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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LILIA PERKINS, on behalf of herself and all others similarly situated,

Plaintiff,

v.

PHILIPS ORAL HEALTH CARE, INC., a Washington corporation; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, a Delaware corporation, and DOES 1 through 20, inclusive,

Defendants.

No. 12-CV-1414H (BGS)

TRUTH IN ADVERTISING, INC.'S REPLY TO PLAINTIFFS' AND DEFENDANTS' OPPOSITIONS TO MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

DATE: November 4, 2013
TIME: 10:30 a.m.
LOCATION: Court Room 15A

Hon. Marilyn Huff

TRUTH IN ADVERTISING, INC.'S REPLY TO PLAINTIFFS' AND DEFENDANTS' OPPOSITIONS TO MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

It is no surprise that Plaintiffs' and Defendants' counsel have joined forces in supporting a proposed settlement that *they* created – a settlement that, if approved, could negatively impact the rights of tens of thousands of consumers who have been – and continue to be – misled by

defendants' deceptive advertising.[1] Yet the parties' counsel do not simply tout the merits of their proposed settlement – they contend that TINA's dissenting point of view should not even be heard as part of what is supposed to be an independent and objective analysis of the merits of their settlement. For the reasons that follow, however, not a single one of the parties' five bases for objecting to TINA's motion has merit, and TINA respectfully requests that its unique perspective at least be considered by this Court in its examination of the proposed settlement.

First, the parties argue that TINA lacks standing. However, it is axiomatic that one does not need constitutional or statutory "standing" to be heard as *amicus curiae*, and the parties' reliance on *In re American Intern. Group Inc. Securities Litigation,* 916 F. Supp. 2d 454 (S.D.N.Y. 2013), is misplaced. There, unlike here, the third-party New York Attorney General did not move for leave to file an *amicus* brief, but, rather, simply attempted to object as if it were a party or, in the alternative, moved to be permitted to intervene as a party. The Court held that the Attorney General lacked standing to object as a party, but went on to observe that it nonetheless had "discretion to permit the NYAG to appear as *amicus curiae* in lieu of intervention, and it elects to use this authority." *Id.* at 462 n.5. Here, TINA is not seeking to intervene as a party. Rather, as a consumer advocacy organization devoted exclusively to eradicating false and deceptive advertising, TINA seeks to have its unique viewpoint heard

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[1] Plaintiffs' counsel is mistaken in asserting, on the merits of the settlement, that "Philips discontinued the complained of misleading statements on their packaging and on the Internet." Doc. No. 27. As the record shows, that simply is not the case. *See, e.g.,* Exhibit H to Doc. No. 32, "The Science Behind Sonicare AirFloss," available at http://www.sonicare.com/professional/en_us/pdf/AirFloss_Clinical_ Study_Booklet.pdf (last checked on Nov. 1, 2013) ("Sonicare AirFloss replaces traditional flossing with microbursts of water and air.") and compare to Doc. No. 4 (First Am. Compl.) ¶ 6.A.; and Exhibit I to Doc. No. 32, Our Products – AirFloss, available at http://www.sonicare.com/professional/en_us/OurProducts/AirFloss.aspx (last checked on Nov. 1, 2013 – note that the web address for this exhibit has recently changed) ("With Sonicare AirFloss, interdental cleaning has just been reinvented.") and compare to Doc. No. 4 (First Am. Compl.) ¶ 6.C.

through an *amicus* brief in order to bring to the attention of the Court relevant issues not already addressed by the parties. In that fashion, TINA's *amicus* posture fits squarely within the authority quoted in Defendants' own brief: "Courts allow submission of an *amicus* brief '…when 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.'" Doc. No. 35.[2]

Second, the parties argue that the Class Members are adequately represented and thus TINA should not interfere. However, regardless of the skill of a party's legal representation, *amicus* briefs serve a useful function. As then-Judge Alito observed:

> Even when a party is very well represented, an amicus may provide important assistance to the court. Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group. Accordingly, denying motions for leave to file an amicus brief whenever the party supported is adequately represented would in some instances deprive the court of valuable assistance.

Neonatology Assocs., P.A. v. Commissioner of Internal Revenue, et al., 293 F.3d 128, 132 (3d Cir. 2002) (internal citation and quotations omitted).

