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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANA BOSTICK, et al.,

PLAINTIFF,

vs.

HERBALIFE INTERNATIONAL OF AMERICA, INC., a Nevada Corporation, HERBALIFE INTERNATIONAL, INC., a Nevada Corporation, HERBALIFE, LTD a Cayman Island Corporation,

DEFENDANTS.

Case No.: 2:13-cv-02488-BRO (RZx)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO (1) TINA'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF [DKT NO. 114] AND (2) NCL'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF [DKT No. 117]

Hon. Beverly Reid O'Connell

Date: May 11, 2015
Time: 1:30 p.m.
Place: Courtroom 14-Spring St. Floor

Complaint filed: April 8, 2013

I. BACKGROUND AND INTRODUCTION

On April 8, 2013, Dana Bostick, on behalf of himself and others similarly situated, filed a complaint against Herbalife International of America, Inc., Herbalife International, Inc., and Herbalife Ltd.

On October 31, 2014, Plaintiffs and Defendants entered into a Stipulation of Settlement ("Settlement Agreement"). The Settlement Agreement provides (1) economic relief for the Settlement Class through cash awards and refunds for returned product and (2) thirteen specific agreed-to corporate reforms. After careful consideration, this Court entered an order granting preliminary approval of the Settlement Agreement and directed that notice of the settlement be disseminated to the Class (the "Preliminary Approval Order"). Dkt. No. 105.

On March 16, 2015, two corporations who are not class members but who call themselves "Truth In Advertising, Inc." ("TINA") and "National Consumers League Inc." ("NCL") filed motions for leave to file *amicus curiae* briefs in opposition to the settlement. Dkt. No. 114 (TINA's brief); Dkt. No. 117 (NCL's brief). Both claim their purpose and accompanying brief is to object to the Settlement Agreement as "fundamentally unfair to the class members." Dkt. No. 114 at 1; Dkt. No. 117 at 1. Their motions are essentially identical. Even the summaries of what they claim their proposed *amicus* briefs provide are identical.

The Court should deny both motions. Neither TINA nor NCL offer the Court helpful information or a unique perspective; TINA and NCL do not represent Class Members' interests; and neither TINA nor NCL have provided important disclosures required of amici to disclose any possible bias or motives they may have.

II. ARGUMENT

Whether to consider an *amicus* brief is solely within the discretion of the court, however, *amicus* briefing is seldom appropriate at the trial court level where

the parties are adequately represented by experienced counsel.[1] The extensive discretion of district courts is such that the denial of permission to appear as *amicus curiae* is not subject to appeal.[2] In order to guide district courts faced with the request of a proposed *amicus curiae* the First Circuit has instructed:

> we believe a district court lacking joint consent of the parties should go slow in accepting, and even slower in inviting, an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance.[3]

A. The "Perspective" TINA and NCL Seek to Provide Is Unhelpful.

The role of *amicus curiae* is to assist "in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration."[4] They should assist the Court, and "give[] information of some matter of law in regard to which the court is doubtful or mistaken,' rather than one who gives a highly partisan, . . . account of the facts."[5] To be true *amicus curiae*, TINA and NCL have the burden of "showing that [their] participation is useful to or otherwise desirable to the court."[6] Their motions and proposed briefs,

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[1] *See* *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997); *Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003) (District courts welcome amicus briefs "if the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'") (quoting *Cobell v. Norton*, 246 F Supp 2d 59, 62 (D.D.C.2003).

[2] *Palladino v. Governor of Pennsylvania*, 589 F. App'x 61, 64 n. 2 (3d Cir. 2014) (noting that its "jurisdiction would not extend to the District Court's decision denying Schneller leave to act as amicus curiae"); *S.E.C. v. Better Life Club of Am., Inc.*, No. 98-5006, 1998 WL 389102, at *1 (D.C. Cir. June 1, 1998) ("the denial of a motion to participate as amicus curiae is not appealable."); *Boston & Providence R. R. Stockholders Dev. Grp. v. Smith*, 333 F.2d 651, 652 (2d Cir. 1964) ("A denial of a motion to intervene as amicus curiae is not appealable").

[3] *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970).

[4] *Miller-Wohl Co.*, 694 F.2d 203, 204.

