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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF LOS ANGELES**

13 SARAH DESIMONE, individually and on
14 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 HERBALIFE LTD., HERBALIFE
18 INTERNATIONAL, INC., HERBALIFE
19 INTERNATIONAL OF AMERICA, INC.,
20 MICHAEL O. JOHNSON, STEPHAN
GRATZIANI, JOHN DESIMONE,
FRANK LAMBERTI, TROY HICKS, and
DOES 1–100, inclusive,

21 Defendants.
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Case No. **24STCV28801**

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1. Failure to Pay Minimum Wage and Liquidated Damages (Labor Code §§ 1182.12, 1194, 1197, 1197.1, at 1198);
2. Failure to Provide Meal Periods or Meal Premium Wages (Labor Code §§ 226.7, 512(a), 1198; IWC Wage Order 4-2001);
3. Failure to Provide Rest Periods or Rest Break Premium Wages (Labor Code §§ 226.7, 558.1);
4. Failure to Keep Requisite Payroll Records (Labor Code § 1174(d));
5. Failure to Provide Timely and Accurate Wage Statements (Labor Code § 226(a), 226(e));
6. Failure to Timely Pay Wages (Labor Code § 204);
7. Failure to Pay Wages Upon Separation (Labor Code § 201-203);
8. Failure to Reimburse Business Expenses (Labor Code §§ 450, 2802; IWC Wage Order 4-2001);
9. Unfair Competition (Bus. & Prof. Code §§ 17200 et seq.)

1 Plaintiff SARAH DESIMONE (“Plaintiff”) brings this action, individually, and on behalf
2 of a class of similarly situated individuals against Herbalife Ltd. (formerly Herbalife Nutrition Ltd.),
3 Herbalife International, Inc., Herbalife International of America, Inc., Michael O. Johnson, Stephan
4 Gratziani, John DeSimone, Frank Lamberti, and Troy Hicks (collectively, “Defendants” or
5 “Herbalife”). Plaintiff’s allegations against Defendants are based upon investigation carried out by
6 Plaintiff’s counsel, except for allegations pertaining specifically to Plaintiff, which are based upon
7 Plaintiff’s personal knowledge.

8 **I. INTRODUCTION**

9 1. Herbalife is a massively successful publicly traded company that, for years, has
10 exploited its California salesforce by misclassifying them as independent contractors rather than
11 as employees. These sales and marketing personnel are known as “Distributors” and work under
12 Herbalife’s rigid direction to promote and sell a variety of Herbalife products (collectively, the
13 “Products” or “Herbalife Products”). In exchange for Distributors’ work promoting and educating
14 the public about the brand and Products on online social media and in retail outlets, acquiring new
15 customers, engaging existing customers, recruiting and training new Distributors, and driving
16 traffic to Herbalife-owned websites, Herbalife pays Distributors at most a paltry commission for
17 certain sales.

18 2. Herbalife was created in 1980 to sell nutritional products, such as protein shakes and
19 bars, weight loss products, supplements, and other personal care products. In 1986, it went public.
20 Today, it is a global company with operations in nearly 100 countries. In 2023, it had approximately
21 116,000 Distributors working from the United States, and a substantial number are based in
22 California, where Herbalife’s international headquarters is located. These Distributors work under
23 Herbalife’s control, with their marketing and sales work happening in two main ways: (1) in
24 connection with Herbalife-driven retail outlets known as “Nutrition Clubs”; or (2) online, by driving
25 social media engagement under Herbalife’s guidance and direction, whereby Distributors are
26 directing consumers to Nutrition Clubs and/or to Herbalife-controlled websites, where Herbalife
27 accepts and processes the sales and fulfills the orders.

28 3. The company’s success—and ability to avoid accountability for its employees thus

1 far—turns on the fact that it operates as multi-level marketing business (“MLM”). Herbalife’s
2 recruitment tactics promise its prospective Distributors the opportunity to build a business. The
3 reality of working for Herbalife is starkly different, though. Distributors supply free brand
4 awareness and perform uncompensated marketing of Herbalife Products on social media and in
5 permanent retail locations, engage in sales support for existing and new customers, recruit new
6 Distributors, and provide onboarding support and periodic trainings for other Distributors that
7 would otherwise cost Herbalife millions of dollars annually.

8 4. Herbalife has been able to skirt the law by operating as a multi-level marketing
9 company (“MLM”) – a industry that has long relied on “direct sales” exemptions to employment
10 laws to justify exploiting sales personnel. But California’s direct sales exemption was written 40
11 years ago, and times – and the industry – have changed. Anti-pyramid scheme enforcements and
12 false advertising lawsuits have forced the MLM industry to adopt far more controls and oversight
13 of sellers than decades ago, and technological advancements, including e-commerce and social
14 media, have not only greatly changed how the typical MLM seller works, but have increased both
15 the opportunities for MLM control over selling and the risks of not doing so.

16 5. The result of this modern reality is that there is no regulatory safe space for Herbalife
17 to offload the costs of labor and business expenses. California’s “direct sales” exemption, among
18 other things, is limited only to those salespersons making “primarily in person” sales to retail
19 customers “in the home”, such as door-to-door salespeople and home “Tupperware party” hosts.
20 Herbalife Distributors selling from Nutrition Clubs are not selling “in the home” but rather, to
21 customers in a permanent retail establishment. And those Distributors who are not associated with
22 Nutrition Clubs are not selling “primarily in person” but rather, are selling online, while generating
23 social media content and advertising for Herbalife.

24 6. Not only have the locations for where and how Distributors sell changed over time,
25 but so too has the control that Herbalife exerts over them. As a result of a 2016 anti-pyramid scheme
26 enforcement action by the FTC, Herbalife is under a court order to train, oversee, and monitor key
27 aspects of the Distributors’ work to ensure they are selling to legitimate retail customers and not
28 merely selling inventory at wholesale to newly recruited Distributors. Because of that order,

Herbalife assumed even more control over its Distributors, codifying some of the new restrictions in Herbalife’s Rules of the Road (the “Rules”), the primary set of directives Herbalife requires all Distributors must follow. Around the same time, Herbalife leaned more heavily into the Nutrition Club model. The result is a centralized, top-down marketing strategy in which Herbalife ensures that its thousands of workers adhere to common instructions and exercise minimal discretion, all working to grow Herbalife’s multimillion dollar international enterprise.

7. Indeed, the lack of discretion Herbalife gives to its Distributors is evidenced by the fact that few earn a profit under its compensation structure. For instance, in a typical month in 2023, Herbalife estimated that only about 56,000 of its 116,000 Distributors received compensation for sales.¹ Of those that did, at least half earned less than \$257 *—before any expenses*. These expenses include additional money paid to Herbalife for shipping and sales tax on products purchased, as well as various expenses that Herbalife charges Distributors, such as annual fees, monthly software fees, and tickets to regular training events. New Distributors must also purchase the Herbalife Distributor Pack (which currently sells for \$94.10). Herbalife only tracks the percentage that received commission, not whether Distributors earned net income from their hard work after deducting for purchases necessary to perform the work.

8. The willful, intentional nature of Herbalife’s decision to misclassify its California Distributors is apparent from its decision to operate as an MLM, a business model that virtually guarantees the company will secure hundreds of thousands of hours of free or below-market labor each year to execute a centralized marketing and growth strategy. Moreover, Herbalife’s willful decision to misclassify its salesforce is evident from its choice to remain organized in this way years after the California Supreme Court’s seminal decision in *Dynamex v. Superior Court*, 4 Cal. 5th 903 (2018) and the California legislature’s codification of the “ABC Test” in AB 5, both of which made clear that its salesforce were in fact employees, in the manner Herbalife deploys and relies on them. Indeed, Herbalife executives have repeatedly extolled the work of the Distributors and

¹ Key Information About Being an Herbalife Independent Distributor, available at <https://www.herbalife.com/content/dam/global-reusable-assets/documents/pd-statement-typical-distributor-earnings-en-us.pdf>

1 emphasized the central role they play in Herbalife operations. For example, in a June 2024
2 shareholder earnings call, CEO Michael Johnson described the Distributors as “the heart of the
3 company.”² As both an MLM and a California-based company, Herbalife knew the law. It is a
4 sophisticated corporate actor and an active member of a national trade association (Direct Selling
5 Association) that issues guidance and warnings to MLMs as to the changing law on
6 misclassification.

7 9. Plaintiff Sarah DeSimone was one such victim of Herbalife’s practices. Like all
8 Distributors, Plaintiff was trained by other Distributors and Herbalife materials, and she was
9 required to market and sell Products to the public in accordance with Herbalife’s directives and
10 strict limitations. Plaintiff was an exemplary Distributor in all respects, with a sales volume that put
11 her in the top 4% of Distributors in the company. She was tapped to speak at events and train new
12 Distributors. But the success was illusory: Plaintiff was often working 60 hours a week, invested
13 tens of thousands of dollars in a Nutrition Club and other sales efforts, and was in debt. While
14 Plaintiff received commissions on certain sales, she was paid nothing for her time, all while
15 incurring unreimbursed personal costs to perform the work on Herbalife’s behalf.

16 10. For these reasons, Plaintiff brings this action to recover unpaid wages, overtime
17 compensation, penalties, interest, injunctive relief, other equitable remedies, damages, and
18 reasonable attorneys’ fees and costs under the California Labor Code, Cal. Lab. Code §§ 201, 202,
19 203, 204, 226(a), 226.7, 226.8, 512(a), 1174(d), 1194, 1197, 1197.1, 1198, 2800, 2802 and 2698 *et*
20 *seq.* (the “CLC”), IWC Wage Order 4 (8 Cal. Code Regs. § 11040), and California Unfair
21 Competition Law (Cal Bus. & Prof Code §§ 17200 *et seq.*). In addition, Herbalife’s conduct violates
22 various municipal and county codes in California, including but not limited to City of L.A. Cal.
23 Code art. 7-7.5; County of Los Angeles Code § 8.100.040, *et seq.*, San Francisco Cal. Code 12R.
24 Finally, Plaintiff seeks a public injunction, prohibiting Herbalife from misclassifying workers and
25 operating Nutrition Clubs under the MLM model in California.

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28 ² <https://www.fool.com/earnings/call-transcripts/2024/08/01/herbalife-hlf-q2-2024-earnings-call-transcript/>,
last accessed September 30, 2024.

1 11. Upon information and belief, Herbalife has not addressed and/or changed its
2 unlawful practices and has continued to deprive employees of millions of dollars in straight and
3 overtime compensation. By bringing this action, Plaintiff intends to stop this ongoing and unlawful
4 practice and recover back wages and overtime to which she is rightfully entitled.

5 **II. JURISDICTION AND VENUE**

6 12. The monetary damages, civil penalties, restitution, and equitable relief sought by
7 Plaintiff and the class members exceed the minimal jurisdiction limits of the Superior Court and
8 will be established according to proof at trial.

9 13. This Court has jurisdiction over this action pursuant to the California Constitution,
10 Article VI, section 10. The statutes under which this action is brought do not specify any other basis
11 for jurisdiction.

12 14. This Court has jurisdiction over all Defendants because, upon information and
13 belief, Defendants are citizens of California, have sufficient minimum contacts in California, or
14 otherwise intentionally avail themselves of the California market so as to render the exercise of
15 jurisdiction over them by California courts consistent with traditional notions of fair play and
16 substantial justice. Moreover, the acts and omissions detailed herein occurred in California.

17 15. Venue is proper in this Court because a majority of the acts, events, and violations
18 occurred in this County. Upon information and belief, Defendants maintain offices—indeed, its
19 principal office—and have agents, employ individuals, and/or transact business in the State of
20 California, County of Los Angeles.

21 **III. THE PARTIES**

22 16. Plaintiff Sara DeSimone is an individual and resident of Gold River, California.

23 17. Herbalife International, Inc. has its principal place of business in Los Angeles,
24 California, and is incorporated under the laws of the State of Nevada.

25 18. Herbalife International of America, Inc. has its principal place of business in Los
26 Angeles, California, and is incorporated under the laws of the State of Nevada. (Defendants
27 Herbalife International, Inc. and Herbalife International of America, Inc. are collectively referred
28 to as “Herbalife Subsidiaries.”)

1 19. Herbalife Ltd. (formerly known as Herbalife Nutrition Ltd.) is the parent company
2 and alter-ego of the Herbalife Subsidiaries. It is publicly traded on the New York Stock Exchange
3 and is incorporated Grand Cayman, Cayman Islands. While its official address of record with the
4 Securities and Exchange Commission is a P.O. Box in the Cayman Islands, it is effectively
5 headquartered in and conducts business from the same Los Angeles address as the Herbalife
6 Subsidiaries. Its official phone number appearing on filings with the Securities & Exchange
7 Commission is (213) 745-0500, a Los Angeles number that it also used by the Herbalife
8 Subsidiaries, and it shares a single URL, www.herbalife.com, with the Herbalife Subsidiaries. As
9 discussed below, Herbalife Ltd. is controlled by the same persons controlling the Herbalife
10 Subsidiaries.

11 20. Plaintiff is informed and believes and based thereon alleges that Michael O. Johnson
12 is, and at all times relevant hereto was, an individual residing in California, as well as Chairman
13 and Chief Executive Officer for Herbalife International of America, Inc. and Herbalife Ltd. Plaintiff
14 is further informed and believes and based thereon alleges that Michael O. Johnson, in his capacity
15 as Chairman and Chief Executive Officer for Herbalife International of America, Inc. and Herbalife
16 Ltd., exercised control over the wages, hours and/or working conditions of Plaintiff and other
17 aggrieved employees, including by informing employees when to report to work and what work
18 hours should actually be recorded, violated, or caused to be violated, the above-referenced and
19 below-referenced Labor Code provisions in violation of Labor Code section 558.1.

20 21. Plaintiff is informed and believes and based thereon alleges that Stephan Gratziani
21 is, and at all times relevant hereto was, an individual residing in Florida, as well as President for
22 Herbalife Ltd. and Herbalife International of America, Inc. Plaintiff is further informed and believes
23 and based thereon alleges that Stephan Gratziani, in his capacity as President of Herbalife Ltd.,
24 exercised control over the wages, hours and/or working conditions of Plaintiff and other aggrieved
25 employees, including by informing employees when to report to work and what work hours should
26 actually be recorded, violated, or caused to be violated, the above-referenced and below-referenced
27 Labor Code provisions in violation of Labor Code section 558.1.

28 22. Plaintiff is informed and believes and based thereon alleges that John DeSimone is,

1 and at all times relevant hereto was, an individual residing in California, as well as Chief Financial
2 Officer for Herbalife Ltd. and Herbalife International of America, Inc. Plaintiff is further informed
3 and believes and based thereon alleges that John DeSimone, in his capacity as Chief Financial
4 Officer of Herbalife Ltd. and Herbalife International of America, Inc., exercised control over the
5 wages, hours and/or working conditions of Plaintiff and other aggrieved employees, including by
6 informing employees when to report to work and what work hours should actually be recorded,
7 violated, or caused to be violated, the above-referenced and below-referenced Labor Code
8 provisions in violation of Labor Code section 558.1.

9 23. Plaintiff is informed and believes and based thereon alleges that Frank Lamberti is,
10 and at all times relevant hereto was, an individual residing in California, as well as Chief
11 Commercial Officer for Herbalife Ltd. and Herbalife International of America, Inc. Plaintiff is
12 further informed and believes and based thereon alleges that Frank Lamberti, in his capacity as
13 Chief Commercial Officer of Herbalife Ltd. and Herbalife International of America, Inc., exercised
14 control over the wages, hours and/or working conditions of Plaintiff and other aggrieved employees,
15 including by informing employees when to report to work and what work hours should actually be
16 recorded, violated, or caused to be violated, the above-referenced and below-referenced Labor Code
17 provisions in violation of Labor Code section 558.1.

18 24. Plaintiff is informed and believes and based thereon alleges that Troy Hicks is, and
19 at all times relevant hereto was, an individual residing in California, as well as Chief Operating
20 Officer for Herbalife Ltd. and Herbalife International of America, Inc. Plaintiff is further informed
21 and believes and based thereon alleges that Troy Hicks in his capacity as Chief Operating Officer
22 of Herbalife Ltd. and Herbalife International of America, Inc., exercised control over the wages,
23 hours and/or working conditions of Plaintiff and other aggrieved employees, including by
24 informing employees when to report to work and what work hours should actually be recorded,
25 violated, or caused to be violated, the above-referenced and below-referenced Labor Code
26 provisions in violation of Labor Code section 558.1.

27 25. Plaintiff alleges that each of the aforementioned Defendants are “persons” who violated
28 or caused to be violated California Labor Code §§ 558, and 1197.1 and the Industrial Welfare

Commission (“IWC”) Wage Orders.

26. The true names and capacities of Defendants sued as DOES 1-100, inclusive, are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names pursuant to section 474 of the California Code of Civil Procedure. Plaintiff will seek leave to amend this Demand when said true names and capacities have been ascertained.

IV. FACTS COMMON TO ALL CLASS MEMBERS

A. Herbalife Is a Successful Multilevel Marketing Company That Is Dependent on its Distributors to Engage in Marketing on Its Behalf.

27. Herbalife was founded in 1980 to sell nutrition products, such as protein bars and diet shakes. By the end of the decade, it had gone both public and international, and its salesforce was rapidly growing. But from its initiation, Herbalife operated as an MLM, claiming to offer people opportunities to build their own businesses, and classified many of its workers as independent contractors.

