

Orion Research, LLC

November 20, 2017

Herbalife Distributors Are Buying Shakes for Prospects in Nutrition Clubs, Where Other Distributors May Be Counting Such Transactions As “Profitable Retail Sales,” A Violation of FTC Order

Herbalife distributors are buying prospects shakes in Nutrition Clubs, where the purchases may be counted as retail sales if distributors do not own the clubs in which they purchase the shakes. It is a violation of a Federal Trade Commission Consent Order imposed on Herbalife’s business in July 2016 for purchases of products by Business Opportunity Participants to count as retail sales.

In this social media posting below, a distributor offers to buy people a free shake in a Nutrition Club in Mustang, Oklahoma.



The distributor, Gage Kern, appears to work regularly out of Plaza Nutrition rather than the club cited in the post – Bronco Nutrition.¹

The FTC Order limits Herbalife’s ability to pay commissions on distributors’ purchases from the company unless distributors can document that the volume was subsequently sold in a “Profitable Retail Sale.” The FTC Order defines a “Profitable Retail Sale” as: “a sale of Product by a Business Opportunity Participant to a **Retail Customer or a Preferred Customer** that is a genuine sale made at a price above the Business Opportunity Participant’s average wholesale cost over the preceding 12 months for the items sold and for which retail sale information is collected and maintained by Defendants.”

A Retail Customer is defined as: “a purchaser of Products sold through a Multi-Level Marketing Program **who is not a Business Opportunity Participant** or a Preferred Customer, is not registered with the Program and is not otherwise participating in the Program.”

¹ <https://www.facebook.com/profile.php?id=100010978452189>

According to a distributor we interviewed from Oklahoma, all volume sold in Nutrition Clubs there is documented as retail sales.²

Earlier this year, we spotted a message on Instagram in which a distributor stated that Ibi Fleming (Montesino), Herbalife's Managing Director for North America, had advised during a conference call with high level distributors that complimentary shakes purchased in Nutrition Clubs could be counted as retail sales, but only if the distributor making the purchase did not acquire volume through the club in which the shake was purchased. The posting has since been removed, but the practice would appear to be continuing.

² See Memo: "According To An Oklahoma Distributor, Herbalife Nutrition Club Operators Are Reporting "Profitable Retail Sales" When They Sell Shakes To Distributors, Leading to Violations of the FTC Consent Order": 6.1.ORN.HLF.Sales in clubs to distributors.11.20.17