Third, the parties argue that none of the Class Members have objected, and thus TINA should not either. Based on this argument, there would never be a need for a fairness hearing when the parties agree that the settlement is fair, just, and reasonable, effectively gagging any and all *amici* from ever voicing their relevant concerns. However, the entire point of a final fairness hearing is to have the Court closely examine a proposed settlement affecting a large class of consumers. *See U.S. v. Montrose Chemical Corp. of California, et al.,* 50 F.3d 741, 747

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[2] Defendants attempt to make much of the fact that this is TINA's first *amicus* brief, referencing that fact in the opening portion of their brief and attaching a related press release. Needless to say, the number of *amicus* briefs filed by TINA is wholly irrelevant to the issues before the Court.

(9th Cir. 1995) (stating that the court has an obligation to "independently 'scrutinize' the terms of a settlement"); *Norman v. R. L. McKee, et al.,* 431 F.2d 769, 774 (9th Cir. 1970) ("Because the rights of many persons are at stake who are parties to the action only through their representative, a settlement negotiated between the named parties may not give due regard to the interests of those unnamed," and thus the district judge must determine "whether the proposed settlement is fair and adequate to all concerned."); *In re First Capital Holdings Corp. Financial Prods. Secs. Litigation,* 1992 U.S. Dist. LEXIS 14337 (C.D. Cal. 1992) ("[T]he court is obliged to conduct an independent and objective evaluation of the fairness of the proposed settlement."); *Kullar v. Foot Locker Retail, Inc.,* 168 Cal. App. 4th 116, 130 (Cal. App. 2008) ("[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished."). *See also* 28 U.S.C. § 1712(e) ("In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members."); *In re Easysaver Rewards Litigation,* 921 F. Supp. 2d 1040, 1047 (S.D. Cal. 2013) ("[S]everal courts have interpreted section 1712(e) as imposing a heightened level of scrutiny in reviewing such [coupon] settlements."). The Court is not merely serving as a rubber stamp. *See In re Zoran Corp. Derivative Litigation,* 2008 U.S. Dist. LEXIS 48246, at *8 (N.D. Cal. 2008) ("[A] district court may not simply rubber stamp stipulated settlements."); *In re Vitamins Antitrust Litigation,* 305 F. Supp. 2d 100, 103 (D.D.C. 2004) ("The Court must eschew any rubber stamp approval…").

Fourth, the parties argue that 753 Class Members have already submitted claims, showing that a large portion of the Class disagrees with TINA. However, Plaintiffs' counsel represented

that there are 6,000 currently registered Philips Sonicare AirFloss products in California, and there are an estimated 50,000 other consumers in California. Doc. No. 24; Doc. No. 20-1 ("Rott Decl.") ¶6. Thus, those 753 Class Members who submitted claims equate to less than 2% of the overall class. In addition, those 753 Class Members were not choosing between vouchers or cash payments and/or an injunction. Those Class Members were choosing between vouchers or nothing.

Fifth, the parties argue that TINA has made factual errors in its brief when, in reality, they simply disagree with TINA's view of the settlement's merit. For example, Plaintiffs argue that the Class Members will receive more value for the vouchers than TINA would have the Court believe. In support of this argument, Plaintiffs have provided a "partial list" of Philips products that the Class Members can purchase with the vouchers without spending any additional money. However, Plaintiffs have not addressed the indisputable fact that vouchers are not as valuable as cash; that the vouchers come with a time restriction, which further decreases their value; that the vouchers do not restrict the Philips defendants from continuing to marketing the Sonicare AirFloss in a deceptive or false manner; or that by purchasing another Philips product, one result will be increased brand loyalty to the Philips defendants, whether or not the Class Members have to spend any additional cash. Thus, Plaintiffs' argument regarding the value of the vouchers in this case is unavailing.

For the foregoing reasons, TINA respectfully requests that the Court grant its Motion for Leave to File Brief as *Amicus Curiae* in Opposition to the Proposed Settlement.

Dated: November 2, 2013 Respectfully,

By/s/ Earl Bohachek

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CERTIFICATE OF SERVICE

The undersigned hereby certifies the following documents have been filed electronically on this 2nd day of November 2013:

TRUTH IN ADVERTISING, INC.'S REPLY TO PLAINTIFFS'AND DEFENDANTS' OPPOSITIONS TO MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The document is available for viewing and downloading to the ECF registered counsel of record as follows:

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I declare that I am employed in the office of a member of the bar of the State of California at whose direction the service was made.

Executed on November 2, 2013, in San Diego,

By: _/s/ Earl Bohachek_____