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12 behalf of herself, those similarly situated,
and the general public

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION**

15 LAUREL COOK, on behalf of herself, those
16 similarly situated, and the general public,

17 Plaintiffs,

18 v.

19 EFUSJON, INC., a Nevada corporation; ROBERT
20 TOWLES; R. S. EDWARDS; KEITH DILLON;
21 AARON CALLAHAN; KATHY HUMPHREYS;
22 KENNY GILMORE; MARC SHARPE; KEN
VANDER KAMP; and DOES 1-300, inclusive,

23 Defendants.
24

) **Case No.**

) **COMPLAINT AND DEMAND FOR JURY TRIAL**

) **CLASS ACTION**

) **1) Declaratory Relief**

) **2) Penal Code § 327**

) **3) Business and Professions Code §17500**

) **4) Business and Professions Code §17200**

) **Judge:**

) **Dept:**

) **Trial Date:**

25 **CLASS ACTION COMPLAINT**

26 Plaintiff Laurel Cook on behalf of herself, those similarly situated, and the general public and alleges
27 as follows:
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COMPLAINT AND DEMAND FOR JURY TRIAL

1 **Nature of Action**

2 1. This is an action to enjoin Defendants' operation of a pyramid scheme which is substantially
3 injurious to California Citizens.

4 2. While pyramid schemes can take different forms, they are at core inherently illegal schemes by
5 which their perpetrators induce others to join the scheme with the promise of high profits and rewards from a
6 putative business. The reality of the schemes, however, is that rewards to those that join come almost exclusively
7 from the recruitment of new participant victims of the scheme.

8 3. "Like chain letters, pyramid schemes may make money for those at the top of the chain or
9 pyramid, but "must end up disappointing those at the bottom who can find no recruits." *Webster v. Omnitrition,*
10 *Inc.*, 79 F.3d 776, 781 (9th Cir. 1996) (quoting *In re Koscot Interplanetary, Inc.*, .86 F.T.C. 1106, 1181 (1975),
11 *aff'd mem. sub nom.*, *Turner v. FTC.* 580 F.2d 701 (D.C. Cir. 1978)). As such, "[p]yramid schemes are-said to be
12 inherently fraudulent...." *Omnitrition* at 781.

13 4. Pyramid schemes are characterized as "[such contrivances are characterized by the payment by
14 participants of money to the company in return for which they receive (1) the right to sell a product *and* (2) the right
15 to receive, in return for recruiting other participants into the program, rewards which are unrelated to sale of the
16 product to ultimate users." *Omnitrition* at 781.

17 5. According to the Ninth Circuit, the "satisfaction of the second element of the *Koscot* test is the *sine*
18 *qua non* of a pyramid scheme: As is apparent, the presence of this second element, recruitment with rewards
19 unrelated to product sales, is nothing more than an elaborate chain letter device in which individuals who pay a
20 valuable consideration with the expectation of recouping it to some degree via recruitment are bound to be disappointed."
21 *Omnitrition* at 782.

22 6. The Ninth Circuit has adopted the *Koscot* standard and has held that "the operation of a pyramid
23 scheme constitutes fraud for purposes of several federal antifraud statutes." *Omnitrition* at 782.

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1 7. California law also renders pyramid schemes per se illegal. California Penal Code § 327 defines
2 an endless chain (or pyramid scheme) as follows:

3 “Every person who contrives, prepares, sets up, proposes, or operates
4 any endless chain is guilty of a public offense, and is punishable by
5 imprisonment in the county jail not exceeding one year or in state prison
6 for 16 months, two, or three years.

7 As used in this section, an "endless chain" means any scheme for the
8 disposal or distribution of property whereby a participant pays a
9 valuable consideration for the chance to receive compensation for
10 introducing one or more additional persons into participation in the
11 scheme or for the chance to receive compensation when a person
12 introduced by the participant introduces a new participant.

13 Compensation, as used in this section, does not mean or include
14 payment based upon sales made to persons who are not participants in
15 the scheme and who are not purchasing in order to participate in the
16 scheme.”

17 Thus, if one received compensation, whether designated a bonus, commission, or sale, from
18 others who join the scheme, that is illegal. If one receives compensation from sale made to outsiders,
19 i.e. true retail sales to people who are not involved in the business, that is not illegal.

20 8. Efusjon, Inc. (“efusjon”), a Nevada corporation, sells efusjon's energy drinks to distributors
21 through a pyramid scheme disguised as a multi-level marketing program. The efusjon pyramid scheme is
22 fraudulent because it induces individuals to invest in products and to recruit new victims into the scheme with the false
23 promise of enormous profits. Completely contrary to the law, efusjon forces its distributors to make purchases
24 and then conveniently considers those purchases as “sales” to meet its legal obligations of accruing retail sales.
25 New entrants into the pyramid scheme are effectively required to invest approximately \$170 per month to buy
26 products from efusjon in order to stay qualified and be compensated under the scheme. Because efusjon
27 distributors essentially do not sell products to consumers who are not also distributors, they obtain returns on their
28 investment in the efusjon program only by recruiting new distributors who will then buy products (and recruit more
distributors who will buy products), which purchases result in "bonuses" to the recruiting distributor. The efusjon
pyramid scheme is a prototypical one, purportedly formed as a multilevel marketing (MLM) system, with
rules and regulations which are drafted solely as a pretense, which are not enforced, and which have no
substance in the operation of the business. This practice should be immediately enjoined.

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Parties

9. This is an action brought on behalf of California citizens pursuant to the California Business and Professions Code §§ 17200, *et seq.* and Penal Code of California § 327.