28. Today, Herbalife has a network of 116,000 Distributors in the United States. All Distributors are classified as independent contractors, despite doing work central to the company’s business. All Distributors are responsible for marketing and generating brand awareness, and they recruit new Distributors. Distributors today largely work in one or both of the following capacities:

- **Marketing and Selling in Nutrition Clubs:** Herbalife encourages Distributors to open and work in “Nutrition Clubs,” which are retail stores where Distributors sell to the public Herbalife products, as well as prepare nutrition shakes and smoothies using Herbalife products. Distributors must obtain Herbalife approval to operate a Nutrition Club and are subject to its various controls regarding the operation, promotion, and management of Nutrition Clubs.
- **Marketing and Selling Outside of Nutrition Clubs:** Outside of Nutrition Clubs, Distributors primarily engage in marketing and selling online, or when in person, they are typically done in other locations away from the home. Those Distributors engaged in online selling drive social media engagement, posting on Instagram and other social media outlets. Distributors also can promote Nutrition Clubs, or to encourage them to meet them at gyms and fitness centers, where Herbalife coaches offer free wellness profiles or workouts as a way to drum up sales. Herbalife uses its Distributor workforce to ensure that social media is saturated with posts about Herbalife Products and testimonials as to the quality and effectiveness of its Products. For example, in advance

of the launch of a new Product, Herbalife urges its Distributors to purchase and promote the product on social media using Herbalife talking points and graphics and to direct customers to Herbalife-controlled websites to make their purchases.

29. Herbalife views Distributors as the product of a product, in that the Distributor's own health and wellness success story is the "product" of using Herbalife Products, and it directs them to market Herbalife Products accordingly. Herbalife encourages Distributors to purchase products for personal consumption, and accordingly urges Distributors to regularly promote their own personal Herbalife regimen, either online in social media postings or in talking to retail customers at Nutrition Clubs.

30. But despite their inextricably vital role to Herbalife's success, Herbalife has never properly classified its salesforce—Distributors—as employees. Rather, it treats them as independent contractors. But these Distributors are not independent contractors under applicable law. Rather, Herbalife created the Distributor "opportunity" to secure an expansive marketing and sales network for minimal to no cost. It has reaped enormous profits by deliberately avoiding paying wages and benefits to those performing the sales work that forms the backbone of Herbalife's business model and revenue generation. Herbalife does not compensate Distributors for their out-of-pocket expenses, including internet and cell phones as well as rent and overhead to operate the Nutrition Clubs, further increasing Herbalife's profits and/or reducing its operating costs and decreasing Distributors' income, in violation of California law. The intended result is for Distributors to receive, at most, de minimis profit for their work, while providing free labor and shouldering the costs of doing business that Herbalife should be bearing.

B. Herbalife Distributors Are Employees

1. Controlling Law

31. Companies like Herbalife were never supposed to be allowed to run an entire business on the backs of independent contractors. People who work in a company's core line of business are its "employees." *United States v. Silk*, 331 U.S. 704, 718 (1947).

32. Herbalife has approximately 116,000 Distributors in the United States, all of whom are classified as independent contractors, while employing several thousand people who are

1 classified as employees at its Los Angeles headquarters and various distribution centers around the
2 country. Herbalife employees work in a variety of roles, such as accounting and finance, supply
3 chain management, product development, and distribution. These workers receive competitive
4 benefits from Herbalife, including health insurance, paid time off, and retirement plans. Distributors
5 receive none these perks or benefits, while also being denied the most basic protections of federal
6 and state labor laws. Herbalife does not pay them minimum wage; it does not pay overtime; and it
7 does not reimburse business expenses, such as internet connections, laptops, smart phones,
8 Herbalife Products, hosting events, or expenses incurred from social media video production over
9 Facebook, YouTube, and Instagram. Herbalife’s classification of its Distributors also deprives them
10 of basic protections against discrimination and sexual harassment.

11 33. Today, Herbalife preys upon many of the most vulnerable members of society.
12 Despite MLMs being a \$40 billion industry, “the vast majority of people involved in them don’t
13 make money off of MLMs, and many people lose money.”³ Herbalife Distributors are no exception:
14 many make nothing, and of those that do earn some commission, at least half are not receiving
15 enough to cover necessary business expenses.

16 34. In recent years, state legislatures have taken action to send a clear message that most
17 workers should be “employees.” California has adopted the “ABC test” to determine whether a
18 company, like Herbalife, has misclassified its workers as “independent contractors.” Because
19 employee status was meant to be the default, the ABC test “presumptively considers all workers to
20 be employees and permits workers to be classified as independent contractors only if the hiring
21 business demonstrates that the worker in question satisfies *each* of three conditions:

- 22 a. that the worker is free from the control and direction of the hirer in connection with
23 the performance of the work . . . *and*
24 b. that the worker performs work that is outside the usual course of the hiring entity’s
25

26 ³ Emily Stewart, *\$5 Jewelry and an MLM Conference Gone Wrong: Multilevel marketing companies were*
27 *the “perfect” pandemic business*, VOX (Sept. 23, 2021), [https://www.vox.com/the-goods/22688317/mlm-](https://www.vox.com/the-goods/22688317/mlm-covid-19-pandemic-recruiting-sales-paparazzi)
28 [covid-19-pandemic-recruiting-sales-paparazzi](https://www.vox.com/the-goods/22688317/mlm-covid-19-pandemic-recruiting-sales-paparazzi) [https://perma.cc/8SC6-P9FF] (citing study finding that 99
percent of MLM participants lose money).

business; *and*

- c. that the worker is customarily engaged in an independently established ... business of the same nature as that involved in the work performed.”

Dynamex Operations West, Inc. v. Superior Court, 4 Cal. 5th 903, 956–57 (2018) (emphasis in original).

2. Herbalife Exerts Control Over Distributors.

35. Herbalife does not require Distributors to hold any special experience, skills, license, or education level. In fact, there is no space in the application to document prior work experience or the ability to upload one’s resume. The only “qualification” required is for those Distributors seeking to be the primary “operator” of a Nutrition Club; those Distributors must have least one year of sales experience with Herbalife. But Herbalife permits operators of Nutrition Clubs to have those in their Downlines conduct sales and marketing work at the Club.

36. The application process suggests to Distributors that this initial payment is the only payment to Herbalife required to become a Distributor. In reality, Distributors must pay additional fees to Herbalife to be able to perform their work. For example, Herbalife charges Distributors an annual fee, the amount of which is determined by the Distributor’s rank and experience level. For example, supervisors are charged \$79 annually. Herbalife also charges \$7.99 a month for “software,” which is how Distributors access a platform and app called “Bizworks.” While described as an optional expense, Distributors often sign up because it would be virtually impossible to track sales and commissions without it. Any person who recruits other Distributors becomes a “supervisor,” and must pay an annual fee of \$79. And Herbalife strongly encourages Distributors to attend regular training seminars and conferences, which typically cost between \$20-50 for the more regional, monthly events, and as much as \$200 or \$300 for bigger quarterly national events.

37. Upon acceptance of their application, all Distributors are required to adhere to various rules. The central document is the 30-page “Rules of the Road” (the “Rules”), which sets forth a variety of policies and directives for Distributors. In addition, Herbalife requires Distributors to adhere to the policies and directives outlined in a second 30-page document, the “Sales & Marketing Plan” (“Marketing Plan”). While Herbalife periodically updates the

documents to make minor, routine updates, the Rules and Marketing Plans have generally remained consistent throughout the class period. And all versions contain language providing that Distributors are to be considered independent contractors.

38. Because Herbalife treats the Distributors as independent contractors, it does not pay them any salary, wages, or benefits or offer reimbursement for business related expenses. Rather, as is typical in the MLM industry, the Herbalife Marketing Plan provides for two overarching types of compensation: (1) for certain sales the Distributor made to retail consumers, the Distributor receives a small percentage as a commission; and (2) if the Distributor builds a “Downline,” i.e., recruits other new Distributors to market and sell Herbalife Products and recruit more Distributors, then the “Upline” Distributor receives commission on their Downline Distributors’ sales.⁴

39. To receive a commission for a retail sale, the Distributor must provide a detailed receipt of the transaction. Rules at p. 5. The receipt requirement is a result of the FTC enforcement action and an important anti-pyramid scheme safeguard, as it ensures Distributors are only selling to retail customers, not offloading inventory on to other Distributors. While receipts are created automatically when a Distributor directs a customer to an Herbalife-controlled website, those selling in person must undergo a more laborious process to get credit for their sales, including obtaining the name and contact information of purchasers.

40. Distributors are responsible for all expenses. Herbalife does not reimburse Distributors for the purchases, or for the costs of a cell phone, internet, and other routine business expenses. Nor does Herbalife reimburse Distributors for any of the costs associated with maintaining a Nutrition Club, including the rental cost of the establishment, or any expenses, such as the raw supplies, food preparation equipment, food service items (e.g., cups, plates, etc.),

⁴ The “Upline” and “Downline” concepts are the hallmark of the MLM structure. To illustrate, when an established Consultant, whom we will call “Amy,” recruits a friend, whom we will call “Sarah,” to be a Consultant, Sarah is in Amy’s Downline; and Amy is in Sarah’s Upline. If Sarah in turn recruits a new Consultant, whom we will call “Rachel,” then Sarah has an Upline (to Amy) and a Downline (to Rachel); the established Consultant Amy now has two levels to her Downline, to Sarah (first level), and Rachel (second level). Should Rachel then recruit someone, the established Consultant Amy would have three levels to her Downline.

1 cleaning supplies, etc.

2 41. In the Rules, Marketing Plan, and other directives, Herbalife gives itself broad rights
3 to control Distributors and mandate conformance with its directives and authorizes itself to amend
4 those directives at any time. And Herbalife has the exclusive authority to terminate the Distributor
5 for failure to comply with the terms.

6 42. Moreover, Herbalife exerts substantial control and direction over how the
7 Distributors perform their work, both under the terms of the Rules, Marketing Plan, and other
8 directives, and in practice. While Herbalife permits Distributors to set their own work hours and
9 work as little or as many as they desire, the Distributor's discretion ends there. Because of the
10 control and direction exerted by Herbalife, the Distributor has virtually no discretion over how
11 they are to actually do the job.

12 43. Herbalife also exerts control over a Distributor's ability to earn income from sources
13 outside of Herbalife. For example, Distributors are prohibited from promoting other business
14 opportunities or products from other MLMs to other Distributors, as well as any retail customer
15 that holds a "Preferred Member" status with Herbalife (i.e., a loyalty program where the customer
16 can get discounts on Herbalife products).

17 **a. Herbalife Closely Controls Distributors' Marketing and Directs**
18 **Distributors to Conduct Marketing and Sales Online When Not**
Selling at Nutrition Clubs.

19 44. While some MLMs rely on home parties, door-to-door sales calls, and other forms
20 of selling to people in person and in the home, Herbalife's business model and digital platform and
21 tools are designed so that Distributors can work online to market and sell Herbalife Products, solicit
22 leads and recruit new Distributors under Herbalife's close control and direction.

23 45. *First, Herbalife places limitations on the Distributors' ability to create their own*
24 *marketing materials, limiting their ability to exercise creativity and discretion. See. e.g., Rules at*
25 *p. 5 (limiting discretion of Distributor's ability to make claims about the Products); id. (prohibiting*
26 *Distributors from modifying any materials for Herbalife Products); id. at p. 6 (prohibiting*
27 *Distributors from providing "any indication of price to the general public, except as permitted by*
28 *Herbalife on its platforms"); id. (placing restrictions on the use of Herbalife's intellectual*

property). While Herbalife encourages Distributors to market their own experience with the Products, Herbalife's general restrictions on the claims they can make and content they can generate whenever they mention Herbalife prevents the meaningful exercise of Distributors' discretion.

46. While modest intellectual property protections are not unheard of in the sales contexts, the onerous restrictions imposed by Herbalife severely limit Distributors ability to use independent judgment and creativity. Distributors must compete with 100,000 other Distributors for customer sales, and if they are not provided adequate discretion in how they market the products, then all 100,000 are effectively advertising for Herbalife, not for their own independent business.

47. Herbalife's restrictions on how Distributors may use the Herbalife brand also limits Herbalife Distributors' ability to market the Nutrition Clubs. While Herbalife encourages Distributors to open Nutrition Clubs to sell the Herbalife products and recruit new Distributors, Herbalife prohibits Distributors from how they use Herbalife to promote the Clubs. For example, Distributors may not use Herbalife in the Club name, nor in advertising for the Club, and Distributors must take care to ensure that Herbalife products are not visible to the general public who pass by the Clubs. Distributors, however, cannot sell other products or services at the Nutrition Clubs, and may only sell Herbalife products, and things such as shakes made with Herbalife products. Thus, the restrictions on advertising and selling prevent Distributors from both attracting more customers and using their creativity and discretion to increase their income. \

48. Herbalife maintains a social media department that monitors all Distributors postings on social media and will order them to remove posts advertising Herbalife content that does not comply with the Rules, including in situations when the content is truthful, non-misleading, and does not disparage Herbalife. And to discourage Distributors from exercising discretion in creating marketing materials, Herbalife provides Distributors with a library of marketing content to use, suggested pitches, hashtags and other slogans.

49. ***Second, while Herbalife touts the Distributors' ability to maintain a Herbalife Website for selling, Herbalife uses those Websites to exert greater control over Distributors.*** The

1 template for the Distributor Websites is designed by Herbalife and restricts the Distributors from
2 exercising discretion over content, as Herbalife generates the Product pages, prices, and
3 descriptions appearing on the Distributor Websites, maintaining exclusive control over the
4 storefront. The Distributor Websites are little more than a personalized domain or affiliate link by
5 which consumers can access the same content that appears on the Herbalife Website, Distributors
6 have no ability to sell non-Herbalife Products.

7 50. ***Third, Herbalife controls pricing of its products.*** Herbalife sets retail prices, and
8 Distributors may not charge more than that. While in theory, a Distributor may offer discounts or
9 waive shipping or other costs, discretion is limited both practically and in theory. Distributors earn
10 only a small amount on any full priced sale, particularly after taxes, shipping, credit card processing
11 fees. Thus, they have little incentive to discount products. Moreover, commissions are determined
12 based on the Distributor's status, and Distributors must hit certain targets to maintain or improve
13 their status. Herbalife will not credit any sales in which the Distributor does not profit.

14 51. ***Fourth, Herbalife disseminates regular communications to ensure Distributors***
15 ***comply with its advertising and marketing rules.*** For example, Herbalife regularly emails news
16 and important information about products to Distributors. Other sales tips and new product
17 information is sent out regularly by Herbalife directly or disseminated throughout the Distributor
18 workforce via emails from Upline Distributors to those in their Downlines.

19 52. Herbalife Distributors are incentivized to adhere to Herbalife's instructional guides
20 and prompts in marketing the Products. Because they are only paid if they make sales, rather than
21 their marketing efforts, they are incentivized to follow the suggestions and directives of Herbalife,
22 and their Upline Distributors, on what kinds of marketing efforts are likely to result in successful
23 sales.

24 53. ***Fifth, Herbalife restricts where Distributors can sell the Products, leaving little***
25 ***choice but to use Herbalife's proscribed online forums for their work.*** Herbalife prohibits
26 Distributors from selling products "in markets (open or enclosed), pharmacies, kiosks, booths
27 (temporary or permanent), swap meets, flea markets, food trucks, shipping containers, restaurants,
28 food service establishments or any similar location." Rules at p. 5. In the required training,

Distributors are also told that they are prohibited from selling Herbalife products on non-Herbalife e-commerce websites, such as Amazon, E-Bay, or similar.

54. ***Sixth, Herbalife restricts where and how Distributors may advertise Herbalife Products.*** As discussed in the preceding paragraph, unless Distributors associate with a Nutrition Club, Distributors are not permitted to set up a kiosk or booth in areas with a lot of foot traffic, and thus, cannot advertise the Products by mere presence and signage. Distributors are also prohibited from advertising on “television, radio or any similar medium.” Rules at p. 6. And Distributors may not use the Herbalife brand or any of its intellectual property in any paid online search advertisements, nor in “the domain name of any website, in any registry, or on any external sign.” *Id.* Distributors are also prohibited from buying sales leads from any source. *Id.* at 8.

b. Herbalife Reliance on an E-Commerce Platform Limits Distributors’ Discretion and Promotes Online Sales over In Person Interactions.

55. Herbalife has developed numerous online tools and resources, including the Distributor Websites to influence Distributors to sell online.

56. ***First,*** Herbalife relies on an e-commerce platform to sell its products and requires that Distributors “only sell products online using platforms created by Herbalife.” Rules at p. 6.

57. ***Second,*** the Distributor Websites are designed in a way that ensures Distributors operate in compliance with Herbalife’s marketing directives. And in relying on Herbalife controlled websites to perform sales, Distributors are subject to Herbalife’s controls over order processing, cancelations, and refunds, further limiting Distributors’ exercise of business discretion.