[5] *New England Patriots Football Club, Inc. v. Univ. of Colorado*, 592 F.2d 1196, 1198 (1st Cir. 1979) (quoting 1 Bouvier's Law Dictionary 188 (3d ed. 1914)) (internal citations omitted).

[6] *In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal. 1991) (quoting *United States v. Louisiana*, 751 F.Supp. 608, 620 (E.D.La.1990)).

however, provide no such assistance and, therefore, fail to meet their burden of showing helpfulness.

TINA and NCL's amicus briefs offer nothing more to the court than a cursory comparison of the allegations of Plaintiffs' latest complaint with the Settlement Agreement. Their analysis lacks any substance, and ignores the extensive discovery between the parties, which included: (1) preparing and overseeing massive written discovery to Herbalife and discovery responses by the named Plaintiffs; (2) analyzing over 148,000 pages of internal Herbalife documents that were produced, including several gigabytes of confidential Herbalife data, numerous documents provided by former Herbalife members or distributors and other persons, and large amounts of Herbalife's public materials and other publicly available documents; (3) participating in several depositions; (4) participating in interviews with former Herbalife members or distributors; (5) participating in site inspections of Herbalife's quality control facilities, research and development facilities, Los Angeles distribution center and a Los Angeles area nutrition club; and (6) selecting and consulting with experts (including an economist for class certification). TINA and NCL seek to advocate their position with no idea who or how many class members have made claims, what those claims currently look like, or whether the settlement fairly and adequately addresses them.

Amicus curiae are traditionally non-partisan providers of a *legal* perspective or *information* to the court,[7] but TINA and NCL offer only unhelpful and unnecessary conclusions. As one court explained: "A district court must keep in mind the differences between the trial and appellate court forums in determining whether it is appropriate to allow an *amicus curiae* to participate. Chief among those differences is that a district court resolves fact issues. '*An amicus who argues*

[7] *Funbus Systems, Inc. v. California Public Utilities Com.*, 801 F.2d 1120, 1124–25 (9th Cir.1986).

facts should rarely be welcomed.'"[8] Yet that is precisely what TINA and NCL's briefs do: argue in an unsupported and conclusory matter that the allegations in Plaintiffs' Amended Complaint are factually correct and that the settlement should therefore not be approved. *See, e.g.*, Dkt. No. 117 at 2 (noting NCL's conclusion "that Herbalife is in fact a sophisticated pyramid scheme."); Dkt. No. 114 at 3 ("TINA.org opposes the proposed settlement"). This type of cursory analysis does not aid the Court with anything, let alone "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide."[9]

In truth, TINA and NCL are objectors without standing masquerading as *amici*. Contrary to the purpose of an *amicus* filing, both TINA and NCL claim to represent "consumers" in some capacity, Dkt. No. 117 at 1 & Dkt. No. 114 at 1, but they both ultimately concede their real purpose is to object to the settlement. *See, e.g.*, Dkt. No. 117 at 2 (noting NCL's conclusion "that Herbalife is in fact a sophisticated pyramid scheme."); Dkt. No. 114 at 3 ("TINA.org opposes the proposed settlement"). *Amicus curiae* are not parties to the litigation,[10] and therefore "*amicus* has been consistently precluded from . . . participating and assuming control of the controversy in a totally adversarial fashion."[11] The true purpose of an *amicus curiae* should not be abused or twisted into a means for non-

[8] *Club v. Fed. Emergency Mgmt. Agency*, No. CIV.A. H-07-0608, 2007 WL 3472851, at *1 (S.D. Tex. Nov. 14, 2007) (quoting *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970)); *see also Acra Turf Club, LLC v. Zanzuccki*, No. CIV.A. 12-2775 MAS, 2014 WL 5465870, at *5 (D.N.J. Oct. 28, 2014) (noting that an *amicus* are less likely to be helpful at the district court level) (italics added).

[9] *Merritt v. McKenney*, No. C 13-01491 JSW, 2013 WL 4552672 at *4 (N.D. Cal. Aug. 27, 2013) (*citing Miller-Wohl Co.*, 694 F.2d 203).

[10] *Miller-Wohl Co. v. Comm'r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982).

[11] *U.S. v. State of Mich.*, 940 F.2d 143, 165 (6th Cir. 1991); *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976) ("[T]he courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not.")

parties to circumvent the more stringent requirements of intervention and standing in order to control the litigation.