10. Plaintiff Laurel Cook ("Cook") is, and at all material times was, an individual who resides in the County of San Diego, in the State of California. Cook entered into a Distributor Agreement with efusjon and became an efusjon distributor on or about May 1, 2009. She has lost money as a result of Defendants' conduct as stated herein.

11. Efusjon is, and at all relevant times was, a corporation organized under the laws of the state of Nevada, authorized to conduct business in the State of California, with its principal place of business in the state of Oregon, and doing business regularly throughout the United States, including in the state of California. Efusjon transacts its business in the County of San Diego and is properly before the Court pursuant to Code of Civil Procedure §395.5.

12. Robert Towles – President/CEO and Co-Founder; R.S. Edwards – Vice President of Field Operations and Co-Founder; Keith Dillon – Vice President of Business Development; Aaron Callahan – Vice President of Business Operations; Kathy Humphreys – Vice President of Field Relations & Development; Kenny Gilmore – Director and Co-Founder; Marc Sharpe – Director and Co-Founder; and Kent Vander Kamp – Director of Compliance and Legal Affairs, are, and at all relevant times were, individuals doing business in the County of San Diego in the State of California.

13. The above named Defendants had sufficient and continuous contact with the County of San Diego and the State of California in that, among other things, Defendants have been actively promoting the pyramid scheme through the use of agents and promoting their "lines of sponsorship" in the county.

14. The names of Defendants DOES 1 through 300, inclusive, are presently unknown to Plaintiffs, who therefore sues these Defendants by fictitious names. Plaintiffs will seek leave of this Court to amend the Complaint to show these Defendants; true names and capacities when the same have been ascertained. Plaintiffs are informed and believe, and based thereon allege, that these Defendants were authorized to do and did business in the County of San Diego and/or the State of California. Plaintiffs are informed and believe, and based thereon allege, that the Defendants designed, developed, imported, manufactured, tested, advertised, marketed, promoted, distributed, and/or sold the efusjon product and/or marketing plan to citizens of California. In doing so, these Defendants placed the product in the stream of commerce in California. These Defendants have received, and will continue to receive,

1 substantial benefits and income through these activities.

2 15. Plaintiffs are informed and believe and based thereon allege that at all relevant times each of the
3 Defendants was the agent, servant, employee, subsidiary, affiliate, partner, assignee, successor-in-interest, alter ego,
4 joint venturer, and/or other representative of each of the remaining Defendants and was acting in such capacity in
5 doing the things herein alleged, or ratified or approved the conduct herein.

6 **Jurisdiction and Venue**

7 16. Defendants are subject to the jurisdiction of this Court. The corporate Defendants at all relevant
8 times have been engaged in continuous and systematic business in this State, have designated agents for service of
9 process in this State, and/or have committed tortious acts in this State. The individual defendants have at all relevant
10 times been engaged in continuous and systematic business in this State and/or have committed tortious acts in this
11 State. The actions giving rise to this lawsuit were taken by defendants at least in part in California. Plaintiffs are
12 citizens of California. In accordance with California's long-arm statute, California Code of Civil Procedure §
13 410.10, this Court has personal jurisdiction over the Defendants.

14 17. Venue is proper in this County because a substantial number of the acts and transactions that gave
15 rise to the claims of the Plaintiffs and the Plaintiff class occurred within this County; Defendant did, or
16 solicited, business, and transmitted communications by mail or electronic means relating to their illegal pyramid in
17 this County; transacted their affairs, and/or resided within California and this judicial district; Plaintiff Cook is a
18 resident of this County, and defendants' wrongful acts occurred in this County and have directly impacted the
19 general public of this County.

20 **Preliminary Statement**

21 18. Efusjon lacks all appearances of legitimacy. Efusjon, which is commonly spelled with
22 the lower case "e," holds itself out as a legitimate, multi-level marketing, home based business
23 opportunity. But in fact, efusjon runs a pernicious marketing campaign and clearly operates as a
24 pyramid recruitment scheme. Efusjon sells and markets its line of energy drinks through its
25 independent contractors, commonly referred to as "distributors." This form of selling and distributing
26 goods is known as multi-level marketing. When done appropriately, multi-level marketing may be a
27 legal form of moving products from companies to end users. However, efusjon has corrupted the
28 model and leveraged fraudulent means to create a classic pyramid recruitment scheme. Pyramid

1 schemes are predatory in nature and occur when participants obtain monetary benefits primarily from
2 recruiting members and not from the sale of goods and services to consumers outside the distributor
3 network. Efusjon’s compensation plan literally forces distributors to be their own best customer by
4 requiring them to purchase an inordinate amount of product for themselves and recruit additional
5 participants to do the same in an endless chain of recruits. There are few, if any, real incentives to sell
6 products to nonparticipants. As is typical with pyramid recruitment scheme, the efusjon compensation
7 plan dramatically favors recruiting new members over selling to outside consumers.

8 19. In efusjon, rather than encouraging distributors to sell their energy drinks to retail
9 customers, efusjon has conveniently, and illegally, structured its program where its distributors serve
10 dual roles simultaneously as distributors AND retail customers. Instead of requiring distributors to sell
11 products to customers, efusjon forces its distributors to purchase 48 energy drinks a month and then
12 considers those required purchases as “sales.” In order to advance up the pay scale, distributors
13 simply need to purchase an inordinate amount of product for personal use and recruit additional
14 participants to do the same in an endless chain. Efusjon distributors are enticed by company materials,
15 its compensation plan and its key leaders to immediately go out and enroll three new distributors and
16 teach those three about “The Power of Three” by helping each of them enroll three distributors of their
17 own. This is the sum of their marketing strategy. The efusjon compensation plan produces a system of
18 monetary rewards that dramatically favors recruitment over retail sales and leads to a constant cycle of
19 victims churning in and out of the program.