58. ***Third,*** Herbalife’s strict and onerous receipt policy incentivizes Distributors to sell directly from Herbalife online systems, rather than conduct in person sales outside of Nutrition Clubs. Herbalife is under a court order to require Distributors to provide detailed receipts for every retail sale and it must conduct regular targeted and random audits of Distributors’ practices. Herbalife codified its court-ordered receipt requirement in its Rules by requiring all Distributors to provide receipts that include:

- the exact product and quantities sold
- the specific method of payment

- the date of sale
- the price paid by the customer
- the customer's first and last name
- the customer's contact information, including at least two of the following:
telephone number, email, or address

Rules at p. 5. In addition to collecting all this information, Herbalife prohibits combined receipting, such as combining sales to multiple customers in one receipt or combining multiple purchases by one customer into a single receipt. If a Distributor sells to a customer and does not obtain valid contact information, Herbalife will not recognize the transaction for purposes of bonuses and advancement. Because receipts are generated by Herbalife automatically when the customer purchases the products online through the Distributors' Websites, Distributors get appropriate credit for the sale and satisfy Herbalife's requirements without the burden of recordkeeping.

59. *Fourth*, as discussed above, because Herbalife prohibits Distributors from selling in most in person locations, Herbalife incentivizes reliance on its e-commerce platforms or at Nutrition Clubs to remain in compliance.

60. By relying on Herbalife's e-commerce platform for selling, handling payments, and shipping orders, Distributors save time and reduce expenses, given that in person sales would require them to create or identify and attend suitable and compliant in person events, handle payment and shipment for in person orders, complete the onerous receipt process, perform exhaustive bookkeeping and forecast and make advance purchase of extra inventory to have in stock while remaining in compliance with strict prohibitions on inventory loading.

c. Herbalife Exerts Control Over Distributors in Recruiting and in Relationships with Other Distributors and with Prospective and Existing Customers

61. Herbalife's control over Distributor's marketing and conduct extends to controlling their recruiting efforts and their relationships and interactions with prospective Distributors (prospective Downlines), as well as the Distributor-Downline relationship, and the Distributor-customer relationship.

62. Herbalife controls how Distributors market the Distributor experience and the

1 Program generally to recruit Downlines. Herbalife restricts how Distributors may disclose their
2 own income or earnings or from making lifestyle claims.

3 63. While Distributors are encouraged and incentivized to engage in recruiting,
4 Herbalife restricts their discretion to build their own team, too. For example, once a Distributor
5 joins a sponsoring Distributor's Downline, they cannot easily change to a different Downline.
6 Rather, they must refrain from selling and recruiting for a full year and enter a new agreement with
7 Herbalife to join the new sponsoring Distributor's Downline. Any Distributor who follows that
8 process effectively starts from the beginning, losing any status they had earned, and forfeiting any
9 commissions from any Distributors they had previously recruited under their former Downline
10 team.

11 64. When a Distributor recruits new Distributors and builds their Downline, Distributors
12 "are responsible for providing training to their downline Distributors, but may not profit from it."
13 Rules at p. 8. In other words, Distributors must ensure that anyone in their Downline learns and
14 adheres to all the rules and policies and cannot charge for their time. Similarly, Distributors cannot
15 sell to other Distributors any sales or business tools they develop to assist with their work. *Id.*

16 65. Herbalife limits Distributors' ability to make mutually beneficial business
17 agreements. For example, Herbalife prohibits Distributors from making agreements with one
18 another about the territories in which they sell, pricing, customers, or distribution. Rules at p. 13.

19 **3. Herbalife Cannot Meet its Burden to Show that Distributors are**
20 **"Customarily Engaged" in a Separate Business.**

21 66. Herbalife cannot meet its burden to show that Distributors are "customarily
22 engaged" in an independently established sales and marketing business. Instead, most Herbalife
23 Distributors are recruited regardless of their skill or experience, exclusively perform sales and
24 marketing for Herbalife (using Herbalife controlled systems and Herbalife materials) and maintain
25 no separate sales or marketing business.

26 67. Herbalife Distributors are not required to have any background in sales or nutrition
27 prior to becoming a Distributor. Distributors are not required to have any licensure or meet any
28 educational requirements, either. Nor does Herbalife require that they have schooling, training, or

1 prior employment in marketing, sales, or general business. With few exceptions, Distributors have
2 not ever owned or operated their own separate sales business outside of Herbalife. After becoming
3 Distributors, most do not maintain any registered or incorporated sales or marketing business, for
4 their work with Herbalife or otherwise. Distributors generally do not hold themselves out to others
5 as sales or marketing professionals or maintain any office or business address outside of those at
6 Nutrition Clubs.

7 68. With respect to the Nutrition Clubs, Herbalife does not permit Distributors to offer
8 non-Herbalife products for sale, so Herbalife Distributors operating Club do not have a business
9 independent of Herbalife.

10 69. Herbalife discourages all Distributors from other direct sales and MLM companies,
11 and actively prohibits high achieving Distributors from so doing. Specifically, in the Rules,
12 Herbalife prohibits all Distributors from promoting non-Herbalife business opportunities to
13 Distributors, and from selling products from other MLMs to Distributors.

14 70. When Distributors reach high levels of sales, Herbalife invites them to join the TAB
15 Team, at which point Herbalife requires them to sign strict non-compete agreements, prohibiting
16 them from working for any other sales company ever. Herbalife enforces these agreements. For
17 example, in 2021, when sales were slow as a result of the COVID pandemic, many Herbalife
18 distributors sought out other opportunities to supplement Herbalife sales. Herbalife held an online
19 call, requiring these distributors to attend, and ordered them to stop. Many of these distributors
20 were promoting these other opportunities and products from their personal Instagram accounts
21 (which Herbalife prohibits them from using “Herbalife” in their handles or screen name), and
22 Herbalife ordered them to cease promoting any opportunities from any personal accounts that the
23 Distributors had ever used to promote Herbalife, stating that so doing would be cause to lose certain
24 compensation for the rest of the year.

25 71. As discussed throughout, rather than rely on Distributors’ own sales experience to
26 market products, Herbalife provides the instrumentalities of Distributors’ sales and marketing
27 work through Herbalife’s online enterprise management system, from which Distributors access
28 proprietary resources and tools, like shareable content, and business reporting and analytic tools.

1 And Herbalife controls all Distributor Websites.

2 72. Ultimately, Herbalife intends for Distributors to view Herbalife as their employer.
3 This is evident because Herbalife policies require that Distributors rely on its materials and tools;
4 regardless of whether a Distributor maintains any kind of independent business, Herbalife's
5 policies and mandated instrumentalities of work make it so the Distributor responsibilities are not
6 those that are of the sort that would be performed by an independent and trained professional. For
7 example, because Herbalife provides Distributors with the platform, apps, websites, and other tools
8 to sell the Products, the Distributors are using the Herbalife brand to sell, not their own business's
9 identity. Those experienced in social media marketing are not allowed to use the kinds of tools
10 used by professionals in that field; as discussed above, Herbalife prohibits them from advertising
11 through mass media.

12 **4. Distributors' Work is Not Outside Herbalife' "Usual Course of**
13 **Business."**

14 73. Herbalife views the work of the Distributors to market the Products online as central
15 to its business model. It celebrates and prides itself on the work of the Distributors to market and
16 sell the Products online as central to its business model – work itself that Herbalife does not
17 compensate for—and as core to its past and future successes.

18 74. Herbalife does not hold itself out as a purveyor of business opportunities, but rather,
19 a company that manufactures and sells products to consumers. For example, in its communications
20 to shareholders, Herbalife describes itself as a “global nutrition company that provides health and
21 wellness products to consumers in 95 markets, which consists of countries and territories, through
22 our direct-selling business model.”⁵ Rather than tout the number of business opportunities that
23 Herbalife sold, its focus throughout its communications is on Herbalife's success in selling the
24 actual products it manufactured, as Herbalife stated in its most recent 10-K:

25 As of December 31, 2023, we marketed and sold approximately 136 product types. Our
26 products are often sold as part of a program and therefore our portfolio is comprised of a
series of related products designed to simplify weight management, health and wellness,
and overall nutrition for our Members and their customers.⁶

27 ⁵ [10-K - 02/14/2024 - Herbalife Ltd.](#)

28 ⁶ *Id.*

1
2 75. Moreover, while the Distributor opportunity is not Herbalife’s main business, the
3 Distributor role is central to how Herbalife reaches retail customers, telling shareholders, “the
4 distribution and sales of our products with personalized support, coaching, and education provide
5 a supportive and understanding community of like-minded people who prioritize health and
6 nutrition.”⁷

7 76. Distributors are so central to the Herbalife business model that Herbalife’s
8 President Stephan Gratziani himself started as an Herbalife distributor, working in the role for 32
9 years. In 2023, he became Herbalife’s Chief Strategy Officer and shortly thereafter, elevated to
10 President.

11 77. Herbalife executives regularly tout developments impacting the Distributors and the
12 central role Distributors play. For example, in an earnings call on May 1, 2024, President Gratziani
13 announced the company’s new Chief Commercial Officer, Frank Lamberti, who Gratziani stated
14 “will be assuring that everything we do daily has our distributors in mind and focused on helping
15 them attract and retain more customers, distributors, and build bigger businesses.”⁸ Later, Gratziani
16 reiterated the importance of the Distributors to Herbalife, stating: “We are really listening to our
17 distributors. We want to support them and make sure that we’ve got the products like the product
18 bundle that you’ve just seen. Some of them are very excited and are seeing opportunities.” And in
19 that same call, CEO Michael Johson stated, “And that everything we do daily has our distributors
20 in mind and focused on helping them attract and retain more customers, distributors in building
21 bigger businesses. Those are two key elements to where we are today and where we’re going.”⁹

22 **5. Herbalife Distributors Are Not “Direct Sellers.”**

23 78. Despite classifying the Distributors as independent contractors, they are employees
24 under California law. As set forth below, while some MLM workers might meet the narrow
25 statutory exemption for those employed in “direct sales,” the Distributors do not.

26 ⁷ *Id.*

27 ⁸ https://www.fool.com/earnings/call-transcripts/2024/05/01/herbalife-hlf-q1-2024-earnings-call-transcript/?source=isafpbcs0000001&utm_source=sharewise&utm_medium=feed&utm_campaign=firehose

28 ⁹ *Id.*

1 **a. Background on MLMs and the Direct Sales Exemption**

2 79. For many years, the MLM industry has enjoyed notoriety for its ability to carve out
3 legal loopholes that exempted them from federal and state employment laws, thereby permitting
4 MLMs to treat its sales personnel as independent contractors rather than employees. These
5 exemptions were enacted in the 1970s and 1980s. However, the California Exemption describes a
6 different job or function than what is performed by Herbalife Distributors.

7 80. When AB 5 was passed in 2019, it codified the opinion in *Dynamex Operations*
8 *West, Inc. v. Superior Court of Los Angeles County*, 4 Cal. 5th 903 (2018), in which it set forth a
9 new test for misclassification (the “Dynamex Test”). When the bill was being debated, many in
10 the MLM industry recognized that the Dynamex Test would require them to classify their workers
11 as employees. The Direct Selling Association (“DSA”), the industry lobbying group, pushed for
12 an exemption. As a result of those efforts, AB 5 exempts from the Dynamex Test any salesperson
13 “described in Section 650 of the Unemployment Insurance Code, so long as the conditions for
14 exclusion from employment under that section are met.” (“Direct Sales Exemption”). For such
15 workers who fall within the Exemption, the old common law test (rather than the ABC test) would
16 govern the question of employee status.

17 81. For an entity to be covered under the Direct Sales Exemption, the hiring entity must
18 show that the work satisfies all three criteria set forth in the statute, namely that (a) the worker
19 performs one of two specific types of work; (b) the worker’s compensation is directly tied to sales
20 or output, and not hours worked; and (c) the worker and business have an agreement that the worker
21 will be treated as a contractor for tax purposes. If all three criteria are not met, then the Exemption
22 does not apply, and if the worker otherwise meets the Dynamex Test, they are misclassified. While
23 the third of these criteria—services performed pursuant to a contract identifying the person as an
24 independent contractor—is only facially met, and even if it were an enforceable contract, that
25 factor is not dispositive. As discussed below, the Distributor job does not satisfy the other two
26 criteria.

27 //

28 //

1 **b. Herbalife Distributors Do Not Perform the Jobs Identified in the**
2 **Direct Sales Exemption.**

3 82. First, for the Direct Sales Exemption to apply, the salesperson must be performing
4 one of two narrowly defined jobs. Specifically, the Exemption requires that one be “engaged in the
5 trade or business of primarily inperson [sic] demonstration and sales presentation of consumer
6 products, including services or other intangibles, in the home or sales to any buyer on a buy-sell
7 basis, a deposit-commission basis, or any similar basis, for resale by the buyer or any other person
8 in the home or otherwise than from a retail or wholesale establishment.” In other words, section
9 (a) of the Direct Sales Exemption is best understood as identifying two specific categories of direct
10 sales jobs, *Primarily In Person Consumer Home Sales Work*, and *Wholesale/Resale Work*, that
11 could trigger the applicability of the Direct Sales Exemptions. The work of an Herbalife Distributor
12 does not fall under either of these categories.

13 83. *Herbalife Distributors Are Not Engaged Primarily in In Person Consumer Home*
14 *Sales Work*. This job category covers those who are “engaged in the trade or business of primarily
15 in person [sic] demonstration and sales presentation of consumer products, including services or
16 other intangibles, in the home.” Thus, the Direct Sales Exemption is limited to those who are
17 *primarily* selling consumer products *in person* and *in the home*. These terms are significant, as they
18 differ from what appears in the analogous job category of “direct sellers” under a later federal
19 statute. *See* 26 U.S.C. § 3508(b)(2)(ii). Thus, the California Exemption applies narrowly to jobs
20 like door-to-door salespersons, or the direct sellers who work almost exclusively through the home
21 party circuit, i.e., people who sell consumer products by meeting with other consumers in their
22 homes.

23 84. Herbalife Distributors sell in two primary places: (1) in Nutrition Clubs, which are
24 “in person,” but not “in the home” and (2) online, which might occur “in the home” but is not sales
25 work that is “primarily in person.” And even when Distributors are not selling in a Nutrition Club
26 or online, they are not selling “in the home,” but rather, in gyms and fitness centers or other public
27 places. At most, any in person sales that occur outside of a Nutrition Club are merely incidental
28 those occurring in the Nutrition Club (which are not “in the home”) and/or to those occurring

1 online (which are not “in person”). As discussed herein, Herbalife restricts the use of kiosks and
2 the like, all while Herbalife requires the use of various tools, which it designed to promote online
3 sales.

4 85. ***Herbalife Distributors are not engaged in Wholesale/Resale Work.*** This job
5 category covers those “individuals . . . engaged in the trade or business of . . .”:

6 [a] “sales to any buyer”

7 [b] “[i]on a buy-sell basis, [ii] a deposit-commission basis, or any similar basis,”

8 [c] “for resale by the buyer or any other person”, and

9 [d] “in the home or otherwise than from a retail or wholesale establishment.”

10 This classification also has a federal parallel, 26 U.S.C. § 3508(b)(2)(i). While California law does
11 not define the terms buy-sell or deposit-commission in [b], federal law does. The term “buy-sell
12 basis” is one in which one buys the product to sell the product and gets paid for selling the product
13 with the spread between the purchase price and the resale price. *See* 26 U.S.C. 6041A(b)(2)(A) &
14 (B). The term “deposit-commission basis” applies where the buyer keeps as commission for a sale
15 of a product the deposit received from the buyer. *See id.*

16 86. The “Wholesale/Resale Work” category is even narrower than “In Person Home
17 Sales Work” and does not apply to Herbalife. Rather, Herbalife requires that Distributors sell *only*
18 to retail customers. Nowhere in the Agreement or in Distributors’ public materials does it state that
19 compensation is on a buy-sell or deposit-commission basis.

20 87. To illustrate what is meant by “Wholesale/Resale Work,” a hypothetical Upline
21 Distributor Sue would be performing this work if:

22 [a] Sue (the “seller”) sold a widget to her Downline Distributor Barb (the “buyer”) for \$50;

23 [b] for Barb (or “any other person” Barb transfers the widget to) to re-sell to another person,
24 Paula, for \$60; and

25 [c] Sue compensated Barb for Barb’s successful effort to re-sell the widget to Paula by
26 permitting Barb to keep the difference between the price Barb paid to Sue (\$50) and price
27 at which Barb re-sold the widget to Paula (\$60), either on

28 [i] a buy-sell basis, in which Barb pays \$50 to Sue, then Barb sells the product to

1 Paula for \$60, and Sue permits Barb to keeps the difference; or

2 [ii] a deposit-commission basis, in which Paula pays Barb a \$10 deposit, Barb pays
3 Sue \$50 to buy the product to sell to Paula, and upon delivery, Paula pays \$60 to Barb, and
4 Sue permits Barb to keep the \$ 10 deposit.¹⁰

5 88. In the Herbalife model, however, Herbalife is the “seller,” and Distributors are the
6 “buyers.” No Herbalife Distributor can be “engaged in any sales to any buyer . . . for resale” as
7 required by the Direct Sales Exemption because Herbalife does not permit Distributors to sell to
8 other Distributors. *See, e.g.*, Rules at p. 7 (“Distributors may only purchase products directly from
9 the company.”). Indeed, when Distributors make a purchase from Herbalife, they must tell
10 Herbalife if the purchase is for their personal use or to sell to retail customers; no wholesale selling
11 option is provided.

