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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOREAN BARRERA, On Behalf of Herself and All Others Similarly Situated, Plaintiff, v. PHARMAVITE, LLC, a California limited liability company, Defendant.	CASE NO: 11-cv-04153-CAS MOTION OF TRUTH IN ADVERTISING, INC., FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN OPPOSITION TO PROPOSED SETTLEMENT Assigned to: Hon. Christina A. Snyder Date: December 4, 2017 Time: 10:00 a.m. Courtroom: 8D

Truth in Advertising, Inc. ("TINA.org") respectfully requests leave of the Court to file the attached amicus curiae brief in the above-captioned case in opposition to the proposed settlement. TINA.org is a 501(c)(3) nonprofit organization whose mission is to protect consumers nationwide through the prevention of false and deceptive marketing. To further its mission, TINA.org investigates deceptive marketing practices and advocates before federal and state

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government agencies, as well as courts. As a consumer advocacy organization working to eradicate false and deceptive advertising, TINA.org has an important interest and a valuable perspective on the issues presented in this case.

With respect to the instant case, TINA.org is filing this motion and brief to assist this Court in evaluating whether the proposed settlement is fair, reasonable, and adequate, and thus should be granted amicus curiae status. *See, e.g.*, *Korolshteyn v. Costco Wholesale Corp.*, 2017 U.S. Dist. LEXIS 135303, at *4-5 (S.D. Cal. Aug. 23, 2017) (granting motion for leave to file an amicus brief by a dietary supplement trade group in a class action alleging false marketing of supplements, stating the group's brief "advises the Court in order that justice may be done"); *Safari Club Int'l v. Harris*, 2015 U.S. Dist. LEXIS 4467, at *2-3 (E.D. Cal. Jan. 13, 2015) (granting motion for leave to file an amicus brief and stating "'[d]istrict courts frequently welcome amicus briefs from nonparties concerning legal issues that have potential ramifications beyond the parties directly involved or 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.'…'Even when a party is very well represented, an amicus may provide important assistance to the court.'"); *Jamul Action Committee, et al. v. Stevens, et al.*, 2014 U.S. Dist. LEXIS 107582 (E.D. Cal. Aug. 4, 2014) (granting motion for leave to file an amicus brief); *State of Missouri, et al. v. Harris*, 2014 U.S. Dist. LEXIS 89716 (E.D. Cal. June 30, 2014) (granting motions for leave for file amicus briefs); *Thalheimer, et al. v. City of San Diego, et al.*, No. 09-cv-2862 (S.D. Cal. Jan. 19, 2010) (orders allowing two non-profit organizations to enter case as *amicus curiae*). *See also Neonatology Assocs., P.A. v. Comm'r of Internal Revenue, et al.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) ("Even when a party is very well represented, an amicus may provide important assistance to the court …. 'Some friends of the court are entities with particular expertise not possessed

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by any party to the case …'"); *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.) ("An amicus brief should normally be allowed 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."); Managing Class Action Litigation: A Pocket Guide for Judges, 3d ed., Federal Judicial Ctr. 2010, at 17 ("Institutional 'public interest' objectors may bring a different perspective … Generally, government bodies such as the FTC and state attorneys general, as well as nonprofit entities, have the class-oriented goal of ensuring that class members receive fair, reasonable, and adequate compensation for any injuries suffered. They tend to pursue that objective by policing abuses in class action litigation. Consider allowing such entities to participate actively in the fairness hearing.").[1]

In addition, now that the parties to this lawsuit have reached an agreement, they no longer have an adversarial relationship, and thus this Court can look only to objectors to illuminate any potential issues with the settlement. *See In re HP Inkjet Printer Litig.*, 2011 U.S. Dist. LEXIS 65199, at *2-3 (N.D. Cal. June 20, 2011) ("Objectors can play a valuable role in providing the court with information and perspective with respect to the fairness, adequacy, and reasonableness of a class action settlement."); *In re Leapfrog Enterprises, Inc. Securities Litig.*, 2008 U.S. Dist. LEXIS 97232, at *7 (N.D. Cal. Nov. 21, 2008) (same); *see also Pearson, et al. v. NBTY, Inc., et al.*, 772 F.3d 778, 787 (7th Cir. 2014) ("[O]bjectors play an essential role in judicial review of proposed settlements of class actions …")

The attached amicus brief explains in detail why TINA.org opposes the proposed settlement and urges this Court to deny final approval of it. In short, the brief explains that the terms are unfair because the agreement does not

[1] Neither party nor their counsel played any part in the drafting of this Motion or contributed in any other way.