20 **Factual Background**

21 **A. Summary of the efusjon Business**

22 20. Efusjon holds itself out as a multi-level marketing business. Efusjon purports to sell
23 and distribute its consumer products through its distributors, but in fact few of efusjon’s products are
24 ever sold to anyone other than to the distributors themselves. There are three levels of participation in
25 the efusjon business. First, efusjon offers a “Member” tier of participants. Members pay a nominal
26 “membership” fee of \$30 and theoretically have the ability to purchase product at wholesale and sell at
27 retail. Although efusjon vaguely references the ability for Members to sell at retail, the selling
28 proposition is not quite ideal. For example, Members can personally purchase four cases of energy

1 drinks at the wholesale price of \$120 and sell at the suggested retail price of \$140 to theoretically earn
2 an immediate profit. However, once one adds on the \$36 to \$47 shipping charge,¹ the theoretical \$20
3 profit quickly morphs into an actual \$16 to \$27 loss. The more that gets sold, the more the distributor
4 loses. No sales person can make those margins work. But for obvious reasons, efusjon places very
5 little emphasis on such retail sales efforts. The “real money” is made in recruiting a leveraged
6 downline of participants.

7 21. Second, efusjon offers an “Associate” tier of participants. Associates are Members
8 that pay a \$150 fee which includes the \$30 membership fee and \$120 in product. They then purchase
9 \$120 worth of inventory a month, plus taxes and the additional \$47 shipping fee. In exchange for their
10 membership fee and continuous product order, the Associate maintains a spot in the efusjon
11 compensation plan (“the matrix”) and has the ability to sponsor others. While Associates occupy
12 positions in the matrix, they cannot earn commissions until they “get their three” by sponsoring three
13 other Associates, regardless if they’ve made retail sales or not. In a unique rule that places
14 considerable pressure on Associates to inventory load and purchase large quantities of product
15 irrespective of need or want, Associates lose their position in the matrix if they fail to purchase the
16 requisite 48 cans (\$167 plus tax) of energy drinks for two consecutive months. Stated another way,
17 Associates get “kicked out” of the business if they fail to purchase 48 cans in a two month period.
18 Theoretically, an Associate can build a large organization making a few thousand dollars a month, and
19 if they fail to spend the required \$167 in the business for two months, they lose everything. Clearly,
20 the pressure is on Associates to inventory load and purchase cans, regardless if they want it, due to
21 fear of being eliminated from the business and wasting all of their effort. Upon further discovery, the
22 evidence will show that distributors are not purchasing the products for its inherent quality; but rather
23 they are purchasing positions in the matrix to remain eligible for the money transfer scheme.

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27 ¹ Rob Towles, CEO and Founder, said the \$47 shipping was high because the funds were being used
28 to offset administrative costs. EfusjonCorporate’sChannel, Rob Towles on Shipping Costs, *available*
at: <http://www.youtube.com/user/EfusjonCorporate#p/u/5/irB1uhZ1E4w>

1 22. Finally, efusjon offers an “Executive Associate” tier of participants. Executive
2 Associates have sponsored three participants and are eligible to receive commissions from the product
3 volume generated by their recruits. As with Associates, if the Executive Associate fails to purchase
4 the requisite quantity of product for two consecutive months, they lose their position in the matrix.
5 Efusjon pays each Executive Associate 4.25% on the product volume generated by their recruits, and
6 the recruits of their recruits in their matrix.

7 **B. The Nature of Classic, Illegal Pyramid Schemes**

8 23. An illegal pyramid scheme is characterized by the payment of money to a company in
9 exchange for: a) the right to sell a product, and b) the right to receive rewards for recruiting others to
10 join the scheme, independent from the sale of products to the ultimate users. *In re Koscot*
11 *Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975), *aff’d mem. sub nom., Turner v. FTC*, 580 F.2d 701
12 (D.C. Cir. 1978). Essentially, participants are duped into believing they are buying into a legitimate
13 business opportunity to sell a product but, in reality, the profits are derived almost solely from money
14 advanced by new recruits inducted into the scheme. In efusjon’s case, the new recruits are under
15 exorbitant pressure to “get their three” and purchase the requisite amount of product for personal use,
16 not for resale.

17 24. Since the financial incentives require distributors to focus on enrolling new participants
18 in the matrix, the sole way to make money is for the Executive Associates to continually recruit new
19 distributors who are also willing to buy and self-consume, inventory load, discard, or give away the
20 efusjon products. There is no incentive to make outside retail sales. This fact alone renders efusjon a
21 classic recruitment pyramid scheme.

22 25. “Like chain letters, pyramid schemes may make money for those at the top of the chain
23 or pyramid, but ‘must end up disappointing those at the bottom who can find no recruits.’” *Webster v.*
24 *Omnitrition Int’l Inc.*, 79 F.3d 776, 781 (9th Cir. 1996) (quoting *In re Koscot Interplanetary, Inc.*, 86
25 F.T.C. at 1181). “Pyramid schemes are said to be inherently fraudulent because they must eventually
26 collapse.” *Omnitrition*, 79 F.3d at 781, (citing *S.E.C. v. International Loan Network, Inc.*, 968 F.2d
27 1304, 1309 (D.C.Cir.1992)).