12 89. For those selling at Nutrition Clubs, the exemption is further inapplicable. To qualify
13 for this exemption, the selling must be occurring “in the home or otherwise than from a retail or
14 wholesale establishment.” Nutrition Clubs are not “in the home,” but rather, constitute selling from
15 a retail establishment.

16 90. While Distributors are permitted to sell shakes to other Distributors who visit
17 Nutrition Clubs, they are not selling these shakes to the Distributors for resale. Moreover, any sales
18 a Distributor makes to another Distributor in a Nutrition Club are not credited to the Distributor’s
19 sales records for purposes of advancement in the company.

20 91. ***The job descriptions in the Direct Sales Exemption predate significant changes to***
21 ***how MLMs now operate.*** By way of background, these two categories of jobs outlined in the
22 Direct Sales Exemption were how MLMs organized at the time the Direct Sales Exemption was
23

24 ¹⁰ If Barb directs Paula to her Distributor Website, and Paula purchases a product from Herbalife, both Barb
25 and her Upline consultant Sue would receive a commission for sales from Herbalife. But Sue did not perform
26 Wholesale/Resale Work, because Sue did not sell the Products to Barb, i.e., [a] is not met, nor did Sue pay
27 Barb on a buy-sell or deposit-commission basis, i.e., [c] is not met. Rather, Paula purchased directly from
28 Herbalife’s e-commerce platform at Herbalife’s set price, Herbalife took the full payment at the point of
sale, sent the Product directly to Paula, and paid a commission to Barb and Sue.

1 enacted. In the 1970s and 1980s, Downline sellers hosted parties, traveled door-to-door, or visited
2 friends and family in their homes to hand out samples, catalogs, and sales sheets. They took orders
3 and payment directly from the customer. Once the seller had enough orders, the seller placed the
4 order with the company, received the shipment from the company, and then met with the customer
5 again in person to deliver the product and if necessary, collect any further payment that might be
6 due. The direct seller engaged with consumers both directly and personally; the consumers had
7 little to no interaction with the company.

8 92. In some instances, instead of placing the order with the company, the seller
9 performing “In Person Home Sales” would place the order with the person in their “Upline,” who
10 was engaged in “Wholesale/Resale Work.” The Upline seller acquired products from the company
11 and sold them to the Downline “In Person Home Sales” worker on a buy-sell or commission
12 deposit basis for them to sell to end consumers (or to their Downlines). The seller was able to do
13 “Wholesale/Resale Work” because at the time, MLMs permitted direct sellers to fulfill their sales
14 quotas by either selling the product to retail consumers or selling it to Downline sellers.

15 93. Since the Direct Sales Exemption was enacted, various changes in the MLM
16 industry occurred to move away from this model. Most notable is the fact that over the last few
17 decades, MLMs have been forced to make changes to their operations in response to regulatory
18 actions and civil lawsuits by private litigants to enforce anti-pyramid scheme laws. Courts and
19 regulators have made clear that to avoid violating criminal and civil pyramid scheme laws, MLMs
20 needed to conduct operations so as to ensure that real, meaningful sales were happening directly
21 to consumers—instead of primarily to sellers’ own Downlines. *See, e.g., Webster v. Omnitrition*
22 *Int’l*, 79 F.3d 776, 782 (9th Cir. 1996). It was not enough to simply have a policy that sales should
23 be at retail; the law has evolved to require MLMs to enforce that policy and to demonstrate its
24 effectiveness at ensuring participants were not merely stockpiling inventory and seeking to recoup
25 losses by recruiting new sellers to buy the product from them.

26 94. Indeed, Herbalife itself faced such a challenge. In 2016, the FTC initiated an
27 enforcement action over Herbalife’s practices. As a result, Herbalife was forced to pay \$200
28 million in restitution and agreed to restructure aspects of the Distributor program. Effectively,

Herbalife agreed to assume more control over Distributors to ensure that Distributors were not overly focused on recruiting and were selling to legitimate retail customers. Herbalife must require all Distributors to undergo training on documentation of retail sales, budgeting strategies, refund practices, permissible representations, and other topics. With respect to Distributors who lease space for Nutrition Clubs, Herbalife must require them to undergo additional training and ensure they prepare a business plan, which must include projected expenses and income, a promotional strategy, and other information. In addition, Herbalife must ensure that all Distributors are in compliance with all aspects of the FTC's Order, including maintaining a corrective action plan and investigating complaints.

95. These legal developments have prompted two important changes. First, because Herbalife generally must ensure retail sales are occurring, it prohibits its Distributors from selling to other Distributors, i.e., performing "Wholesale/Resale Work." Second, the work undertaken by Herbalife to enforce policies as to sales at retail results in them exercising far more control than it would have had decades ago.

96. Furthermore, by implementing platforms such as the Distributor Website and imposing such strict regulations on any sales outside of Herbalife's e-commerce platforms, Herbalife can better oversee and control sales of Herbalife Products and ensure Distributors are not engaging in activities that could run afoul of anti-pyramid scheme laws. Herbalife essentially oversees all retail sales, given the vast majority of sales outside of Nutrition Clubs occur on Herbalife controlled websites, not in person. And with respect to Nutrition Clubs, Herbalife has the Distributor's business plan and can oversee the ordering of Products to sell, both because the Distributor must purchase directly from Herbalife and because Herbalife must oversee receipt practices. While this control may protect Distributors from being a victim of one kind of legal violation, they also remove much of the discretion that other independent MLM contractors had.

c. The Direct Sales Exemption requires specific compensation practices, and Herbalife's complicated Compensation Plan does not conform with the requirement.

97. For a position to qualify for the Direct Sales Exemption, "[s]ubstantially all of the

1 remuneration (whether or not paid in cash) for the services performed by that individual is directly
2 related to sales or other output (including the performance of services) rather than to the number
3 of hours worked by that individual.” While Herbalife claims that Distributors are paid commissions
4 based on their sales, remuneration is not “directly related” to the sales and marketing services
5 Distributors perform for Herbalife, both because of how Herbalife’s policies and procedures
6 structure pay and because of the outsized role that chance plays. Ultimately, Herbalife has designed
7 the Distributor Program such that Distributors are required to perform extensive unpaid labor
8 promoting the brand – for purposes of sales and marketing the Program itself, from which
9 Herbalife, but not the individual Distributor, directly benefits. And even when Herbalife does pay
10 Distributors for their work, it is not “directly related” to the output of the Distributor.

11 **d. The Terms and Conditions in the Distributor Agreement are**
12 **Unconscionable, Unfair, and Unlawful.**

13 98. The agreement between Herbalife and Distributors is a tool and mechanism by
14 which Herbalife exerts control over the Distributor while maximizing Herbalife’s profits. The
15 agreement is a take-it-or-leave it deal, with no opportunity for negotiation. Only after enrolling and
16 beginning the work do Distributors discover that the arrangement is one in which they will spend
17 extraordinary amounts of time and money promoting the company with little payoff. Indeed, the
18 effect of the agreement, when considered in tandem with Herbalife’s other business practices,
19 grossly restricts Distributors’ ability to profit from their work, and may cause Distributors to turn
20 attention to recruiting more Distributors into a futile business endeavor.

21 99. Indeed, MLMs like Herbalife have been criticized for the fact that few of the sellers
22 manage to profit. At least one study concluded that 99% of MLM participants do not earn money;¹¹
23 another found that only 25% earned a profit.¹² Herbalife’s numbers are consistent with this low
24 rate of success; as discussed above.

25 100. Herbalife’s business model is designed in a way that all but guarantees Distributors
26

27 ¹¹ *Id.*

28 ¹² *What is Multilevel Marketing (MLM)?*, AARP Foundation, <https://www.aarp.org/aarp-foundation/our-work/income/multilevel-marketing/> [https://perma.cc/9X2C-QBNU].

1 receive low commissions in exchange for hard work advertising and selling Herbalife Products.
2 While the Distributors theoretically can receive between 25-50% commission on Products, in
3 practice, the structure limits most Distributors earning potential in unforeseeable, surprising, and
4 unfair ways.

5 101. To make a sale, Distributors must compete with more than 100,000 other
6 Distributors, while abiding by Herbalife's non-solicitation policies, and its restrictions on where
7 Distributors may market, display, and sell Herbalife Products.

8 102. Moreover, Herbalife has structured its business operations to benefit from the
9 addition of more Distributors, i.e., more brand awareness, sales, in addition to free recruiting and
10 training labor by Distributors, while Distributors lose. While Herbalife benefits from an
11 oversaturation of Distributors, the individual Distributors, only have more competitors and a harder
12 time setting themselves apart. And nowhere does Herbalife promise to limit the number of
13 Distributors retained in any way.

14 103. Given that Distributors must compete with Herbalife and other Distributors for retail
15 sales, Preferred Customers, and new Downline Distributors under such oppressive and onerous
16 terms, it is no surprise that so many struggle to break even. But because Distributors receive
17 commission from the retail sales made by any Distributors they recruit and ultimately sponsor,
18 Herbalife's own Income Disclosure Statements indicate that those who advance to higher levels
19 through recruiting more Distributors on average earn more money. Thus, Distributors have a
20 financial incentive—and are expected to— promote the opportunity to work for Herbalife under
21 these unfair, unconscionable, and oppressive terms.

22 **C. Herbalife's Misclassification of Plaintiff and Distributors Was Willful.**

23 104. Herbalife's decision to misclassify the Distributors as independent contractors was
24 willful and intentional.

25 105. *First*, Herbalife is based in Los Angeles, California, and employs personnel in a
26 variety of roles there, thus, it is implementing California's labor and employment laws as a matter
27 of regular practice. It is a highly sophisticated, large company, whose legal team includes
28 California lawyers, both those at the prestigious law firms that provide it representation in other

1 matters, as well as those comprising its team of in-house counsel. Both its management and its
2 legal team would be exposed to news about changes in California law with respect to
3 misclassification.

4 106. **Second**, as detailed above, Herbalife's Distributor Agreement, as well as the
5 materials on its proprietary platform exclusively available to Distributors, set forth detailed codes
6 of conduct. Herbalife knew and intended for Distributors to conform to these codes of conduct –
7 mandated under the Rules and other guidance – and ensured adherence through its platforms and
8 other instrumentalities, including the use of the tools to monitor Distributors' online conduct.

9 107. **Third**, Herbalife knows and depends on the Distributors and even the highest levels
10 of the company understand that the Distributors have immense value to the success of the company
11 and play an essential role in Herbalife's revenue, growth, and business model. The management
12 team, including but not limited to Defendants, not only understand the essential role the
13 Distributors play, but know they are classified as independent contractors. Thus, the decision was
14 not a singular decision by a low-level employee, but a conscious and knowing choice envisioned
15 and strategized by all Defendants and continuously endorsed and improved upon by the highest
16 levels of the Company.

17 108. **Fourth**, Herbalife further knows and understands as an MLM, only a small fraction
18 will make money under its commission structure and reports data that highlight that exact outcome.
19 Indeed, the commission structure here represents a significant cost savings over the payment of
20 wages. Herbalife is well aware that it is receiving inexpensive, commission-based work from the
21 Distributors and intentionally structured the Distributor Program to leverage word of mouth efforts
22 it does not have to pay for.

23 109. **Fifth**, Herbalife knew that its Distributors were not engaged in either type of work
24 protected under the Direct Sales Exemption. It does not use terms like "buy-sell" or "deposit-
25 commission" in its Rules or Marketing Plans. It prohibits wholesale selling to other Distributors.
26 It knows that Nutrition Clubs are not "in the home," but rather are retail establishments. And it
27 knows that outside of the Nutrition Clubs, sales are primarily online, not primarily in person. It
28 also knows that its Distributors engage primarily in social media marketing on its behalf, and are

1 rarely, if ever, engaging in person sales or hosting parties in others' homes, particularly during and
2 since the COVID pandemic. And it designs platforms, such as the Herbalife e-commerce platforms,
3 including the Distributor's Websites, to facilitate online sales and marketing.

4 110. *Sixth*, Herbalife knew the Direct Sales Exemption was enacted years ago, and there
5 was no guarantee that all MLMs could enjoy its protection. Rather, Herbalife has been an MLM
6 since its inception in 1980 and thus, would know that the classification of MLM workers has for
7 years been one of the most critical legal and policy issues for the industry.

8 111. Specifically, Herbalife is a member of the Direct Selling Association ("DSA"), an
9 MLM lobbying association, which disseminates updates about its activities to its members,
10 including its lobbying efforts for exemptions to wage and hour laws for its members. For years, it
11 has issued warnings and information to its members, advising them to review their agreements to
12 ensure conformity.

13 112. For example, in 2018, the DSA filed an amicus brief in a misclassification case
14 pending before the Oregon Supreme Court. There, the court determined that the MLM had
15 misclassified its sales personnel as independent contractors. *See ACN Opportunity, LLC v.*
16 *Employment Department*, 362 Or. 824 (2018). The decision was based in part on the fact that the
17 statute exempted sales "in the home," and the legislative history indicated that this Exemption was
18 narrowly tailored to apply to things like Tupperware parties. Notably, the concurrence made clear
19 that the direct sales laws on the books reflect outdated direct selling practices and may not reach
20 many modern MLMs.

21 113. It is hard to imagine that Herbalife would not have learned of a decision by a
22 neighboring state supreme court, particularly given the decision's significance to its industry, the
23 role played by the DSA, and the timing in the wake of the *Dynamex* decision locally. And shortly
24 after its passage, the DSA announced the creation of an "Independent Contractor Initiative" combat
25 the consequences of that decision and ensure stronger state laws.¹³

26
27 ¹³ See Jeff Babener, *Op-Ed by Jeff Babener in the World of Direct Selling: DSA Launches Independent*
28 *Contractor Initiative*, Direct Selling Association (Sept. 10, 2018),

1 **D. Herbalife’s Misclassification of Distributors and Unfair Business Practices**
2 **Harm the California Public.**

3 114. Herbalife’s misclassification of its workers and unfair and unconscionable business
4 model threatens the general public. Because Herbalife has no incentive to stop these practices and
5 boasts its efforts to expand these practices, a public injunction is necessary to stop these practices.

6 **1. Herbalife Utilizes Widespread Marketing Practices Directed at the**
7 **General Public to Recruit New Distributors.**

8 115. Herbalife has eschewed traditional recruiting practices in lieu of widespread
9 advertising. Because of how Herbalife recruits, nearly everyone in the state of California is likely
10 to be targeted for recruiting and engagement in Herbalife’s unfair and unlawful business model.

11 116. Rather than market job opportunities to job seekers meeting certain criteria,
12 Herbalife uses its Distributors to promote the Herbalife Distributor role in the same way they
13 market its Products, i.e., it publishes advertising, marketing and information materials for the role,
14 too, not just the Products. Herbalife has made clear that it views every person as a prospective
15 Distributor.

16 117. Herbalife has set up its compensation structure and business model to encourage
17 Distributors to recruit, and those Distributors in turn will promote the opportunity to their
18 customers, as well as their family and friends. Thus, the public does not need to be affirmatively
19 seeking out job opportunities; merely buying a routine consumer good or having a friend or family
20 member working as a Distributor may subject them to recruiting messaging, and by extension,
21 could lead them to complete an application, agree to the terms of the Distributor Agreement, and
22 become a Distributor.

23 118. Herbalife’s reliance on Nutrition Clubs further increases the risk to the general
24 public for several reasons. First, Herbalife permits and even encourages its Distributors to rely on
25 their Downlines to work in the Nutrition Clubs. Thus, Distributors are not only being misclassified
26 but are being encouraged to misclassify the workers assisting with their Nutrition Clubs. While

27 _____
28 [https://www.dsa.org/events/news/individual-press-release/op-ed-by-jeff-babener-in-the-world-of-direct-
selling-dsa-launches-independent-contractor-initiative](https://www.dsa.org/events/news/individual-press-release/op-ed-by-jeff-babener-in-the-world-of-direct-selling-dsa-launches-independent-contractor-initiative) [https://perma.cc/EQ89-CP8K].

1 Herbalife instructs those Distributors operating Nutrition Clubs to comply with laws, Herbalife
2 communicates to Distributors that all Distributors are independent contractors, effectively
3 encouraging, aiding, and abetting the primary operators of Nutrition Clubs to break the law.

4 119. Moreover, Herbalife's reliance on its Distributor Community to market the
5 Distributor opportunity is likely to cause the message to reach the general public at large, as its
6 100,000+ Distributor network is enormous. Distributors need not respect geographic boundaries
7 when marketing the opportunity to become a Distributor for Herbalife. Thus, any member of the
8 California public who either personally knows a Herbalife Distributor or follows one on social
9 media, regardless of where the Distributor lives, is likely to receive messages about the Distributor
10 opportunity.

11 120. Because of the financial incentives those Distributors receive, members of the public
12 may sometimes repeatedly and consistently receive marketing about the Distributor opportunity
13 over weeks or months at a time, and perhaps from multiple Distributors. Indeed, each newly
14 accepted Distributor presents the risk of an exponential increase of Distributors. Distributors can
15 maintain their status and receive additional compensation based on the sales volume of the
16 Downline Distributors that they recruited. Therefore, the more Distributors recruit to join their
17 Downline, the more likely it is that they will be able to generate more income.