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remedy the deceptive marketing alleged in the operative complaint, publishes inadequate notice to the class, provides paltry relief to class members, and allows for an inappropriate cy pres award, all while handsomely rewarding plaintiffs' counsel so they will go away. In sum, the proposed agreement is wholly inadequate and, if approved by this Court, would, among other things, grant defendants a stamp of judicial imprimatur for their use of deceptive marketing. *See Pearson*, 772 F.3d at 785. This is an improper use of a class-action settlement.

For these reasons, TINA.org moves for leave to appear as amicus curiae and submit the attached brief in opposition to the proposed settlement, as well as the attached notice of intent to appear at the Final Fairness Hearing (attached hereto as Exhibits 1 and 2).

DATED: November 13, 2017

Respectfully submitted,

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The undersigned hereby certifies that this document has been filed electronically on this 13th day of November 2017 and is available for viewing and downloading to the ECF registered counsel of record:

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EXHIBIT 1

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOREAN BARRERA, On Behalf of Herself and All Others Similarly Situated,

Plaintiff,

v.

PHARMAVITE, LLC, a California limited liability company,

Defendant.

CASE NO: 11-cv-04153-CAS

BRIEF OF *AMICUS CURIAE* TRUTH IN ADVERTISING, INC., IN OPPOSITION TO PROPOSED SETTLEMENT

Assigned to:
Hon. Christina A. Snyder

Date: December 4, 2017
Time: 10:00 a.m.
Courtroom: 8D

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I

INTRODUCTION

The parties to this litigation have struck a deal in which plaintiffs' counsel will pocket more than $4 million in exchange for allowing Pharmavite to continue its deceptive labeling, pay a nominal sum to a small percentage of class members, and bind the hands of a nationwide class from ever holding Pharmavite accountable for the kind of deception that led to this lawsuit. For these reasons, Truth in Advertising, Inc., a national consumer advocacy organization dedicated to protecting consumers from false and deceptive advertising, opposes the proposed settlement, and respectfully urges the Court to deny final approval.

II

INTEREST OF AMICUS CURIAE

Truth in Advertising, Inc. ("TINA.org") is a 501(c)(3) nonprofit organization dedicated to protecting consumers nationwide through the prevention of false and deceptive marketing. To further its mission, TINA.org investigates deceptive marketing practices and advocates before federal and state government agencies, as well as courts.

As explained in detail in the attached Motion for Leave to File Brief as Amicus Curiae in Opposition to Proposed Settlement, TINA.org has an important interest and valuable perspectives on the issues presented in this case.[1] Participation of amicus curiae will assist this Court in evaluating the proposed settlement in fulfillment of its fiduciary duty to protect the interests of the class.

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[1] Pursuant to F. R. A. P. 29(a)(4)(E), Amicus states that this brief was not authored in whole or in part by any party or its counsel, and that no person other than TINA.org, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief.

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See In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011). *See also, e.g., Safari Club Int'l v. Harris,* 2015 U.S. Dist. LEXIS 4467, at *2-3 (E.D. Cal. Jan. 13, 2015).

III

ARGUMENT

The essence of plaintiffs' complaint is that Pharmavite deceives consumers by marketing its TripleFlex glucosamine supplements as being able to improve joint mobility, increase joint flexibility, and reduce joint pain and discomfort, when competent scientific evidence does not support, and even contradicts, these marketing claims. Second Am. Compl. at ¶¶ 1, 11-13, 18-20, 22-23. In exchange for attorney fees that are three times larger than the cash available to the proposed nationwide class, plaintiff is willing to permit Pharmavite to continue making deceptive claims to millions of aging Americans that are experiencing joint degeneration.