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1 26. The Ninth Circuit has adopted the *Koscot* standard, holding that the “satisfaction of the
2 second element of the *Koscot* test is the *sine qua non* of a pyramid scheme: ‘As is apparent, the
3 presence of this second element, recruitment with rewards unrelated to product sales, is nothing more
4 than an elaborate chain letter device in which individuals who pay a valuable consideration with the
5 expectation of recouping it to some degree via recruitment are bound to be disappointed.’”
6 *Omnitrition*, 79 F.3d at 782. “[T]he operation of a pyramid scheme constitutes fraud...” *Id.*

7 27. Efusjon’s business is driven completely by recruitment, wherein distributors are
8 exhaustively encouraged by both company executives and field leaders to go out and “get their three”
9 and watch the matrix fill up with people. In *Koscot*, the court illustrated its disdain for recruitment
10 schemes when it held,

11 [Defendants’] multilevel marketing program . . . contemplates an endless
12 recruitment of participants since each person entering the program must
13 bring in other distributors to achieve the represented earnings. **The**
14 **demand for prospective participants thus increases in geometric**
progression ...”

15 *In re Koscot*, 86 F.T.C. at 1106.

16 28. Efusjon, with its requirement that all Associates recruit three new members, clearly
17 matches the pattern of recruitment that was once abhorred by the court in *Koscot*. The only way for
18 distributors to advance in the matrix and earn the represented income is to focus on “getting their
19 three.” Efusjon offers only cosmetic opportunities for its distributors to sell products to customers.

20 29. California law also renders pyramid schemes illegal. California Penal Code § 327
21 defines an endless pyramid chain as follows:

22 [A]ny scheme for the disposal or distribution of property whereby a
23 participant pays a valuable consideration for the **chance to receive**
24 **compensation for introducing additional persons into participation**
in the scheme or for the chance to receive compensation when a
25 **person introduced by the participant introduces a new participant.**
26 Compensation . . . does not . . . include payment based upon sales made
27 to persons who are not participants in the scheme and who are not
28 purchasing in order to participate in the scheme.
California Penal Code § 327 (emphasis added).

1 30. Efusjon’s behavior, as noted previously and in the next section, clearly constitutes an
2 “endless chain scheme” as contemplated by the California legislature. Efusjon participants are
3 encouraged and enticed to recruit active distributors who in turn recruit more active distributors. The
4 primary focus of the efusjon opportunity is on recruiting additional distributors, not on selling to
5 nonparticipants.

6 **C. The Power of Three: Efusjon Fosters Endless Recruitment**

7 31. The overwhelming crux of the efusjon message is simple: sponsor lots of people and
8 make lots of money. Selling to retail customers is hardly referenced, as if the requirement to sell was
9 an unfortunate formality thrust upon the company by lawyers. The following excerpts are taken from
10 efusjon communications and demonstrate their insatiable demand for endless recruiting.

11 32. On slide six of efusjon’s compensation plan ([Exhibit 1](#)), which is widely distributed
12 across the efusjon websites, the company provides a mathematical illustration of the possibilities in the
13 efusjon business. Assuming a new distributor sponsors three Associates in a month, and those three
14 sponsored three the next month, and on down the line, at the end of ten months, the company boasts
15 about the possibility of there being 59,049 people in the new Associate’s matrix. On slide seven a
16 prospective distributor is shown the possibility of a monthly payout of \$668,320 from recruitment.
17 Selling is never referenced. With efusjon, success is always depicted in terms of distributor numbers,
18 not in retail sales.

19 33. On page 2 of a letter to all efusjon distributors from efusjon President, Rob Towles,
20 ([Exhibit 2](#)), Mr. Towles inserted a quote from a “key distributor” that said:

21 This [facebook] app will fill the matrix if all associate distributors
22 committed to becoming an executive were out there doing what they
23 agreed to do with that space, ***and that is to get three who will get three
24 and help them get theirs. If that is being done, your matrix will fill top
to bottom.***

25 Clearly, in a communication sent to all efusjon Associates (which numbers in the tens of thousands),
26 Mr. Towles endorses the message of getting three, to get three, to get three, ad infinitum.

27 34. Moreover, in its most recent financial promotion titled “Power of 3, Pay it Forward,”
28 efusjon enhanced the rewards for recruiting. ([Exhibit 3](#)). In the promotional literature, page two,

1 efusjon states, “The goal of an efusjon [distributor] will be to ‘Pay it Forward’ by helping your new
2 Associate(s) generate \$360.00 of product volume within 30 days **by enrolling 3 new active**
3 **Associates** and thereby achieving the rank of Executive. For every new Associate that achieves the
4 rank of Executive within 30 days of their join date, the efusjon [distributor] ...will receive a one-time
5 \$200.00 bonus for the \$360.00 product volume generated.” Stated another way, if an efusjon
6 distributor helps a new recruit sponsor three other participants, they get paid a \$200 bonus. It’s a
7 disguised recruitment fee, which is prohibited by California’s endless chain statute. Again, the statute
8 states that it’s illegal to give participants the “chance to receive compensation for introducing
9 additional persons into participation in the scheme.” As summarized by the court in *Koscot*, “The
10 promise of lucrative rewards for recruiting others tends to induce participants to focus on the
11 recruitment side of the business at the expense of their retail marketing efforts, making unlikely that
12 meaningful opportunities for retail sales will occur.” *In re Koscot*, 86 F.T.C. at 1106. Efusjon’s needs
13 an endless chain of recruits, which explains why its pay plan is heavily slanted in favor of recruiting.

