Herbalife. This factor weighs in favor of final approval.

6. The reaction of Class Members was overwhelmingly positive.

"[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *IN RE LYFT INC. SECURITIES LITIGATION*, 19-CV-02690-HSG, 2023 WL 5068504, at *9 (N.D. Cal. Aug. 7, 2023); *see also In re Linkedin User Privacy Litig.*, 309 F.R.D. 573, 589 (N.D. Cal. 2015) ("A low number of opt-outs and objections in comparison to class size is typically a factor that supports settlement approval.").

Here, A.B. Data received 164,790 claims and only three exclusions and one objection. Miller Decl. at ¶¶ 14-17. One of the three exclusions also submitted a claim, rendering that exclusion inoperative pursuant to the Settlement Agreement. *Id.* at ¶ 15. The sole objector objected to facets of her interactions with Herbalife unrelated to this litigation, and did not object to the terms of Settlement. *See* Miller Decl. at ¶ 16, Ex. F. The fact that out of tens of thousands of approximate class members only three sought exclusion and one objected for unrelated reasons weighs heavily in favor of

final approval.

iii. 23(e) Factors are Met

Like the 23(a) and 23(b)(3) factors, the Court extensively analyzed the 23(e) factors as well and held that each of the factors weighed in favor of approval of the Settlement Agreement. *See* PAO at pp. 20-22. As there has not been any material change in circumstances that would warrant any of the 23(e) requirements to be revisited, the Court should adopt the rationale set forth in the PAO and similarly conclude that the requirements of Rules 23(e) have been satisfied for purposes of finally approving the Settlement Agreement.

c. The Court should finally approve the plan of allocation.

The Settlement provides a comprehensive plan of allocation for distributing Net Settlement Funds (as defined in the Settlement) to Settlement Class Members. *See* Settlement (ECF No. 383) at pp. 8-12. The Court has already found that this plan of allocation is fair and reasonable. *Id.* Plaintiffs respectfully request the Court finally approve the plan of allocation set forth in the Settlement as fair and reasonable.

d. The Court should overrule the sole objection.

The sole objection to the Settlement was made by Flor Garcia Ochoa. Miller Decl. at ¶ 16, Ex. F. Although Ms. Ochoa submitted a valid claim and is eligible for compensation as a Class Member, *id.*, her objection is focused on an improper transfer of her purported entitlement to royalties as an Herbalife distributor, *see id.* at Ex. F. As Ms. Ochoa fails to make any objection relevant to this dispute or the Settlement, the Court should overrule the objection.

e. The Settlement Administration Costs are fair and reasonable.

Plaintiffs also submit a request for disbursement of $840,269.81 to A.B. Data for administering the claims administration process thus far. While this number is approximately $423,000 greater than the estimate provided by Class Counsel at the Preliminary Approval Hearing, the increased cost is directly attributable to an unexpected increase in postage costs associated with notice to the class. Specifically,

1 A.B. Data initially estimated that 2.7 million notices would be sent via email at a cost
2 of approximately $0.002 each and approximately 270,000 notices (or 10% of the
3 potential Settlement Class Members) would require notice by First Class Mail at a
4 cost of approximately $0.55 each based on the information available prior to the
5 commencement of notice. *See* Miller Decl. at ¶ 25. The final mailing list, however,
6 included 2.3 million records with email addresses and over 460,000 records that
7 required mailing via First Class Mail. *Id*. In addition, A.B. Data caused an additional
8 596,911 notices to be mailed to those whose email notices bounced, or not delivered
9 to the potential Settlement Class Member. *Id*. In aggregate, over 1.1 million notices
10 were mailed via First Class Mail resulting in an expense increase of approximately
11 $423,000 over the original anticipated costs of approximately $417,000. *Id*. A further
12 breakdown of A.B. Data's administration costs, including invoices, is appended as
13 exhibits to Eric Miller's declaration.

14 **f. The Court should approve Class Counsel's request for attorney's**
15 **fees and costs and Class Representatives' request for service**
16 **rewards.**

17 Class Counsel has extensively briefed its request for attorneys' fees and costs,
18 reimbursement of expenses, and service awards in two prior filings. ECF Nos. 392,
19 399. Consistent with the Court's divisional instructions, Class Counsel is including
20 modified spreadsheets supporting its proposed award of attorneys' fees as an exhibit
21 to Etan Mark's Third Declaration. *See* Mark Decl. at ¶ 9. For the reasons set forth in
22 Plaintiffs' Motion for Final Approval of Class Counsel's Attorney Fees (ECF No.
23 399), the modified spreadsheets accept the Court's adjusted lodestar as set forth in the
24 PAO. *See id.* at Exs. A and B. The Court has already found Class Counsel's rates to
25 be reasonable, PAO at p. 33, and found an adjusted loadstar of $3,935,806.50 to be
26 appropriate, *id.* at 51. Rather than contest the Court's downward modification of the
27 lodestar, Class Counsel reiterates its request for a modest multiplier of 1.058.

28 Class Counsel also renews its requests for final approval of service awards for

1 the three named class representatives ($30,000.00 for Patricia Rodgers, $30,000.00
2 for Jennifer Ribalta, and $18,000.00 for Izaar Valdez) for the reasons set forth in its
3 June 19, 2023 filing.
4 Finally, Class Counsel notes that it is not seeking reimbursement for any
5 additional costs and asks the Court to finally approve its request for reimbursement
6 of $337,926.03, which the Court already found to be reasonable. PAO at 52.

7 **VI. CONCLUSION**[8]

8 The Settlement is fair, adequate, and reasonable, and Plaintiffs respectfully
9 request the Court:
10 1. Grant final approval of the Class Action Settlement Agreement (ECF No.
11 383) between Plaintiffs and Defendant Herbalife International of America, Inc., as fair,
12 reasonable, and adequate;
13 2. Permanently certify under Federal Rule of Civil Procedure 23(a) &
14 (b)(3), for settlement purposes only, the Class conditionally certified by the Court
15 when granting the previous motion for preliminary approval, *see generally*, Order Re
16 Plaintiff's Motion for Preliminary Approval of Class Action Settlement (ECF No.
17 396);
18 3. Confirm the appointment of the named Plaintiffs as Settlement Class
19 Representative and Plaintiffs' attorneys as Settlement Class Counsel;
20 4. Approve the motion for attorneys' fees, reimbursement of expenses, and
21 service awards, pursuant to the separate motion papers previously filed with the Court
22 (ECF Nos. 392, 399);
23 5. Approve payment of administration fees to the Settlement
24 Administrator; and
25 6. Enter judgment accordingly, finally approve the plan of allocation
26
27
28 [8] Class Counsel intends to file a motion for final distribution after the Claims Administrator has completed its claim administration.

1 contained in Section 4 of the Settlement (ECF No. 383), and retain continuing
2 jurisdiction over the implementation of the settlement.
3 DATED: September 8, 2023 Mark Migdal & Hayden
4
5
By:
6
7 Etan Mark
Attorneys for Plaintiffs Patricia Rodgers,
8 Jennifer Ribalta, and Izaar Valdez
9

Local Rule 11-6.2 Certificate of Compliance

10
11 The undersigned counsel of record for Plaintiffs certifies that this brief contains
12 6,954 words which complies with the word limit of L.R. 11-6.1.
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