18 121. Because Distributors are incentivized to recruit new Distributors, and Herbalife
19 considers every customer to be a potential Distributor, California's residents are vulnerable to long-
20 term consequences of Herbalife's rampant misclassification. Notably, Herbalife is not a selective
21 employer; it requires little in the way of experience or other criteria like minimum education level.
22 The overwhelming majority of adults in the state of California are likely qualified for the job, and
23 millions of people in the state may seek out this opportunity. Indeed, it is estimated that one in
24 every thirteen Americans will participate in an MLM at some point in their lifetimes.¹⁴ This could
25

26 ¹⁴ Marguerite DeLiema, et al., *AARP Study of Multilevel Marketing: Profiling Participants and their*
27 *Experiences in Direct Sales*, AARP Foundation (2018), at 13,
28 [https://www.aarp.org/content/dam/aarp/aarp_foundation/2018/pdf/AARP%20Foundation%20MLM%20Re](https://www.aarp.org/content/dam/aarp/aarp_foundation/2018/pdf/AARP%20Foundation%20MLM%20Research%20Study%20Report%2010.8.18.pdf)
[search%20Study%20Report%2010.8.18.pdf](https://www.aarp.org/content/dam/aarp/aarp_foundation/2018/pdf/AARP%20Foundation%20MLM%20Research%20Study%20Report%2010.8.18.pdf) [https://perma.cc/7T9E-QE5Y].

1 translate into hundreds of thousands of Californians, if not millions of Californians, who are at risk
2 of being recruited into an illegal and unfair working arrangement. Notably, in 2022 California had
3 1,525,948 individuals involved in direct selling, i.e., working under an independent contractor sales
4 contract – the highest number in the country.¹⁵

5 2. **Herbalife’s Unfair and Unlawful Conduct Harms California In Other** 6 **Ways.**

7 122. Herbalife is responsible for perpetrating economic and social harms on Californians
8 through its misclassification of its Distributor workforce. By choosing not to compensate
9 Distributors for their time or reimbursing their business expenses, Herbalife siphons away their
10 time and resources, which harms them and their families. For example, it is well documented,
11 including in Herbalife’s very own Income Disclosure Statements, that many MLM salespeople do
12 not earn money. One study, published in 2017 by the Consumer Awareness Institute, analyzed 350
13 MLMs with publicly available data and reported that 99% of MLM sellers lost money, after
14 deducting upfront and recurring costs.¹⁶ This is particularly troubling given MLM companies,
15 including Herbalife, continue to market and promote the Distributor “opportunity” as an “income”
16 or “business” opportunity, knowing full well that the vast majority of its Distributor workforce will
17 experiences losses. It is also not uncommon for Distributors to accumulate credit card debt or debts
18 to their families due to their non-reimbursed business expenses.

19 123. Herbalife’s unfair and unlawful practices leave Distributors with fewer resources to
20 invest in their families or in legitimate businesses and less time to spend working for real,
21 guaranteed wages. Instead of the opportunity being a “side hustle” that allows them to pay off
22 mortgages or student loan debt, cover costs of childcare, or otherwise advance financially, the loss

24 ¹⁵ *Impact of Direct Selling by State, 2022*; Direct Selling Education Foundation,
25 [https://www.dsa.org/docs/default-source/industry-fact-](https://www.dsa.org/docs/default-source/industry-fact-sheets/2023statestatsfactsheetv2.pdf?sfvrsn=c11ed2a5_2)
[sheets/2023statestatsfactsheetv2.pdf?sfvrsn=c11ed2a5_2](https://www.dsa.org/docs/default-source/industry-fact-sheets/2023statestatsfactsheetv2.pdf?sfvrsn=c11ed2a5_2) [https://perma.cc/HRS5-3UUG].

26 ¹⁶ Consumer Awareness Institute, Taylor, Jon M., MBA, Ph.D., *The Case (for and) against Multi-level*
27 *Marketing* (2011) Multi-Level Marketing Unmasked—Why Multilevel Marketing Is Unfair and Deceptive;
28 available [https://www.ftc.gov/sites/default/files/documents/public_comments/trade-regulation-rule-](https://www.ftc.gov/sites/default/files/documents/public_comments/trade-regulation-rule-disclosure-requirements-and-prohibitions-concerning-business-opportunities-ftc.r511993-00008%C2%A0/00008-57281.pdf)
[disclosure-requirements-and-prohibitions-concerning-business-opportunities-ftc.r511993-](https://www.ftc.gov/sites/default/files/documents/public_comments/trade-regulation-rule-disclosure-requirements-and-prohibitions-concerning-business-opportunities-ftc.r511993-00008%C2%A0/00008-57281.pdf)
[00008%C2%A0/00008-57281.pdf](https://www.ftc.gov/sites/default/files/documents/public_comments/trade-regulation-rule-disclosure-requirements-and-prohibitions-concerning-business-opportunities-ftc.r511993-00008%C2%A0/00008-57281.pdf) [https://perma.cc/RU2J-JJ4Q] (cited by the Federal Trade Commission).

1 of money from fruitless financial investments as a Distributor could cause them greater economic
2 hardship.

3 124. MLMs notoriously target women to sell health and wellness, beauty, and household
4 products by marketing an unattainable dream of financial freedom, particularly stay-at-home
5 mothers, who may be boxed out of traditional workforce opportunities due to lack of flexibility in
6 setting their own work schedules. Consequentially, Herbalife has disproportionately harmed and
7 disempowered thousands of Californian women, who have wasted thousands of dollars with no
8 return on their investment to become and maintain their status as Distributors thanks to Herbalife's
9 unlawful conduct.

10 125. Beyond recruitment, Herbalife's misclassification of their Distributors harms
11 Californians both economically and socially. When Distributors lose money and accumulate credit
12 card debt, they and their families are harmed by the siphoning away of their uncompensated time
13 and lost money on business expenses. This results in them and their families having fewer
14 resources to invest in legitimate businesses and less time to spend working for real, guaranteed
15 wages. And instead of the opportunity being a "side hustle" that allows them to pay off mortgages
16 or student loan debt, cover costs of childcare, or otherwise advance financially, the loss of money
17 from fruitless financial investments as a Distributor could cause them more economic hardship.

18 126. Most MLMs benefited from greater recruitment of participants during COVID-19
19 because they recruit new Distributors under the guise that they will be able to grow their own
20 business with a sustainable income. These claims, whether or not they are made during times of
21 global financial crisis, siphons potential workers away from legitimate opportunities with the
22 promises of building a personal business, when these individuals are under the control of MLM
23 companies, like Herbalife, with none of the benefits of proper classification, hurting California
24 families and increasing reliance on public benefits, such as federal and state COVID relief.

25 127. Herbalife's practices also harm competitors, who must and do pay wages and
26 benefits at prevailing market rates to market and sell their products. By misclassifying its workers,
27 and paying them only for certain sales, Herbalife incurs lower expenses, giving them a competitive
28 advantage over other market participants in the cosmetics industry.

1 128. The California Legislature specifically considered harms like these in passing AB-
2 5. The legislature recognized “harm to misclassified workers who lose significant workplace
3 protections, the unfairness to employers who must compete with companies that misclassify, and
4 the loss to the state of needed revenue from companies that use misclassification to avoid
5 obligations such as payment of payroll taxes, payment of premiums for workers’ compensation,
6 Social Security, unemployment, and disability insurance” and that “the misclassification of
7 workers as independent contractors has been a significant factor in the erosion of the middle class
8 and the rise in income inequality.” Herbalife’s continued misclassification of California workers
9 will exacerbate all these harms to the California public.

10 129. Absent an injunction protecting the public from the negative impacts of Defendants’
11 illegal activities, including by and through their officers and/or entities in their control, the
12 California public remains at risk from Herbalife’s deceptive recruitment strategies and the
13 economic and social harms created by their unlawful practices.

14 **E. Plaintiff’s Experiences as a Herbalife Distributor**

15 130. Plaintiff began work as a Herbalife Distributor in October 2012. She was recruited
16 by another Distributor to join, and she had no experience in sales, marketing, business, and had not
17 worked in the nutrition and wellness industry.

18 **1. Plaintiff Utilized Herbalife Tools and Followed Herbalife Directives.**

19 131. Throughout the class period, Herbalife provided Plaintiff access to its proprietary,
20 password-protected digital platform, which served as the portal for resources, analytics, and tools
21 related to work as Distributors. Plaintiff regularly accessed the various key documents that
22 Herbalife had stored there, such as the Rules, the Marketing Plan, other policy directives, training
23 tools; marketing instructions and guidance; approved Herbalife marketing tools; a catalog of
24 products, prices, and corresponding commissions rates, and other important reference materials.
25 Herbalife required her to understand, abide by, and utilize these materials. Plaintiff also obtained
26 earnings statements, information about her Downline, receipt forms, and other critical information
27 and tools from Herbalife’s Distributor portal.

28 132. During Plaintiff’s time with Herbalife, Herbalife frequently released new products,

1 rebranded existing products, launched marketing campaigns, shifted advertising strategies,
2 updated approved marketing materials and intellectual property, made changes to the
3 compensation plan, released training tools for Distributors, hosted live events, and other initiatives
4 to engage Distributors, encourage them to market and sell, and educate about Herbalife Products
5 and policies.

6 133. As required by Herbalife, Plaintiff regularly accessed and reviewed amendments to
7 Herbalife's documents and undertook efforts to ensure she remained in compliance with all of
8 Herbalife's requirements and directives. Plaintiff understood that performing these types of tasks
9 were required in order to remain an active Distributor, i.e., in compliance.

10 134. Because Plaintiff recruited other Distributors, who became her Downlines, she was
11 required to expend time engaging with her Downlines to ensure they understood the Rules and
12 how to comply with them, as well as Herbalife's product catalog and how to sell the Products.

13 135. Plaintiff also regularly attended training events, which Herbalife pressured
14 Distributors to attend. Certain training events were held monthly, and Plaintiff had to pay to attend,
15 typically around \$20-\$40. These were at the behest of Herbalife and run by local Distributors.
16 Plaintiff attended many of these, especially in the 2020–2022-time frame. In addition, Herbalife
17 hosted quarterly training events that were further away, and often required travel time and could
18 cost up to \$200. Over the last four years, Plaintiff attended a number of these quarterly events,
19 including as recently as January 2023. Except in instances when Plaintiff was invited to attend as
20 a speaker, Herbalife did not cover the cost of travel for these events, which often required a plane
21 ticket and/or hotel room. And in all instances, Herbalife did not compensate Plaintiff for her time
22 attending the training.

23 136. Plaintiff was also asked to work at the training events, helping with set up and other
24 logistics, speaking at conferences, or other work. While Plaintiff was reimbursed by Herbalife for
25 supplies Herbalife requested for the training, such as decorations, she was only reimbursed for her
26 travel expenses when she was a speaker. If she was attending for training purposes, she paid for
27 her own travel, lodging, and food. And in no instance was she compensated for her time in
28 preparing for or attending these events, which required her to take substantial time away from

1 running her Nutrition Club and other responsibilities.

2 137. Once Plaintiff reached a high degree of success and was in the top 4% of Herbalife
3 Distributors and was eligible to join the TAB team, Plaintiff was forced to sign a non-compete
4 agreement, requiring her to agree to never sell to another MLM.

5 **2. Plaintiff Sold Herbalife Products Under Herbalife's Direction at a Retail Nutrition**
6 **Club.**

7 138. From approximately 2016 to October 2022, Plaintiff worked at various Nutrition
8 Clubs. For the first six months, Plaintiff worked for an upline Distributor in that Distributor's club,
9 during which time she was not paid any hourly wages. Later, in around 2017, Plaintiff worked
10 with several other Distributors to open her own Nutrition Club.

11 139. Plaintiff marketed the Nutrition Club according to Herbalife's directives. Because
12 Herbalife prohibited her from certain kinds of signage and advertising the sale of Herbalife shakes
13 and products, Plaintiff did other things to get members of the public into the store. Plaintiff would
14 offer things such as free weight loss challenges and workouts to get members of the public
15 interested in visiting the Club. Plaintiff would offer Herbalife tea samples to people in public
16 spaces, such as public spaces as a way to encourage them to visit the Clubs.

17 140. During the many years that Plaintiff operated a Nutrition Club, she often worked 12
18 hours a day, nearly every day. Plaintiff typically spent at least 6 or more hours in the store each
19 day, preparing shakes to sell and hosting workouts. When she was not working at the store, she
20 was spending hours each day promoting Herbalife products online, communicating with her upline
21 and downline, meeting people at the gym to offer workouts and promote the Club and Herbalife
22 products, and other efforts.

23 **3. Outside of her Work at Nutrition Clubs, Plaintiff's Efforts Were**
24 **Primarily Online.**

25 141. During Plaintiff's tenure, Plaintiff used her personal social media to promote
26 Herbalife Products and the Distributor opportunity regularly. During the period after October 2022,
27 when she was no longer associated with a Nutrition Club, nearly all of her sales efforts were online,
28 and prior to that point, any sales not made at the Nutrition Club, were also done online. This work

1 was involved and time consuming and involved multiple phases. Plaintiff often would spend
2 several hours throughout the week planning posts and sales strategies for the upcoming week,
3 engaging other Distributors, and performing other tasks, elaborated below.

4 142. Typically, before posting online, Plaintiff spent time planning for and the content
5 that would ultimately be the subject matter of any given social media post. In accordance with
6 Herbalife's policies, Plaintiff devoted time ensuring proper advertising of the many available
7 Herbalife Products she would promote. Before posting, she would spend time drafting and revising
8 content, and determining the appropriate graphics to accompany any text, often preparing for,
9 taking, and editing videos and photographs for the posts.

10 143. Plaintiff's social media-based marketing work was not limited to crafting and
11 publishing posts, but included ongoing oversight of her social media accounts to reply to public
12 comments as well as engage with existing customers and leads who would send her direct online
13 messages to her social media inboxes. Because it was critical for customer acquisition and
14 retention, she constantly monitored responses to posts, and expediently replied to any direct
15 messages from interested customers. Plaintiff spent ample time to thoughtfully prepare these
16 responses, often a few hours a week engaging in text and email messaging with customers and
17 potential leads.

18 **4. Plaintiff Followed Herbalife Directives in Recruiting and Training**
19 **With Her Downline.**

20 144. Once she had a Downline, she was required to onboard those people in her
21 Downline, e.g., to explain Herbalife's business model, educate them on the Rules and other
22 directives, and answer any questions to ensure they would be successful. This included ensuring
23 they completed the mandatory training sessions offered by Herbalife.

24 145. After onboarding, she was required to ensure her Downline stayed abreast of
25 developments, new products, training requirements, or other obligations. Typically, information
26 was communicated to all Distributors from Herbalife, or from her Upline for her to pass on to her
27 Downline. She communicated with her Downline regularly, sending weekly communications, and
28 was available whenever they reached out frequently with questions.

1 146. She also had both in person and video meetings with her team.

2 147. Plaintiff was committed to ensuring her Downlines were successful and remained in
3 compliance with Herbalife's directives, and she received no compensation for this work.

4 **5. Plaintiff Spent Many Hours, Sometimes Without Breaks, and Paid for**
5 **Business Expenses.**

6 148. Plaintiff would often work at least four hours without a break or rest period. On
7 weeks when Herbalife had trainings or other meetings, Plaintiff spent more than four hours without
8 break or rest period attending trainings and learning about the products.

9 149. While Plaintiff's hard work appeared to pay off, success was illusory. She was in
10 the top 4% of sellers at Herbalife, and she was asked to speak at events. Her Nutrition Club was
11 extremely well run, and other Distributors frequently visited her Nutrition Club to learn from her
12 success. Despite this, Plaintiff was struggling to break even. She was working long hours, her
13 monthly expenses were high, and she had incurred debt.

14 150. During her tenure, Plaintiff was not compensated for her time doing any of the
15 forementioned activities or fulfilling any of the aforementioned responsibilities, nor paid any
16 overtime.

17 151. Plaintiff was not compensated or reimbursed for out-of-pocket expenses. She
18 regularly purchased Products to test them out and use in social media promotions or to develop
19 recipes to sell at the Nutrition Club. The cost of leasing the Nutrition Club was expensive, even
20 though Plaintiff shared the cost with other Distributors. In addition, Plaintiff's monthly business
21 expenses included her monthly cell phone bill and internet access, and she was not reimbursed any
22 proportion of these expenses.

23 152. The commissions were paid via direct deposit. Because Plaintiff paid Herbalife to
24 access the BizWorks platform, she was able to see a breakdown of all commissions she had earned.
25 But no formal paystub was provided that identified hours worked, nor were any employment taxes
26 withheld at any time. For some of Plaintiff's sales, Herbalife did not pay her commissions because
27 the customer returned the products.

28 153. Today, Plaintiff no longer works at the Nutrition Club. Instead, she sells primarily

1 online, assisting customers with questions and issues with their orders.

2 **CLASS ALLEGATIONS**

3 154. Plaintiff incorporates and realleges the above paragraphs.

4 155. Plaintiff brings this action on her own behalf, as well as on behalf of each and all
5 other persons similarly situated, and thus seeks class certification under California Code of Civil
6 Procedure section 382.

7 156. All claims alleged herein arise under California law for which Plaintiff seeks relief
8 authorized by California law.