14 35. Additionally, on the company’s facebook page, there’s a video that further illustrates
15 efusjon’s prominent message of recruiting. The video displays several slides that say the following:

16 “In order to make good money you must work very hard ... Yeah,
17 right! Says who? . . .’ ***All you have to do is get three people, who will***
18 ***get three people.***” ([Exhibit 4](#), pages 1-3; 9).

19 Throughout the video, selling was never referenced.

20 36. In its “Matrix Overview” video on YouTube, efusjon provides several slides that
21 explain how the matrix works for prospective distributors. The slides state, “So let’s take a look at
22 how it works! The Power of 3 in action...” In subsequent slides, it literally provides a pyramid
23 illustration of characters in their matrix where one character turns to twenty-six. ([Exhibit 5](#), pages 6-8).
24 And consistent with all of efusjon’s marketing materials, there is zero reference of the need for retail
25 sales to nonparticipants.

26 **D. efusjon Manipulates its Policies to Appear Legitimate and Fails**

27 37. Efusjon does its best to appear legitimate on paper by copying rules promulgated in the
28 1970’s Amway decision. Completely contrary to the law, efusjon forces its distributors to make
purchases and then conveniently considers those purchases as “sales” to meet its legal obligations of

1 accruing retail sales. Specifically, in its Policies and Procedures ([Exhibit 6](#), page 21) under its
2 “Seventy Percent Rule,” efusjon states, “...It is Company policy to strictly prohibit the purchase of
3 products/services solely for the purpose of qualifying for commissions or bonuses.” However, in a
4 rule that renders the above restriction moot, efusjon **allows** its distributors to meet the 70% rule by
5 **personally** consuming the product, or giving it away. Ibid. Thus, the distributor self-consumes the
6 products and spends at least \$167 each month to maintain their position in the matrix. In its
7 “Associate” rule ([Exhibit 6](#), page 2) efusjon states, “If an Associate fails to make a minimum product
8 order of \$120.00 [plus \$47 shipping] for (2) consecutive months, Associate will be demoted ... and
9 **lose position in Compensation Plan.**” On the one hand, they prohibit distributors from purchasing
10 products to advance in matrix. On the other hand, they expressly require distributors to purchase
11 products to advance in the matrix. By itself, the fact that distributors may personally consume product
12 to meet the 70% rule is irrefutable evidence that the efusjon MLM scheme is a pyramid scheme and
13 violates Penal Code Section 327.

14 **E. Efusjon Operates as a Pyramid Scheme, Violates *Amway***

15 38. In the late 1970s, the Federal Trade Commission (“FTC”) began looking at Amway’s
16 business model to determine whether it was operating as an illegal pyramid scheme. Because the
17 company was still producing products capable of being sold in the retail market, the FTC ruled in 1979
18 that Amway was not a pyramid scheme. *In re Amway Corp.*, 93 F.T.C. 618 (1979).

19 39. The FTC ruled that Amway was not a pyramid scheme because it adopted, and
20 enforced, certain policies designed to avoid the *Koscot* characteristics of an illegal pyramid scheme.
21 *Amway*, 93 F.T.C. at *108. What later became known as the “Amway Safeguards,” the keys to
22 Amway’s survival were its “initial investment” rule; the “70%” rule; and the “10 customer” rule. *Id.*
23 As held by the FTC, these safeguards, if enforced, would likely encourage retail sales and place
24 natural restrictions on endless recruiting. And as held by *Omnitrition*, the mere existence of the rules
25 does very little good without proper enforcement. *Omnitrition*, 79 F.3d at 783 (9th Cir. 1996).
26 Efusjon does not enforce any of these rules.

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1 **The Initial Investment Rule**

2 40. Pyramid schemes require an initial payment by a new recruit in exchange for the right
3 to a) sell products, and b) receive rewards for recruiting other participants into the scheme, unrelated
4 to the sale of products to the ultimate user.

5 41. In *Amway*, the FTC found that there was no “investment in inventory” required of new
6 distributors. Instead, the FTC found that a new distributor only needed to purchase a sales kit of
7 literature for \$15.60. *Amway*, 93 F.T.C. at *107. Compared to the \$5,000 required in *Koscot*, 86
8 F.T.C. at 1179; the \$1,950 in *Ger-Ro-Mar, Inc.*, 84 F.T.C. 95, 108-10 (1974); and the \$4,500 in
9 *Holiday Magic, Inc.*, 84 F.T.C. 748 (1974).

10 42. Today efusjon’s stated initial sign-up membership fee is \$30.00. However, to be an
11 associate distributor, one must also purchase \$120 in product. ([Exhibit 1](#), page 7). This requisite
12 product purchases gives the distributor a position in the matrix, which is where the “real money” is
13 made. And this “investment” is not a one-time deal. It’s a rolling commitment that endures in
14 perpetuity so long as the distributor wants to profit from his recruits. Seeking to cash in from the
15 matrix, distributors inevitably buy products they would never buy at prices they would never pay at
16 quantities they would never consume in order to advance and remain qualified in the matrix. It is
17 widely acknowledged by efusjon distributors that they buy just enough product to remain eligible in
18 the matrix. This functionally necessary product purchase qualifies as an initial investment under
19 *Amway*, far in excess of \$15.