B. TINA and NCL Do Not Represent the Class Members' Interests.

As non-parties who have suffered no actual or prospective injury, TINA and NCL appear, unarmed with any details save those from the press and the docket, and ask the Court to let them second-guess the favorable settlement reached following arms-length negotiations. If TINA and NCL have their way, Class Members who are owed money under the Settlement Agreement would not be permitted to settle their grievances and, instead, must litigate based on two non-party entities' desire to move forward with litigation that presumably benefits TINA and NCL's interests—not the interests of Class Members. TINA itself has acknowledged what this would mean for the Class Members:

> [P]yramid schemes cannot be fixed. The bad parts cannot be excised from the rest of the organization. The only remedy for an illegal pyramid scheme is the complete and irreversible destruction of the company. As a result, in those cases where the company does not immediately lie down and die, such accusations of wrongdoing inevitably lead to a long, protracted legal battle that consumes an obscene amount of money and a multitude of man hours.[12]

In its Preliminary Approval Order, the Court preliminarily concluded that Plaintiffs are adequately represented and that a preliminary assessment of the Settlement Agreement shows it to be fair, reasonable and adequate. Dkt. No. 104

[12] https://www.truthinadvertising.org/not-your-grandmas-tupperware-mlms-vs-pyramid-schemes/.

¶¶ 7 & 9.[13] Objections have been filed in this case and the objectors have legal counsel. Thus, the Court does not need non-parties who do not act in the interest of Class Members objecting to a proposed settlement when some Class Members have already done so. This is especially true where the proposed *amici* add nothing new to the assertions already made by objectors.

C. Appellate Rule 29 Supports Denial of the Motions.

While Rule 29 of the Federal Rules of Appellate Procedure does not specifically apply to district courts, many district courts look to the rule for guidance in determining whether an amicus brief should be considered.[14] Rule 29 requires *amicus curiae* corporations to include "a disclosure statement like that required of parties by Rule 26.1." Rule 26.1 requires a statement that "identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."[15] In addition, Rule 29(5)(c) requires an *amicus curiae* to state whether "a person--other than the amicus curiae, its members, or its counsel--contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person."[16]

TINA and NCL have failed to comply with any of the disclosure requirements of Rule 29, leaving the Court unable to assess whether any financial

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[13] Contrary to the assertions of both TINA and NCL, the fact of settlement itself does not remove, and has not removed, the adversarial nature of the settling parties. Plaintiffs continue to negotiate with Herbalife to allow for late filing of claims and additional clarifications to the Settlement Agreement that provide additional benefits to the class. In addition, Plaintiffs intend to move the Court to increase the payout percentage under section 4.4.5 of the Settlement Agreement to maximize the settlement benefits for those class members who qualify as Business Opportunity Claimants.

[14] *See* *Monarch Beverage Co. v. Johnson*, No. 1:13-CV-01674-WTL, 2014 WL 7063019, at *1 (S.D. Ind. Dec. 11, 2014) ("Upon the rare occasion of such desire to participate as amicus curiae on the district court level, courts look to the principles used in implementing Rule 29 of the Federal Rules of Appellate Procedure."); *Ctr. For Biological Diversity v. U.S. E.P.A.*, No. C13-1866JLR, 2015 WL 918686, at *31 n. 9 (W.D. Wash. Mar. 2, 2015); *Acra Turf Club, LLC v. Zanzuccki*, No. CIV.A. 12-2775 MAS, 2014 WL 5465870, at *5 (D.N.J. Oct. 28, 2014); *Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 303 F.R.D. 266, 269 (D. Md. 2014).

[15] Fed. R. App. P. 26.1.

[16] Fed. R. App. P. 29(5)(c)

incentives exist for filing their motions and, if so, what person or entity is behind them. Lack of financial and corporate disclosures provide the Court yet another basis for denying the motions, particularly given the widely publicized third party hedge fund investors who have substantial economic self-interest in the success or failure of Herbalife's business model.

III. CONCLUSION

The Court should deny both TINA's and NCL's motion for leave file to file objections to the Settlement Agreement shrouded in the cloak of *amicus curiae* briefs.

DATED: April 13, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2015, the foregoing has been served via the CM/ECF system on counsel for Plaintiffs and Defendants at the following addresses:

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