9 157. Plaintiff's proposed class consists of and is defined as follows:

10 All current and former Herbalife Distributors who resided in the State of California or who
11 performed marketing or sales activities in California during the applicable statutes of
12 limitations through the date a class is certified.

13 158. Plaintiff also alleges the following subclasses:

14 The Non-Compete Subclass

15 All Class Members who were bound by a non-compete agreement.

16 The Los Angeles County Subclass

17 All Class Members who resided in Los Angeles County or who performed marketing
18 and sales activities in Los Angeles County.

19 The Los Angeles City Subclass

20 All Class Members who resided in the City of Los Angeles or who performed
21 marketing and sales activities in the City of Los Angeles.

22 The San Francisco Subclass

23 All Class Members who resided in San Francisco or who performed marketing and
24 sales activities in San Francisco.

25 159. Members of the Class will hereinafter be referred to as "Class Members." Plaintiff
26 reserves the right to redefine the Class and to add subclasses as appropriate based on further
27 investigation, discovery, and specific theories of liability.

28 160. ***Ascertainable and numerous.*** The Class is ascertainable and numerous such that

joinder is impractical. The membership of the entire class is unknown to Plaintiff at this time. However, the class will likely consist of thousands of members, the precise number which is within the knowledge of and can be readily ascertained through Herbalife' records.

161. ***Community of Interest.*** There is a well-defined community of interest amongst Class Members. A class action is superior to all other available methods for the fair and efficient adjudication of this lawsuit because the Class is both numerous and its membership is geographically widespread across California. A class action will achieve economies of time, effort and expense as compared with separate lawsuits and will avoid inconsistent outcomes because the same issues can be adjudicated in the same manner and at the same time for the entire class. In addition:

a. ***Predominating Common Questions.*** There are numerous questions of law and fact common to the Class which predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are:

- i. Whether Herbalife misclassified its Distributors as independent contractors when in fact they were Herbalife employees;
- ii. Whether Herbalife failed to pay Plaintiff and Class Members the legally mandated minimum wage for all hours worked;
- iii. Whether Herbalife failed to timely pay wages due to Plaintiff and Class Members during their employment;
- iv. Whether any misclassification by Herbalife was voluntary and knowing;
- v. Whether Herbalife Distributors' duties fall within the Direct Sales Exemption to AB5;
- vi. Whether Herbalife controlled the manner and means of the Distributors' work;
- vii. Whether Herbalife failed to reimburse Distributors' business expenses;
- viii. Whether Herbalife failed to maintain accurate time records for its Distributors;

- ix. Whether Herbalife failed to provide complete and accurate wage statements to its Distributors;
- x. Whether Herbalife failed to pay Distributors their wages due at termination; and
- xi. Whether Herbalife should be enjoined from continuing the practices described herein.

b. **Typicality.** Plaintiff's claims are typical of the claims of Class Members because Plaintiff, like all members of the Class, worked as a Distributor for Herbalife in California, was required to adhere to Herbalife's policies, and was paid on a commission basis. Furthermore, like all members of the Class, Plaintiff sustained damages from Herbalife's wrongful conduct. Accordingly, Plaintiff has no interests antagonistic to the interests of any other member of the Class.

c. **Adequacy.** Plaintiff will fully and adequately assert and protect the interests of the Class and has retained counsel who are experienced in prosecuting class actions. Plaintiff acknowledges that she has an obligation to make known to the Court any relationship, conflicts or differences with any Class Member. Plaintiff's attorneys, the proposed class counsel, are versed in the rules governing class action discovery, certification, and settlement. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

FACTS RELATING TO PLAINTIFF AS A PRIVATE ATTORNEY GENERAL

162. At all times set forth herein, PAGA was applicable to Plaintiff's employment by Defendants.

163. At all times set forth herein, PAGA provides that, notwithstanding any other provision of law, any provision of law under the California Labor Code that provides for a civil penalty, including unpaid wages and premium wages, to be assessed and collected by the California Labor & Workforce Development Agency ("LWDA") for violations of the California Labor Code may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of the aggrieved employee and other current or former employees pursuant to procedures

1 set forth in California Labor Code section 2699.3.

2 164. Pursuant to PAGA, a civil action may be brought by an “aggrieved employee,” who
3 is any person that was employed by the alleged violator and against whom one or more of the
4 alleged violations was committed.

5 165. Plaintiff was employed by Defendants and the alleged violations were committed
6 against her and she is, therefore, an aggrieved employee. Plaintiff and the Class are “aggrieved
7 employees” as defined by California Labor Code section 2699(c) in that they are current or former
8 employees of Defendants and one of more of the alleged violations were committed against them.

9 166. Pursuant to California Labor Code sections 2699.3 and 2699.5, an aggrieved
10 employee, including Plaintiff, may pursue a civil action arising under PAGA after the following
11 requirements have been met:

12 a. The aggrieved employee shall give written notice (hereinafter “Employee’s Notice”)
13 to the LWDA and the employer of the specific provisions of the Labor Code alleged
14 to have been violated, including the facts and theories to support the alleged
15 violations.

16 b. The LWDA shall provide notice (hereinafter “LWDA Notice”) to the employer and
17 the aggrieved employee that it does not intend to investigate the alleged violation
18 within sixty (60) calendar days of the postmark date of the Employee’s Notice. Upon
19 receipt of the LWDA Notice, or if the LWDA Notice is not provided within sixty-
20 five (65) calendar days of the Employee’s Notice, the aggrieved employee may
21 commence a civil action pursuant to California Labor Code section 2699 to recover
22 civil penalties in addition to any other penalties to which the employee may be
23 entitled.

24 167. Irrespective of any representations to the contrary in this Class Action Complaint,
25 Plaintiffs specifically disclaim, at this time, any request for penalties under any provision of
26 PAGA, until such time when all the statutory exhaustion requirements described above have been
27 satisfied. On September 12, 2024, Plaintiff provided notice by electronic submission to the LWDA
28 and by certified mail to Defendants regarding the specific provisions of the Labor Code alleged to

1 have been violated, including the facts and theories to support the alleged violations, pursuant to
2 Labor Code section 2699.3. A true and correct copy of that notice letter is attached as Exhibit A.
3 Upon expiration of the notice period, either if the LWDA within 60 calendar days expressly states
4 that it will not intervene, or does not respond within 65 days, or elects to investigate but issues no
5 citation within 120 days, Plaintiff will amend her complaint to assert PAGA claims seeking civil
6 penalties against Defendants for violations of California Labor Code sections 201, 202, 203, 204,
7 226, 226.7, 510, 512, 1174, 1194, 1197, 1197.1, 1198, 2800 and 2802.

8
9 **FIRST CAUSE OF ACTION**

10 **(Recovery of Unpaid Minimum Wages and Liquidated Damages)**

11 ***Against Herbalife Nutrition, Herbalife International, Inc., Herbalife International of America,
Michael O. Johnson, Stephan Gratziani, John DeSimone, Frank Lamberti, and Troy Hicks
and DOES 1–100, inclusive***

12 168. Plaintiff realleges and incorporates by reference all preceding allegations as though
13 fully set forth herein.

14 169. At all relevant times, California Labor Code sections 1182.12, 1194, 1197, 1197.1,
15 and 1198 have provided that the minimum wage for employees fixed by the Industrial Welfare
16 Commission is the minimum wage to be paid to employees, and the payment of a wage less than
17 the minimum so fixed is unlawful. California law provides employees in California must be paid
18 for all hours worked, up to 40 per week or eight (8) per day, at a regular time rate no less than the
19 mandated minimum wage. Compensable work time is defined by the applicable wage order as “the
20 time during which an employee is subject to the control of an employer, and includes all the time
21 the employee is suffered or permitted to work, whether or not required to do so.” Cal. Code. Regs.
22 tit. 8, section 11070(2)(G) (defining “Hours Worked”).

23 170. As alleged herein, during the relevant time, Herbalife maintained and still maintains
24 a policy of requiring employees to work off-the-clock, without compensation. Herbalife only
25 compensates Distributors, including Plaintiff, based on specific sales placed through Plaintiff’s
26 Distributor Site, and does not pay wages for other hours worked. These hours include time spent:

- 27 a. in training and learning about Herbalife Products;
28 b. making and responding to social media posts;

- 1 c. preparing for and participating in team meetings and Herbalife organized activity;
- 2 d. communicating with other Herbalife Distributors about policies, practices, and sales
- 3 instructions and guidance, and conducting onboarding and training;
- 4 e. communicating with customers after their purchases were made to handle routine
- 5 customer service; and
- 6 f. handling other responsibilities as necessary.

7 Plaintiff and Class Members performed these activities throughout the day, nearly every day.

8 171. Herbalife provided no way for Plaintiff and Class Members to log time spent and
9 submit to Herbalife.

10 172. Herbalife's failure to pay Plaintiff and Class Members for work, and failure to pay
11 overtime wages owed, also resulted in failures to pay Plaintiff and Class Members the minimum
12 wage required, in violation of California Labor Code sections 1182.12, 1194, 1197, 1197.1, 1198.
13 In addition, Herbalife's failure to pay for work and overtime is a violation of various municipal
14 and county codes across the state, including, but not limited to City of L.A. Cal. Code art. 7-7.5;
15 County of Los Angeles Code § 8.100.040, *et seq.*, San Francisco Cal. Code 12R.

16 173. California Labor Code § 558.1 states that any employer or person acting on behalf
17 of an employer who causes a violation is liable, among other things, for minimum wage violations.
18 *See* Cal. Labor Code § 558.1. Defendants Herbalife Nutrition, Herbalife International, Inc.,
19 Herbalife International of America, Michael O. Johnson, Stephan Gratziani, John DeSimone,
20 Frank Lamberti, and Troy Hicks inclusive, failed to pay Plaintiff and other aggrieved employees
21 the minimum wage and all Defendants are liable for causing this violation under Labor Code §
22 558.1.

23 174. As such, pursuant to California Labor Code sections 558(a) and 2699(f), Plaintiff
24 and Class Members are entitled to recover civil penalties, attorney's fees and costs pursuant to
25 Labor Code section 2699(g), and interest pursuant to Labor Code section 218.6.

26 //

27 //

28 //

1 **SECOND CAUSE OF ACTION**

2 **(Failure to Provide Meal Periods or Meal Period Premium Wages)**

3 ***Against Herbalife Nutrition, Herbalife International, Inc., Herbalife International of America,***
4 ***Michael O. Johnson, Stephan Gratziani, John DeSimone, Frank Lamberti, and Troy Hicks***
5 ***and DOES 1–100, inclusive***

6 175. Plaintiff realleges and incorporates by reference all preceding allegations as though
7 fully set forth herein.

8 176. Under Cal. Lab. Code §§ 226.7, 512(a), 1198, and IWC Wage Order 4-2001,
9 Herbalife was required to provide Plaintiff and Class Members with one thirty-minute meal break
10 free from all duties for all shifts longer than five (5) hours, and a second thirty-minute meal break
11 free from all duties for all shifts longer than 10 hours and a third thirty-minute meal break free
12 from all duties for all shifts longer than 15 hours. Employers covered by the Wage Orders have an
13 obligation to both (1) relieve their employees for at least one meal period for shifts over five hours,
14 and (2) to record having done so. If the employer fails to properly record a valid meal period, it is
15 presumed no meal period was provided. Cal. Lab. Code § 226.7 also requires an employer to pay
16 mandated premiums of an extra hour of wages to any employees who have not been provided with
17 a timely meal or rest break.

18 177. As alleged herein, Plaintiff and the Class regularly worked periods of more than five
19 (5), ten and fifteen hours in a workday without being provided requisite mandatory timely, thirty-
20 minute, duty-free meal periods. Herbalife also failed to pay Plaintiff and the Class an additional
21 hour of wages at her regular rate for each workday a meal period and/or a legally compliant meal
22 period was not provided.

23 178. California Labor Code § 558.1 states that any employer or person acting on behalf
24 of an employer who causes a violation is liable, among other things, for meal period violations.
25 *See* Cal. Labor Code § 558.1. Defendants Herbalife Nutrition, Herbalife International, Inc.,
26 Herbalife International of America, Michael O. Johnson, Stephan Gratziani, John DeSimone,
27 Frank Lamberti, and Troy Hicks inclusive, failed to provide Plaintiff and other aggrieved
28 employees all meal periods or compensation in lieu thereof and all Defendants are liable for
causing this violation under Labor Code § 558.1.

179. As a result, under Labor Code section 226.7, Plaintiff and the Class are entitled to one additional hour's pay for each day a meal period was missed, late or interrupted, all in an amount according to proof.

THIRD CAUSE OF ACTION

(Failure to Provide Rest Periods or Rest Break Premium Wages)

Against Herbalife Nutrition, Herbalife International, Inc., Herbalife International of America, Michael O. Johnson, Stephan Gratziani, John DeSimone, Frank Lamberti, and Troy Hicks and DOES 1–100, inclusive

180. Plaintiff realleges and incorporates by reference all preceding allegations as though fully set forth herein.

181. Cal. Lab. Code § 226.7 requires an employer to authorize or permit an employee to take a rest period of ten net minutes for every four hours worked, or major fraction thereof, and such rest periods must be in the middle of the four-hour period insofar as practicable. If the employer fails to provide any required rest periods or fails to provide a fully compliant rest break for a net ten minutes wherein the employee is fully relieved of all duties and all employer control, the employer must pay the employee one hour of pay at the employee's regular rate of compensation for each workday the employer did not provide a legally required and/or fully compliant rest period.

182. Herbalife failed to provide Plaintiff and the Class all required and/or fully compliant rest periods, or compensation in lieu thereof. Herbalife employed policies and procedures that ensured Plaintiff and the Class would not receive all legally required rest periods as Herbalife improperly classified Plaintiff and the Class as independent contractors rather than as employees and did not authorize nor permit all required rest periods in strict accordance with the timing requirements of all applicable Wage Orders. Herbalife similarly employed policies and procedures that rendered rest periods non-compliant with the requirements of California law by, inter alia, failing to relieve Plaintiff and the Class of all duties and all employer control. Herbalife further employed policies and procedures ensuring Plaintiff and the Class never received a rest period premium during employment.

183. California Labor Code § 558.1 states that any employer or person acting on behalf

1 of an employer who causes a violation is liable, among other things, for rest period violations. *See*
2 Cal. Labor Code § 558.1. Defendants Herbalife Nutrition, Herbalife International, Inc., Herbalife
3 International of America, Michael O. Johnson, Stephan Gratziani, John DeSimone, Frank
4 Lamberti, and Troy Hicks inclusive, failed to provide Plaintiff and the Class all rest periods or
5 compensation in lieu thereof and all Defendants are liable for causing this violation under Labor
6 Code § 558.1.

7 184. As a result, under Labor Code section 226.7, Plaintiff and the Class are entitled to
8 one additional hour's pay for each day a rest break was missed, late or interrupted, all in an amount
9 according to proof.

10 **FOURTH CAUSE OF ACTION**

11 **(Failure to Keep Requisite Payroll Records)**

12 ***Against Herbalife Nutrition, Herbalife International, Inc., Herbalife International of America,***
13 ***inclusive***

14 185. Plaintiff realleges and incorporates by reference all preceding allegations as though
15 fully set forth herein.

16 186. Cal. Labor Code § 1174(d) requires an employer to keep, at a central location in the
17 state or at the plants or establishments at which employees are employed, payroll records showing
18 the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and
19 any applicable piece rate paid to, employees employed at the respective plants or establishments.
20 These records shall be kept in accordance with rules established for this purpose by the
21 commission, but in any case, shall be kept on file for not less than two years.

22 187. At all times herein set forth, Cal. Labor Code § 1174.5 has imposed a civil penalty
23 of \$500 per aggrieved employee for each willful failure "to maintain . . . accurate and complete
24 records required by subdivision (d) of Section 1174[.]"

25 188. Herbalife has intentionally and willfully failed to keep accurate and complete payroll
26 records showing the hours worked daily and the wages paid to Plaintiff and the Class. For example,
27 any records kept by Herbalife did not include the hours worked off-the-clock, the premium wages
28 owed, and missed and non-compliant meal and rest breaks.

189. Plaintiff and the Class have been injured by Herbalife's intentional and willful

1 violation of Cal. Labor Code § 1174(d) because they were denied both their legal right and
2 protected interest, in having available, accurate and complete payroll records pursuant to Cal.
3 Labor Code § 1174(d).

4 **FIFTH CAUSE OF ACTION**

5 **(Failure to Provide Accurate Wage Statements)**

6 ***Against Herbalife Nutrition, Herbalife International, Inc., Herbalife International of America,***
7 ***Michael O. Johnson, Stephan Gratziani, John DeSimone, Frank Lamberti, and Troy Hicks***
8 ***and DOES 1–100, inclusive***

9 190. Plaintiff realleges and incorporates by reference all preceding allegations as though
10 fully set forth herein.

11 191. At all relevant times herein set forth, Cal. Labor Code § 226(a) provides that, at the
12 time of each payment of wages, the employer must provide each employee with an itemized
13 statement showing gross wages earned, total hours worked, all deductions taken, net wages earned,
14 the inclusive dates for which the employee is being paid, the employee’s name and last four digits
15 of their social security number, the name and address of the legal entity that is the employer, and
16 all applicable hourly rates in effect during the pay period and all hours worked at each rate.