20 43. In 1996 the Ninth Circuit revisited the rules on pyramid schemes in the *Omnitrition*
21 case. In particular, the Court held that Omnitrition operated as an illegal pyramid scheme because
22 distributors had to purchase and convince three other recruits to purchase a certain amount of product
23 in order to advance or receive any benefit from the system. *Omnitrition*, 79 F.3d at 780. The court
24 elaborated:

25 A participant must pay a substantial amount of money to Omnitrition **in the form of**
26 **large monthly product orders**. In exchange for these purchases, the supervisor
27 receives the right to sell the products and earn compensation based on product orders
28 made by the supervisor’s recruits. **This compensation is facially ‘unrelated to the
sale of product to ultimate users’ because it is paid based on the suggested retail
price of the amount ordered from Omnitrition rather than based on actual sales to**

1 **consumers.** On its face, Omnitrition’s program appears to be a pyramid scheme.
2 Omnitrition cannot save itself simply by pointing to the fact that it makes some retail
3 sales.

4 *Id.* (emphasis added)

5 44. Efusjon has a very similar structure to the one condemned in *Omnitrition*. Distributors
6 can only earn money when they self-consume efusjon products and when they recruit new distributors
7 to do the same.

8 **The Retail Sales Rule**

9 45. Instrumental in Amway’s survival in the *Amway* case was its ten customer rule. The
10 *Amway* ten customer rule stated that “distributors may not receive a performance bonus unless they
11 **prove a sale to each of ten different retail customers during each month**...The ten customer rule,
12 also referred to as a retail sales rule, is enforced by Amway and the Direct Distributors.” *Amway*, 93
13 F.T.C. at *26 (emphasis added). The court in *Amway* held, “‘Pyramid’ sales plans based on inventory
14 loading or headhunting fees create an incentive for recruiting rather than selling products to
15 consumers... Amway’s ten customer rule deters inventory loading by sponsoring distributors.” *Id.* at
16 *58.

17 46. As illustrated above, Amway considered a “retail sale” as a sale to a **nonparticipant**.
18 It’s important to note that Amway, the godfather of the retail sales rule, to this day still considers a
19 “retail sale” as a sale to a nonparticipant.² Efusjon has its own different interpretation of “retail sale.”

20 47. Unlike most modern pyramid schemes that ignore their cosmetic retail sales rules,
21 efusjon has skipped this formality by simply not having one. Efusjon has no retail sales requirement.
22 Instead, they have their own interpretation of “retail sales” as purchases made by their own sales force,
23 not from nonparticipants. This is contrary to what the FTC Amway Order contemplated.

24 Efusjon’s quasi Retail Sales rule provides:

25 [E]fusjon will recognize as a retail sale purchase [sic] by non-
26 participants ***and/or purchases by Distributors for personal or family***

27 ² In Amway’s “Customer Volume” rule, they require that “retail sales’ be made to nonparticipants.
28 The rule states, “In order to obtain the right to earn a Performance Bonus on downline volume during
a given month, a [distributor] must: (a) make not less than one sale to each of **10 different retail
customers**; or (b) have at least **50 PV of sales to any number of retail customers.**”

1 *use* in reasonable volume which are not made for purposes of
2 qualification or advancement.

3 48. Instead of requiring distributors to sell products to outside customers, efusjon forces its
4 distributors to purchase 48 energy drinks a month and then considers those purchases as “sales.”
5 Since few sales to nonparticipants occur, the only ways to advance in the efusjon matrix is to
6 personally consume, hoard, discard, or give away large quantities each month and recruit additional
7 participants to do the same. There is no “governor chip” on the practice of recruitment, such as a
8 legitimate retail sales rule. This renders the efusjon business model predatory, unsustainable, and
9 illegal.

10 49. Efusjon requires its distributors to spend \$167 plus tax each month to qualify for
11 commissions. These commissions are directly influenced by the product purchases made by recruits
12 in the matrix. Thus, because efusjon’s products are not being sold to anyone except distributors who
13 are buying to qualify for bonuses, efusjon distributors’ earnings are a direct function of how much
14 product they and their downline recruits consume. The more internal consumption and the larger the
15 downline, the higher the payout.

16 50. Efusjon recruits people to become distributors, entices them to purchase efusjon
17 products through materially false statements and omissions, and then distributes the proceeds of
18 product “sales” to other participants based almost exclusively on the participant’s recruitment of new
19 victims, rather than on the retail sales of products.

20 **70% Rule**

21 51. In the Amway decision, the FTC explained the 70% rule as follows: “to ensure that
22 distributors do not attempt to secure the performance bonus solely on the basis of purchases, Amway
23 requires that, to receive a performance bonus, distributors must resell at least 70% of the product they
24 have purchased each month. . . . Amway enforces the 70% rule. ” Amway, 93 F.T.C. 618 at 72-75.
25 Efusjon has a 70% rule in their policies:

26 . . .It is Company policy to strictly prohibit the purchase of products/services
27 solely for the purpose of qualifying for commissions or bonuses. . .To this
28 end, when purchasing products from Company, **Distributor is required to
 certify that at least 70% of all previous orders have been sold at retail.**

1 Violation of the 70% rule will cause forfeiture of any commission or bonuses
2 for those otherwise qualified or in such cases, suspension or termination.”

3 52. Efusjon’s 70% rule is useless in application because efusjon allows product purchases
4 for self-consumption by its distributors to count toward their 70% retail sales requirement. On paper,
5 efusjon requires its distributors sell 70% of all “previous orders.” However in practice, when a
6 distributor purchases products to remain eligible in the business, efusjon counts those purchases as
7 “sales” in satisfaction of its 70% rule. So in actuality, selling 70% of all “previous orders” really
8 means drinking the products or discarding them. And if they fail to make “sales” (drink the products),
9 they get kicked out of the business. This interpretation of the 70% was not contemplated by the FTC
10 Amway Order.

11 **The Arbitration Agreement**

12 53. Before becoming efusjon distributors, prospective distributors, including Plaintiff and
13 members of the class, were required to sign efusjon’s Distributor Agreements, which contains an arbitration clause.
14 Under the authority of California Supreme Court, *Broughton v. Cigna Healthplans* (1999) 21 Cal 4th 1066, the
15 claims for injunctive relief herein cannot be arbitrated. Under *Aral v. Earthlink, Inc.* (2005) 134 Cal. App. 4th 544,
16 and the below authorities, the entire arbitration provision is unenforceable because it is unconscionable under well
17 established California case law. Buried in the back of its policies and procedures in the section entitled “Violation of
18 Agreement”, there is an arbitration provision. ([Exhibit 6](#), pages 25-26). The arbitration provision is provided on a
19 "take-it-or-leave-it" basis with no opportunity for negotiation. The prospective distributors received no explanation
20 of the arbitration provision and would not have been permitted to become Efusjon distributors unless they signed the
21 Distributor Agreement which references the offending and unenforceable arbitration provision. As a result of the
22 unequal bargaining positions, the hidden terms and the overall harshness of the adhesive arbitration provision,
23 efusjon's arbitration provision is both procedurally and substantively unconscionable. Plaintiffs assert that the
24 arbitration provision contained in efusjon’s Distributor Agreement is also unenforceable under *Winter v. Windows*
25 *Fashion Prof.* (2008) 166 Cal App 4th 943; *Discover Bank v. Superior Court*, 36 Cal 4th 148 (2005), and
26 *Armendariz v. Foundation for Health Psychare Services, Inc.* (2007) 24 Cal 4th 83.

27 54. Efusjon's arbitration provision is also permeated with substantively unconscionable terms
28 as demonstrated by the following examples, which are not exhaustive.

- 1 which were unrelated to the sale of the product to retail consumers;
- 2 c. Whether distributors were required to make an investment into the pyramid scheme;
- 3 d. Whether Defendants enforced the 70% rule;
- 4 e. Whether Defendants had and/or enforced a retail sales rule;
- 5 f. Whether Defendants conduct constitutes an “Endless Chain” under the California Penal
- 6 Code;
- 7 g. Whether Defendants omitted to inform plaintiffs and the plaintiff class that they were
- 8 entering into an illegal pyramid scheme where the overwhelming majority of participants
- 9 lose money;
- 10 i. Whether Defendant's arbitration agreement is unenforceable under California law;
- 11 j. Whether and to what extent the conduct has caused injury to the Plaintiff and the Plaintiff
- 12 class;
- 13 k. Whether Defendants’ conduct constitutes an unlawful, unfair and fraudulent business
- 14 practice under the California Business and Professions Code; and
- 15 l. Whether Defendant’s conduct constitutes false advertising under the California Business
- 16 and Professions Code.

17 65 These and other questions of law and/or fact are common to the class and the subclass, and predominate

18 over any question affecting only individual class members.

19 66. Plaintiffs' claims are typical of the claims of the class and the subclass in that Plaintiffs were

20 distributors for Efusjon and lost money as a result of the pyramid scheme.

21 67. Plaintiffs will fairly and adequately represent the interests of the class and the subclass in that

22 plaintiffs' claims are typical of those of the class and plaintiffs' interests are fully aligned with those of the class.

23 Plaintiffs have retained counsel who is experienced and skilled in complex class action litigation.

24 68. Class action treatment is superior to the alternatives, if any, for the fair and efficient adjudication of

25 the controversy alleged herein, because such treatment will permit a large number of similarly-situated persons to

26 prosecute their common claims in a single forum simultaneously, efficiently and without unnecessary duplication of

27 evidence, effort, and expense that numerous individual actions would engender.

1 The distributors have all lost money through their efusjon involvement and are unable to afford to bring individual
2 claims in arbitration. Accordingly, efusjon's class action prohibition renders the arbitration provision substantively
3 unconscionable.

4 80. Accordingly, the Court should declare that efusjon's arbitration provision is procedurally and
5 substantively unconscionable and that the plaintiff claims are properly before this Court.

6 **SECOND CLAIM FOR RELIEF**

7 **(Violation of Penal Code § 327)**

8 81. California law renders pyramid schemes per se illegal. California Penal Code § 327 defines an
9 endless chain (or pyramid scheme) as follows:

10 “Every person who contrives, prepares, sets up, proposes, or operates any endless
11 chain is guilty of a public offense, and is punishable by imprisonment in the
12 county jail not exceeding one year or in state prison for 16 months, two, or three
13 years.

14 As used in this section, an "endless chain" means any scheme for the disposal or
15 distribution of property whereby a participant pays a valuable consideration for
16 the chance to receive compensation for introducing one or more additional
17 persons into participation in the scheme or for the chance to receive compensation
18 when a person introduced by the participant introduces a new participant.

19 Compensation, as used in this section, does not mean or include payment based
20 upon sales made to persons who are not participants in the scheme and who are
21 not purchasing in order to participate in the scheme.”

22 82. Plaintiffs were enticed into participating in Defendants' pyramid scheme and were damaged thereby in
23 an amount to be proven at trial.

24 **THIRD CLAIM FOR RELIEF**

25 **(Unlawful, Unfair and Fraudulent Business Practices Under the
26 California Business and Professions Code § 17500, et seq.)**

27 83. Plaintiffs and the class re-allege the foregoing paragraphs as though fully set forth herein.