17 192. Cal. Labor Code § 1198 provides that the maximum hours of work and the standard
18 conditions of labor shall be those fixed by the Labor Commissioner and as set forth in the
19 applicable IWC Wage Orders. Section 1198 further provides that “[t]he employment of any
20 employees for longer hours than those fixed by the order or under conditions of labor prohibited
21 by the order is unlawful.” Pursuant to the applicable IWC Wage Order, employers are required to
22 keep accurate time records showing when the employee begins and ends each work period and
23 meal period.

24 193. At all times herein set forth, Cal. Labor Code § § 226.3 has imposed a civil penalty
25 in addition to any other penalty provided by law of two hundred fifty dollars (\$250) per aggrieved
26 employee for the first violation of Cal. Labor Code § 226(a), and one thousand dollars (\$1,000)
27 per aggrieved employee for each subsequent violation.

28 194. As alleged herein, Herbalife knowingly and willfully failed to provide Plaintiff and
the Class with proper, itemized wage statements. Wage statements provided to Plaintiff and the

1 Class did not show total/actual hours worked and all applicable hourly rates in effect during the
2 pay period and all hours worked at each rate. The wage statements provided to Plaintiff and the
3 Class failed to reflect all time spent in training, making and responding to social media posts,
4 preparing for and participating in team meetings and Herbalife organized activity, and
5 communicating with other Herbalife Distributors about policies, practices, and sales instructions
6 and guidance. Herbalife's refusal to properly record this time, and to include it in its itemized wage
7 statements, or to properly pay its employees for this time was willful and intentional. As a result
8 of these violations, Plaintiff and the Class suffered injury because they were not paid for all hours
9 worked.

10 195. California Labor Code § 558.1 states that any employer or person acting on behalf
11 of an employer who causes a violation is liable, among other things, for wage statement violations.
12 *See* Cal. Labor Code § 558.1. Defendants Herbalife Nutrition, Herbalife International, Inc.,
13 Herbalife International of America, Michael O. Johnson, Stephan Gratziani, John DeSimone,
14 Frank Lamberti, and Troy Hicks inclusive, failed to provide Plaintiff and the Class accurate wage
15 statements and all Defendants are liable for causing this violation under Labor Code § 558.1.

16 196. Pursuant to Cal. Lab. Code § 226(e), Plaintiff and the Class are entitled to a penalty
17 in the amount of fifty dollars (\$50) for the initial pay period in which a violation occurred, and a
18 penalty of one-hundred dollars (\$100) for each violation in a subsequent pay period, up to an
19 aggregate penalty of four-thousand dollars (\$4,000), as well as costs of suit and attorneys' fees, all
20 in an amount according to proof.

21 **SIXTH CAUSE OF ACTION**

22 **(Failure to Timely Pay Wages During Employment)**

23 **Against Herbalife Nutrition, Herbalife International, Inc., Herbalife International of 24 America, and DOES 1–100, inclusive**

25 197. Plaintiff realleges and incorporates by reference all preceding allegations as though
26 fully set forth herein.

27 198. At all relevant times herein set forth, Cal. Labor Code § 204 provides that all wages
28 earned by any person in any employment between the 1st and 15th days, inclusive, of any calendar
month, other than those wages due upon termination of an employee, are due and payable between

1 the 16th and the 26th day of the month during which the labor was performed.

2 199. At all times herein set forth, Cal. Labor Code § 204 provides that all wages earned
3 by any person in any employment between the 16th and the last day, inclusive, of any calendar
4 month, other than those wages due upon termination of an employee, are due and payable between
5 the 1st and the 10th day of the following month.

6 200. At all times herein set forth, Cal. Labor Code § 204 provides that all wages earned
7 for labor in excess of the normal work period shall be paid no later than the payday for the next
8 regular payroll period.

9 201. As alleged herein, during the relevant time period, Herbalife intentionally and
10 willfully failed to pay Plaintiff and the Class all wages due to them, within any time period
11 permissible under Cal. Labor Code § 204, including wages for minimum wage compensation,
12 overtime compensation, meal period premiums, and rest period premiums.

13 **SEVENTH CAUSE OF ACTION**

14 **(Failure to Pay All Earned and Unpaid Wages Upon Separation of Employment)**
15 ***Against Herbalife Nutrition, Herbalife International, Inc., Herbalife International of America,***
16 ***Michael O. Johnson, Stephan Gratziani, John DeSimone, Frank Lamberti, and Troy Hicks***
and DOES 1–100, inclusive

17 202. Plaintiff realleges and incorporates by reference all preceding allegations as though
18 fully set forth herein.

19 203. At all times relevant herein set forth, Labor Code sections 201 and 202 provide that
20 if an employer discharges an employee, the wages earned and unpaid at the time of discharge are
21 due and payable immediately, and that if an employee voluntarily leaves his or her employment,
22 his or her wages shall become due and payable not later than seventy-two (72) hours thereafter,
23 unless the employee has given seventy-two (72) hours previous notice of his or her intention to
24 quit, in which case the employee is entitled to his or her wages at the time of quitting.

25 204. Cal. Lab. Code § 203 provides that, at the time of termination of employment, the
26 employer must pay an employee all wages due and owing within the time frames set forth in Cal.
27 Lab. Code §§ 201, *et seq.* If an employer willfully refuses to pay, without abatement or reduction,
28 in accordance with Cal. Lab. Code §§ 201 and 202, any wages of an employee who is discharged

1 or who quits, the employee's wages shall continue as a penalty for up to thirty (30) days from the
2 due date, until paid or until an action to recover those wages is commenced.

3 205. As alleged herein, following his final day of employment, Herbalife willfully failed
4 to pay Plaintiff and the Class all wages due and owing within the deadlines set forth in Cal. Lab.
5 Code §§ 201, *et seq.*, including unpaid overtime wages and wages for missed/noncompliant meal
6 and rest periods.

7 206. California Labor Code § 558.1 states that any employer or person acting on behalf
8 of an employer who causes a violation is liable, among other things, for failure to pay all wages at
9 the time of termination. *See* Cal. Labor Code § 558.1. Defendants Herbalife Nutrition, Herbalife
10 International, Inc., Herbalife International of America, Michael O. Johnson, Stephan Gratziani,
11 John DeSimone, Frank Lamberti, and Troy Hicks inclusive, failed to pay all wages at the time of
12 termination of Plaintiff and Class Members and all Defendants are liable for causing this violation
13 under Labor Code § 558.1.

14 207. Pursuant to Cal. Lab. Code § 203, Plaintiff and the Class are entitled to recover
15 waiting time penalties of up to thirty (30) days' pay, plus attorneys' fees and costs, in an amount
16 according to proof.

17 **EIGHTH CAUSE OF ACTION**

18 **(Failure to Reimburse Business Expenses)**

19 ***Against Herbalife Nutrition, Herbalife International, Inc., Herbalife International of America,***
20 ***Michael O. Johnson, Stephan Gratziani, John DeSimone, Frank Lamberti, and Troy Hicks***
and DOES 1-100, inclusive

21 208. Plaintiff realleges and incorporates by reference all preceding allegations as though
22 fully set forth herein.

23 209. At all times herein set forth, Cal. Lab. Code § 2802 has provided and provides that
24 an employer must reimburse employees for all necessary expenditures and losses incurred by the
25 employee in the performance of his or her job. The purpose of Labor Code section 2802 is to
26 prevent employers from passing off their cost of doing business and operating expenses on to their
27 employees. *Cochran v. Schwan's Home Service, Inc.*, 228 Cal. App. 4th 1137, 1144 (2014). The
28 applicable wage order, IWC Wage Order 4-2001, ¶9(B) provides that: "When tools or equipment

1 are required by the employer or are necessary to the performance of a job, such tools and equipment
2 shall be provided and maintained by the employer, except that an employee whose wages are at
3 least two (2) times the minimum wage provided herein may be required to provide and maintain
4 hand tools and equipment customarily required by the trade or craft.” Herbalife’s conduct, in
5 misclassifying Distributors as independent contractors and failing to reimburse them for expenses
6 they paid that should have been borne by their employer, constitutes a violation of California Labor
7 Code Sections 450 and 2802.

8 210. Herbalife violates Labor Code section 2802 by having failed, and failing, to
9 reimburse Plaintiff and the Class for their business-related expenses. Herbalife charged Plaintiff
10 and the Class various business expenses, including supervisor fees, training fees, software fees,
11 and other charges, which Herbalife did not reimburse. And during the relevant period, Herbalife,
12 required that Plaintiff and the Class use their own personal cellular phones and/or cellular phone
13 data to carry out Herbalife’s business operations, but failed to reimburse them for the full costs of
14 their work-related cellular phone expenses. For example, Plaintiff and the Class were required to
15 use a personal cellular phone to make social media posts, participate in team meetings and
16 Herbalife organized activity, and communicate with customers and their Upline. Plaintiff and the
17 Class also incurred expenses associated with maintaining a home internet connection. Herbalife
18 did not reimburse Distributor for these expenses.

19 211. Herbalife’s company-wide policy and/or practice of passing on their operating costs
20 to Plaintiff and the Class violates California Labor Code section 2802. At all times described
21 herein, Herbalife has acted willfully, and deliberately with oppression, fraud and malice to
22 unlawfully deprive their employees of the employees’ own personal resources in furtherance of
23 Herbalife’s profits.

24 212. California Labor Code § 558.1 states that any employer or person acting on behalf
25 of an employer who causes a violation is liable, among other things, for failure to reimburse
26 business expenses. *See* Cal. Labor Code § 558.1. Defendants Herbalife Nutrition, Herbalife
27 International, Inc., Herbalife International of America, Michael O. Johnson, Stephan Gratziani,
28 John DeSimone, Frank Lamberti, and Troy Hicks inclusive, failed to reimburse business expenses

1 to Plaintiff and the Class and all Defendants are liable for causing this violation under Labor Code
2 § 558.1.

3 213. As a result of Herbalife's failure to reimburse Plaintiff and the Class for all business-
4 related expenses, pursuant to Cal. Lab. Code § 2802, Plaintiff and the Class are entitled to recover
5 unreimbursed business expenses, plus attorneys' fees and costs, in an amount according to proof.

6 **NINTH CAUSE OF ACTION**

7 **(Unfair Competition)**

8 ***Against Herbalife Nutrition, Herbalife International, Inc., Herbalife International of America,***
9 ***Michael O. Johnson, Stephan Gratziani, John DeSimone, Frank Lamberti, and Troy Hicks***
and DOES 1-100, inclusive

10 214. Plaintiff realleges and incorporates by reference all preceding allegations as though
11 fully set forth herein.

12 215. From a date unknown to Plaintiffs and continuing to the present, Herbalife has and
13 continues to engage in business acts or practices that constitute unfair competition as defined in
14 the Unfair Competition Law, Business and Professions Code § 17200 *et seq.*, in that such business
15 acts and practices are unlawful and unfair within the meaning of that statute.

16 **Violation of the Unlawful Prong of the UCL**

17 216. Herbalife has violated section 17200's prohibition on unlawful conduct through the
18 following violations:

- 19 a. Failing to pay minimum wages
- 20 b. Failing to provide meal periods and/or pay associated premium wages
- 21 c. Denying rest periods and/or failing to pay rest break premium wages
- 22 d. Failing to keep requisite payroll records
- 23 e. Failing to provide accurate wage statements
- 24 f. Failing to timely pay wages during employment
- 25 g. Failing to pay all earned and unpaid wages upon separation of employment
- 26 h. Failing to reimburse business expenses
- 27 i. Willfully misclassifying Distributors as independent contractors, in violation of
- 28 Labor Code Section 226.8 and 2775

1 j. Failing to pay overtime in violation of Cal. Lab. Code § 510

2 217. The forgoing unlawful conduct of Herbalife alleged herein constitutes unfair
3 competition within the meaning of California Business and Professions Code section 17200 *et seq.*

4 **Violations of the Unfair Prong of the UCL**

5 218. Herbalife has violated section 17200's prohibition on unfair conduct in at least two
6 ways by engaging in each of the forgoing unlawful acts.

7 219. First, Herbalife has violated section 17200's prohibition on unfair conduct by
8 unfairly and unconscionably structuring its Agreement and business activities in a way that does
9 not create meaningful opportunities for Distributors earn a fair wage and/or commission for their
10 work. Herbalife used its superior bargaining power, superior market power, and take-it-or-leave-it
11 Agreement to prevent Distributors from exercising discretion and accessing tools and resources
12 needed to market the Products effectively and competitively to generate profits. And Herbalife
13 further undermined Distributors' ability to earn compensation by engaging in activities in
14 competition with the Distributors, by for example, maintaining the exclusive right to disseminate
15 online advertising to any customer sales leads generated by the Distributors and selling Products
16 via Amazon.com. By denying Distributors meaningful opportunities to earn fair commission,
17 Herbalife also unfairly incentivized Distributors to divert time and attention away from marketing
18 the sale of products to retail customers to marketing the opportunity to become a Distributor to
19 unsuspecting members of the California public. So long as Defendants continue these unfair
20 practices, the California public remains at risk for being recruited into Herbalife and similarly
21 harmed.

22 220. Second, Herbalife has violated section 17200's prohibition on unfair conduct by
23 unfairly and unconscionably encouraging and permitting Distributors to open Nutrition Clubs
24 under Herbalife's onerous and unreasonable terms and conditions.

25 221. Herbalife knows that Nutrition Clubs increase the sales of its products and aid in the
26 recruitment of more Distributors. Social media is saturated with influencers and MLM sellers
27 pushing nutrition and wellness products, including Herbalife Distributors. By promoting the
28 Nutrition Club model and enlisting Distributors to open them, Herbalife provides a unique channel

1 to reach customers. Because Herbalife sets the prices and Distributors cannot negotiate with it,
2 Herbalife also knows that it will profit from any sale to a Distributor for products the Distributor
3 sells at retail at the Nutrition Clubs, regardless of whether the Distributor turns a profit after
4 expenses.

5 222. At the same time, Herbalife knows that its restrictions on how the Clubs could
6 operate would reduce opportunities for profit and increase the likelihood that the Distributors
7 would incur debt.

8 223. MLMs have long relied on the fallacy of sunk costs to increase retention, and
9 Herbalife is no different. It encourages people to keep going with their efforts to keep selling and
10 growing their “business,” or the time and money invested so far would be wasted.

11 224. The Nutrition Clubs build on that fallacy by taking it to an unconscionable level. By
12 encouraging Distributors to take on long term commercial leases, recruit Distributors and workers
13 to assist them at the Clubs, and undergo other formal steps, like business licenses, Herbalife
14 increases the Distributor’s financial and emotional investment in their relationship to Herbalife.
15 This massive sunk cost makes it harder for a Distributor to walk away from their efforts selling
16 Herbalife. Indeed, because of the longer-term nature of commercial leases, many will have no
17 choice but to continue to invest time and money into trying to make the Nutrition Club profitable
18 for them, while Herbalife profits from every sale.

19 225. Moreover, because Distributors who create Nutrition Clubs typically enroll in long
20 term commercial leases, Herbalife knows that these Distributors will have a harder time walking
21 away from the Herbalife opportunity. And by prohibiting the Distributor from offering non-
22 Herbalife products for retail at the Nutrition Clubs, Herbalife makes it harder for that Distributor
23 to stop the Herbalife opportunity during the time that they are in the commercial lease. can increase
24 the length of the Distributor’s time with Herbalife.

25 226. Prior to opening Nutrition Clubs, Herbalife provides only training on sales
26 strategies. Herbalife does not provide meaningful business advice, such as advice on corporate
27 formation or taxes, employment laws, or insurance. While Herbalife is under a court order to
28 require a marketing plan from Distributors opening Nutrition Clubs as a result of the FTC action,

1 Herbalife typically rubber stamps these proposals. Unless the proposal violates Herbalife's many
2 rules on marketing, Herbalife typically permits any Distributor with the requisite one year of sales
3 experience to open a Club, regardless of how unrealistic their financial projections or budgets are.

4 227. Ultimately, Herbalife profits regardless of whether the Distributor sets the business
5 up in a way that is financially advantageous to the Distributor, and Herbalife knows that the
6 Distributor will be unable to easily walk away from the investment and have little choice but to
7 keep selling Herbalife products, perhaps even working even harder to increase sales for Herbalife.
8 Thus, Herbalife has no incentive to assist in these aspects of operations.

9 228. Herbalife also uses the Nutrition Clubs as an end-run around the FTC's prohibition
10 on Distributors selling products to other Distributors. While a Distributor working in a Nutrition
11 Club can earn a profit off the sale of a shake to that Distributor, the sale is not one that Herbalife
12 credits for purposes of the monthly sales goals that a Distributor must hit to maintain their status
13 and rate of commission. Thus, Herbalife profits equally from all sales, regardless of whether it is
14 to a Distributor or regular customer, but Distributors do not earn credit for these sales. Because
15 Herbalife encourages all Distributors to visit other Distributors' Nutrition Clubs to observe, try out
16 how they prepare the shakes for sale, and learn sales techniques, Distributors can form a large
17 portion of a Nutritional Club's customer base.

18 229. Moreover, while Herbalife prohibits Distributors from charging other Distributors
19 for time spent observing or training in one another's Nutrition Club, Herbalife's custom is that
20 Distributors should purchase shakes from the Distributor's Club when they visit. Thus, by not
21 crediting these sales to the Distributor's sales goals, Herbalife is able to profitably exploit a
22 loophole at the expense of Distributors. Herbalife can continue to profit from Distributor to
23 Distributor sales, much in the way that it did before the FTC's order. All that has changed is that
24 they make it harder for Distributors who attract a large number of other Distributors to their stores
25 to move to higher levels of the company.

26 230. The more successful a Nutrition Club is, the more likely that Club will attract higher
27 volumes of other Distributors seeking to learn from the Club Owner's efforts. Thus, the Herbalife
28 model penalizes the Club owning Distributor's success, because these Club Owners will be forced

1 to put time and energy into sales that will not allow them to advance to a higher level in the
2 company, where they can earn higher commissions.

3 **Public Injunctions Should Be Entered to Prohibit the Unfair and Unlawful Acts**
4 **Described Herein.**

5 231. Herbalife's unlawful and unfair acts were in contravention of established law and
6 sound public policy.

7 232. California public policy encourages the proper classification of workers to ensure
8 that workers are fairly compensated and provided the full benefits and protections of employment,
9 competitors are operating in a fair and honest marketplace, and the state is not deprived of tax
10 revenue.

11 233. California public policy further promotes honest and fair business practices. And
12 state and federal public policy, including that set by the FTC, prohibits unfair marketing
13 opportunities such as the Distributor opportunity generally, and the Nutrition Clubs specifically.

14 234. Herbalife's unfair acts were immoral, unethical, oppressive, unscrupulous, and
15 substantially injurious to the Class and general public. Herbalife knowingly and willfully classified
16 the Distributors as independent contractors. And it knowingly and willfully structured an unfair
17 and unconscionable Agreement that did not provide for meaningful opportunities to earn
18 compensation, while engaging in business activities that would further frustrate Distributors'
19 efforts to earn compensation.

20 235. The impact on the Class and general public is not outweighed by any countervailing
21 benefits. To the extent any benefits inured to Plaintiff, the Class, and the general public, those
22 benefits are outweighed by the impact of Defendants' unfair acts. Distributors, including Plaintiff,
23 incurred substantial costs in working as Distributors, and were not paid appropriately and fairly
24 for their time and efforts. They could have chosen other opportunities or invested that time and
25 money into other legitimate and fairly paying endeavors.

26 236. As a result of Herbalife's unfair competition as alleged herein, Plaintiff and the Class
27 have suffered injury in fact and lost money or property, as described in more detail above. Pursuant
28 to California Business and Professions Code section 17200, *et seq.*, Plaintiff and the Class are

1 entitled to restitution of all wages and other monies rightfully belonging to them that Herbalife
2 failed to pay and wrongfully retained by means of its unlawful and unfair business practices, and
3 and/or all other equitable remedies that may be available.

4 237. To prevent Herbalife from continuing to prey on the California public through their
5 misclassification of their Distributors, and recruitment of new Distributors under these false
6 pretenses, and operation of the Nutrition Clubs under the onerous and unconscionable terms herein,
7 Plaintiff and the Class also seek a public injunction against Defendants enjoining Herbalife, and
8 any and all persons acting in concert with them, from engaging in each of the California Labor
9 Code violations set forth herein and from recruiting new Distributors or authorizing others to
10 recruit new Distributors, under a misclassified status, including making representations about that
11 status and the commission-based compensation structure, and from encouraging, promoting, and
12 incentivizing the Nutrition Club model.

13 **PRAYER FOR RELIEF**

14 WHEREFORE Plaintiff and the Class pray for judgment and relief as follows:

- 15 (1) An order certifying that this action may be maintained as a class action, that Plaintiff
16 be appointed Class Representative, and that Plaintiff's counsel be appointed Class
17 Counsel;
- 18 (2) Statutory penalties and compensatory damages as authorized under the California
19 Labor Code;
- 20 (3) Restitution and all other equitable remedies pursuant to California's Unfair
21 Competition Law;
- 22 (4) Public Injunctive relief, pursuant to California's Unfair Competition Law,
23 prohibiting Herbalife, its officers, agents, employees, and attorneys, and all other
24 persons in active concert or participation with any of them, whether acting directly
25 or indirectly, in connection with the management, hiring, or coordination of
26 Distributors, or the advertising, promotion, or recruitment of new Distributors, from:
- 27 a. Engaging in the California Labor Code violations as alleged herein,
28 including classifying Distributors as non-employees or independent

1 contractors;

2 b. Recruiting new Distributors or authorizing others to recruit new Distributors,
3 under a misclassified status, including making representations about that
4 status and the commission-based compensation structure.

5 c. Encouraging, promoting, and incentivizing the Nutrition Club model.

6 (5) Punitive damages against the individual officer, director or managing agent
7 Defendants pursuant to Cal. Civil Code § 3294;

8 (6) Reasonable attorneys' fees pursuant to the California Labor Code, including section
9 226(e), and Code of Civil Procedure section 1021.5;

10 (7) Pre- and post-judgment interest pursuant to Labor Code section 218.6; and

11 (8) Such other and further relief as the Court may deem just and proper.

12 **DEMAND FOR TRIAL BY JURY**

13 Plaintiff and the Class hereby demand trial by jury on all issues in this complaint that are so
14 triable as a matter of right.

15
16 Date: October 31, 2024

/s/ Kristen G. Simplicio

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EXHIBIT

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September 12, 2024

VIA ONLINE ELECTRONIC SUBMISSION

California Labor & Workforce
Development Agency
455 Golden Gate Avenue, 9th Floor
San Francisco, California 94102
SUBMITTED ONLINE

Re: Notice Pursuant to California Labor Code § 2699.3 re Herbalife Nutrition Ltd.; Herbalife International, Inc.; Herbalife International of America; Michael O. Johnson; Stephan Gratziani; John DeSimone; Frank Lamberti; and Troy Hicks

Pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Cal. Labor Code § 2698, *et seq.*, Ms. Sarah Desimone provides this notice on behalf of herself and other aggrieved employees in the State of California to the Labor and Workforce Development Agency (“LWDA”) and Herbalife Nutrition Ltd., Herbalife International, Inc., and Herbalife International of America and including any and all affiliates, subsidiaries, parents, directors, officers, and employees, including but not limited to, Michael O. Johnson, Stephan Gratziani, John DeSimone, Frank Lamberti, and Troy Hicks (collectively, “**Herbalife**”) of Labor Code and Industrial Welfare Commission (“IWC”) Wage Order violations committed by Herbalife and personally experienced by Sarah Desimone. Please allow this letter to serve as a notice and a request pursuant to § 2699.3 of the California Labor Code that your agency investigate the claims described below. If the agency does not intend to investigate the alleged violations, we ask that you please notify us of that fact. If your agency decides not to investigate the below-described claims, Ms. Desimone intends to pursue civil penalties through a court action and/or in arbitration, on behalf of herself and the other aggrieved employees against whom Labor Code and Wage Order violations were committed by Herbalife.

Introduction

Herbalife is headquartered in Los Angeles, California. Herbalife develops and sells health, wellness, and nutrition products online. Pursuant to Herbalife’s business model, it establishes explicit relationships with various individuals known as “Distributors” who market and sell Herbalife products for Herbalife, establishing and managing a broad range of employment policies and procedures for these “Distributors.” Despite calling these salespeople “Distributors” but designating them independent contractors, these “Distributors” are in fact employees under

California law. Herbalife has violated numerous provisions of the California Labor Code and applicable IWC Wage Order by denying its “Distributors” the compensation, other benefits and statutory entitlements that they are owed.

One of the many individuals whom Herbalife employs as a “Distributor” is Ms. Desimone. Ms. Desimone worked for Herbalife as a “Distributor” from approximately October 2012 to present, in California. During that entire time, Ms. Desimone was under Herbalife’s control, selling and marketing Herbalife products online in accordance with strict guidelines.

Unless the agency decides to investigate and issue citations for Herbalife’s numerous Labor Code and Wage Order violations, Ms. Desimone intends to bring a representative action in court and/or in arbitration seeking civil penalties for violations of the Labor Code that are recoverable under PAGA on behalf of the State of California and all other aggrieved employees. The aggrieved employees on whose behalf Ms. Desimone will file a PAGA civil action include all current and former Herbalife “Distributors” who sold Herbalife products and services in the State of California during the relevant statutory period, and any other individuals who are actually non-exempt employees of Herbalife under California law.

As set forth below, Herbalife has violated and/or continues to violate, among other provisions of the California Labor Code sections 201, 202, 203, 204, 226(a), 226.7, 226.8, 510, 512(a), 1194, 1997, 1997.1, 2802, and IWC Wage Orders, including inter alia, Wage Order No. 4, and Ms. Desimone has personally experienced each of these violations.

Willful Misclassification of an Individual as an Independent Contractor

California law prohibits the willful misclassification of an individual as an independent contractor when he or she is in fact an employee under California law. Cal. Lab. Code § 226.8(a). “Willful misclassification” means avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor. Cal. Lab. Code § 226.8(i)(4). When an employer willfully misclassifies an individual as an independent contractor, the employer is subject to civil penalties. Cal. Lab. Code § 226.8(b)–(c). Herbalife willfully misclassified Ms. Desimone and other aggrieved employees as independent contractors, because it has been clear for several years now under California law that its “Distributors” are in fact employees under Cal. Lab. Code § 2775, insofar as such “Distributors” are under Herbalife’s control in performing their selling duties, the selling duties that “Distributors” do is within the usual course of Herbalife’s business, and they are not engaged in an independently established trade, occupation or business. Even under a looser definition of “employee,” “Coaches” or “Partners” would also be considered employees because Herbalife controls the manner and means through which Ms. Desimone and other aggrieved employees carry out their duties, including but not limited to restricting advertising, restricting what channels products may be sold through, and providing proprietary lists and direct customer leads.

Failure to Provide Meal Periods and Rest Periods

California law requires employers to provide their employees with an opportunity to take an uninterrupted meal period of no less than thirty (30) minutes before the end of the fifth hour of work when an employee works more than five (5) hours in a day. Cal. Lab. Code §§ 226.7, 512(a); Wage Order No. 4. A second meal period of no less than thirty (30) minutes must be provided before the end of the tenth hour of work when an employee works more than ten (10) hours in a day. Cal. Lab. Code §§ 226.7, 512(a); Wage Order No. 4. Further, an employer must provide an uninterrupted rest period of no less than ten (10) minutes for every four (4) hours, or major fraction thereof, worked. Cal. Lab. Code § 226.7; Wage Order No. 4. When an employer fails to provide a

meal or rest period, an hour of pay at the employee's regular rate of compensation is owed to the employee. Cal. Lab. Code § 226.7(c).

Herbalife failed to provide Ms. Desimone or the other aggrieved employees with an opportunity to take timely, uninterrupted meal and rest periods of the requisite length, free from employer control. Herbalife also failed to compensate Ms. Desimone and the other aggrieved employees properly for the non-compliant meal and rest periods including, inter alia, missed, short, late, and/or interrupted meal and rest periods. Herbalife also failed to pay premium wages for the many meals and rest breaks that Ms. Desimone and the aggrieved employees were deprived of. Indeed, Herbalife did not provide any meal or rest breaks or premium compensation for missed breaks to Ms. Desimone or other aggrieved employees, since Herbalife improperly classified its Coaches as independent contractors who were not entitled to meal or rest breaks.

Failure to Pay Minimum Wages and Failure to Pay Overtime Wages

Herbalife violated California Labor Code sections 1194, 1197, and 1197.1 and Wage Order No. 4 by failing to pay Ms. Desimone and other aggrieved employees at least minimum wages for all hours worked. Primarily, this was due to Herbalife having misclassified its Coaches and/or Partners as independent contractors rather than as employees. Ms. Desimone and other aggrieved employees were required or knowingly permitted to perform all their work duties off-the-clock, including but not limited to training, communicating with Herbalife, and selling and marketing Herbalife products and services. By failing to pay Ms. Desimone and other aggrieved employees any wages for their time spent performing work duties for Herbalife, Herbalife violated Labor Code sections 1194, 1197, and 1197.1 and Wage Order No. 4, which require employers to pay at least the legal minimum wage to their employees.

California Labor Code section 510 and Wage Order No. 4 require employers to pay no less than one and one-half times the regular rate of pay of the employee for hours worked in excess of eight (8) hours in one workday, for hours worked in excess of forty (40) hours in one workweek, and for the first eight (8) hours worked on the seventh day of work in any one workweek, and to pay no less than twice the regular rate of pay of the employee for hours worked in excess of twelve (12) hours in one workday and for any work in excess of eight (8) hours on any seventh day of a workweek. During the relevant time period, Ms. Desimone and other aggrieved employees worked over 8 hours in a day and/or 40 hours in a week without overtime compensation because Herbalife failed to pay them for their work duties, as described above. This was, in turn, due to Herbalife's unlawful misclassification of "Distributors" as independent contractors rather than as employees. On occasions when Ms. Desimone and other aggrieved employees had already worked eight hours in one day (performing all their work off-the-clock), Herbalife failed to pay them any overtime compensation due. Therefore, Ms. Desimone and the other aggrieved employees were entitled to receive overtime compensation from Herbalife that Herbalife failed to pay, violating Labor Code § 510 and Wage Order No. 4.

Failure to Timely Pay Wages During Employment

California Labor Code section 204 requires that all wages earned by any person in any employment between the 1st and the 15th days, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 16th and the 26th day of the month during which the labor was performed, and that all wages earned by any person in any employment between the 16th and the last day, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 1st and the 10th day of the following month. California Labor Code section 204 also requires that all wages earned for labor more than the normal work period shall be paid no later than the payday for the

next regular payroll period. During the relevant period, Herbalife failed to pay Ms. Desimone and other aggrieved employees all wages due to them, including minimum wages, overtime wages, and meal and rest period premium wages, within any time period specified by California Labor Code section 204. Moreover, Herbalife failed to pay Ms. Desimone or other aggrieved employees earned commissions in a timely and complete fashion.

Failure to Timely Pay Wages Upon Termination

California Labor Code sections 201 and 202 provide that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and if an employee quits his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours' notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. During the relevant period, Herbalife willfully misclassified Ms. Desimone and other aggrieved employees as independent contractors rather than employees, and willfully failed to pay them overtime, or meal or rest break premiums for missed breaks, during their employment with Herbalife. When "Distributors" such as Ms. Desimone and other aggrieved employees were terminated or quit, Herbalife willfully failed to pay them all wages to which they were entitled. Moreover, Herbalife failed to pay Ms. Desimone and other aggrieved employees all commissions owed to them prior to their termination. Herbalife's willful failure to pay such commissions during employment carried on following termination of Ms. Desimone and other aggrieved employees' employment.

Failure to Keep Accurate Payroll Records

California Labor Code section 1174(d) requires an employer to keep at a central location in the state or at the establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept with rules established for this purpose by the commission, but in any case, shall be kept on file for not less than two years. During the relevant period, Herbalife failed to keep accurate and complete payroll records showing the actual hours worked daily and the wages paid to Ms. Desimone and other aggrieved employees.

Failure to Furnish Accurate Itemized Wage Statements

Labor Code section 226(a) and Wage Order No. 4 require an employer semimonthly or at the time of each payment of wages to furnish wage statements to its employees setting forth, inter alia, (1) gross wages earned, (2) total hours worked by the employee, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, and (8) the name and address of the legal entity that is the employer. Herbalife failed to provide any wage statements to Ms. Desimone and other aggrieved employees, despite being required to do so. Accordingly, Herbalife is subject to civil penalties under Labor Code section 226.3.

Failure to Reimburse Necessary Business Expenses

Labor Code section 2802 and Wage Order No. 4 require employers to indemnify their employees for all necessary business expenses that they incur in direct consequence of the

September 12, 2024

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discharge of his or her job duties or in direct consequence of his or her obedience to the directions of the employer. During the relevant period, Ms. Desimone and other aggrieved employees incurred necessary business- related expenses and costs that were not fully reimbursed by Herbalife. These costs include, but are not limited to, the use of personal cell phones and computers, Wi-Fi and internet connections, premium memberships for access to sites like youtube.com that “Distributors” were required to use to market and sell Herbalife services and products, home office equipment, ring lights other equipment for making content videos, among other expenses. Indeed, Ms. Desimone and the other aggrieved employees absorbed all the costs associated with marketing and selling Herbalife’s products and services at their own expense and without reimbursement by Herbalife. Ms. Desimone and the aggrieved employees are entitled to reimbursement for all such expenses.

* * *

Herbalife has violated, caused to be violated, or is currently violating, numerous provisions of the California Labor Code, as described above. Ms. Desimone respectfully requests that the agency investigate the above allegations, and, in any event, provide notice regarding its intent to investigate pursuant to Labor Code § 2699.3. If the agency does not intend to investigate the alleged violations, Ms. Desimone respectfully requests a letter confirming the same so that we may bring a civil action under PAGA against Herbalife for the violations described in this letter. Please know that we intend to file a civil complaint and to bring the appropriate claims under Labor Code § 2699 should your office decline to investigate, or investigate but decline to issue citations, within the time frames set out in Labor Code § 2699.3. Should you require anything further or have questions, please do not hesitate to contact me. Thank you for your consideration.

Respectfully Submitted,

CLARKSON LAW FIRM, P.C.



Glenn A. Danas, Esq.

VIA CERTIFIED MAIL

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