28 84. Defendants are engaged in an illegal pyramid scheme or “endless chain” as defined under California
Code § 327. Defendants utilize this illegal pyramid scheme and couple it with false promises of great wealth and
omissions of the fact that only those at the top of the pyramid make money. Defendants make these and similar
misrepresentations and omissions with the intent, directly or indirectly to dispose of property, in the form of efusjon
products and to convince distributors to recruit others to do the same.

1 85. Defendants' business acts, false advertisements and materially misleading omissions alleged herein
2 constitute unfair trade practices and false advertising, in violation of the California Business and Professions Code §
3 17500, *et seq.*

4 86 Defendants engaged in false, unfair and misleading business practices, consisting of false advertising
5 and materially misleading omissions that were likely to deceive the public and include, but are not limited to:

- 6 a. Defendants' failing to disclose to consumers that they were entering into an unlawful
7 pyramid scheme;
- 8 b. Defendants' failure to provide income disclosures to consumers stating the average income
9 achieved in the pyramid scheme;
- 10 c. Defendants' misrepresenting the amount of money that a distributor would earn;
- 11 d. Defendants' omission that distributors would need to engage in retail sales to make money
12 legally and instead would legally earn the promised revenue by simply self-consuming
13 products and convincing others to do the same.

14 87. Defendants' marketing and promotion of the illegal pyramid scheme constitutes misleading, unfair
15 and fraudulent advertising in connection with their false advertising to induce consumers to join the illegal
16 pyramid scheme. Defendants knew or should have known, in the exercise of reasonable care that the statements
17 they were making were untrue or misleading and did deceive members of the public. Defendants' knew or should
18 have known, in the exercise of reasonable care that California citizens, including Plaintiff; would rely, and did in
19 fact rely on Defendants' misrepresentations and omissions.

20 88. Defendants should be ordered to disgorge, for the benefit of Plaintiffs and the Plaintiff Class their
21 efusion profits and compensation and/or make restitution to the plaintiff and the class.

22 **FOURTH CLAIM FOR RELIEF**

23 **(Unlawful, Unfair and Fraudulent Business Practices Under the**
24 **California Business and Professions Code § 17200, *et seq.*)**

25 89. Plaintiffs and the class re-allege the foregoing paragraphs as though fully set forth herein.

26 90. Defendants are engaged in an illegal pyramid scheme or “endless chain” as defined under California
27 Penal Code § 327. Defendants utilize this illegal pyramid scheme and couple it with false promises of great wealth
28 and omissions of the fact that only those at the top of the pyramid make money. Defendants make these and similar

1 misrepresentations and omissions with the intent, directly or indirectly to dispose of property, in the form of efusion
2 products and to convince distributors to recruit others to do the same.

3 91. Defendants' business acts, false advertisements and materially misleading omissions alleged herein
4 constitute unfair trade practices and false advertising, in violation of the California Business and Professions Code §
5 17200, *et seq.*

6 92. Defendants engaged in illegal, false, unfair and misleading business practices, consisting of false
7 advertising and materially misleading omissions that were likely to deceive the public and include, but are not
8 limited to:

- 9 a. Defendants' failing to disclose to consumers that they were entering into an
10 unlawful pyramid scheme;
11 b. Defendants' misrepresenting the amount of money that a distributor would earn;
12 c. Defendants' failure to provide income disclosures to prospective distributors
13 disclosing the average earnings of a distributor; and
14 d. Defendants' misrepresenting that distributors would not need to engage in retail
15 sales to make money and instead would earn the promised revenue legally by
16 simply self-consuming products and convincing others to do the same.

17 93. Defendants' marketing and promotion of the illegal pyramid scheme constitutes illegal, misleading,
18 unfair and fraudulent advertising in connection with their false advertising to induce consumers to join the illegal
19 pyramid scheme. Defendants knew or should have known, in the exercise of reasonable care that the statements
20 they were making were untrue or misleading and did deceive members of the public. Defendants' knew or should
21 have known, in the exercise of reasonable care, that California citizens, including Plaintiff; would rely, and did in
22 fact rely on Defendants' misrepresentations and omissions.

23 94. Defendants should be ordered to disgorge, for the benefit of Plaintiffs and the Plaintiff Class their
24 efusion profits and compensation and/or make restitution to the plaintiff and the class.

25 **PRAYER FOR RELIEF**

26 95. The named Plaintiffs and the Plaintiff Class request the following relief:

- 27 a. An injunction prohibiting the Defendants from marketing their MLM plan in
28 the State of California;

- b. A judgment declaring efusjon's arbitration provision unconscionable and unenforceable;
- c. Certification of the class of California distributors;
- d. A jury trial and judgment against Defendants;
- e. Damages in the amount of the named plaintiffs' and the class' financial loss as a result of Defendants' conduct and for injury to their business and property;
- f. Restitution and disgorgement of monies, pursuant to the California Business and Professions Code § 17203;
- g. The cost of suit including reasonable attorney's fees in accordance with 18 U.S.C. § 1964(c);
- h. For general, compensatory and exemplary damages in an amount yet to be ascertained; and
- i. For such other damages, relief and pre and post judgment interest as the Court may deem just and proper.

Respectfully submitted,

LAW OFFICES OF ALEXANDER M. SCHACK

Dated: November 20, 2009

GEOFFREY J. SPRETER
One of Attorneys for Plaintiffs Laurel Cook
and the Plaintiff Class

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial.

Respectfully submitted,

LAW OFFICES OF ALEXANDER M. SCHACK

Dated: November 20, 2009

GEOFFREY J. SPRETER
One of Attorneys for Plaintiffs Laurel Cook
and the Plaintiff Class