A. The Class Was Inappropriately Expanded To Favor And Protect Pharmavite

The proposed settlement agreement seeks to expand the class certified by this Court so that Pharmavite can prohibit every one of its customers in the nation from ever suing it for deceptively marketing its glucosamine supplement.[2] "The more claim preclusion the defendant can get for its settlement dollars, the happier the defendant." Howard Erichson, *Aggregation as Disempowerment*, 92 Notre Dame L. Rev. 859, 895 (2016). And where, as here, broad release provisions are "coupled with a large broadening of the class description so that now a nationwide class of users is releasing its claims instead of a California-only class,

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[2] A 2014 Court Order in this case denied 23(b)(2) "injunctive relief" class certification, as well as certification of a "multi-state" class, deciding instead to certify a "California-only" class. *See* Civil Minutes and Order on Mot. to Certify Class, Nov. 19, 2014, Doc. 192.

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it appears that [the] Settlement is crafted to provide protection to [Defendant] and not to benefit the unnamed Plaintiffs." *Allen v. Similasan Corp.*, 318 F.R.D. 423, 428 (S.D. Cal. 2016).

Meanwhile, "[c]lass action lawyers lose nothing by agreeing to 'represent' a larger pool of claimants in the settlement. If the prospect of expansive preclusion lubricates the deal, then acceding to a broader class definition enriches class lawyers by hastening the settlement, sweetening the fees, or both." Erichson, 92 Notre Dame L. Rev at 895 (designating an expanded class definition as a red flag for an unfair settlement).

Because the settlement involves a broader class than was certified by this Court, the proposed settlement class should be deemed a pre-certification class and the settlement scrutinized for evidence of collusion or other conflicts of interest. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). *See also Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) ("[P]re-certification settlement agreements require that we carefully review the entire settlement, paying special attention to 'terms of the agreement contain[ing] convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of the negotiations.") (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003)).

B. The Injunctive Relief Is Valueless And Serves Only To Protect Pharmavite

The substance, scope, and duration of the injunctive relief in the proposed agreement is grossly inadequate and, as such, the settlement should not be approved.

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i. The Prohibited Language In The Settlement Does Not Require Pharmavite To Make Any Changes And Only Serves To Protect The Company

The proposed settlement agreement gives the false impression that Pharmavite is making material changes to its marketing of glucosamine supplements when, in reality, the injunctive relief is illusory and only benefits the company. Specifically, the settlement agreement only prohibits Pharmavite from using two words (and substantially identical variations of the words) on its product labels:[3]

- "rebuild/rebuilds/rebuilding"
- "rejuvenate/rejuvenates/rejuvenation/rejuvenating"

Id. at ¶ H. 1. Not only can Pharmavite still market its TripleFlex supplements as being able to improve joint mobility, increase joint flexibility, and reduce joint pain and discomfort – the very claims at issue in plaintiffs' complaint – it can also use numerous other synonyms to achieve the same misleading marketing claims. Moreover, while the operative complaint alleges that Pharmavite conveys its deceptive marketing message through "an extensive, widespread, comprehensive and uniform nationwide marketing campaign," the proposed settlement agreement only addresses labeling issues and wholly ignores Pharmavite's other forms of deceptive marketing. *See* Second Am. Compl. at ¶ 1 and Prayer for Relief ¶ F; Amended Settlement Agreement at ¶ IV. H. 1. Put simply, Pharmavite's agreement to stop using two words on its labeling confers

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[3] Though section IV. H. 1. of the Settlement Agreement states that Pharmavite shall not use the word "renew" on its labels, sections IV.H.7-8 of the Agreement effectively removes that word from the short blacklist by stating that Pharmavite can use whatever language its competitors – Schiff and NBTY – are permitted to use pursuant to the terms of settlement agreements reached and approved in those cases, and the Schiff agreement permits the use of the word "renew."

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no benefit to the class, and will only benefit Pharmavite by providing it with a court-sanctioned settlement approving its continued use of deceptive marketing claims.[4]

Similar injunctive relief was flatly rejected by the Seventh Circuit in *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014). In *Pearson*, Judge Posner explained that because the injunctive relief only required cosmetic word edits to the labels of the glucosamine bottles, the benefits inured solely to defendants, not consumers:

> A larger objection to the injunction is that it's superfluous—or even adverse to consumers. Given the emphasis that class counsel place on the fraudulent character of [defendant]'s claims, [defendant] might have an incentive even without an injunction to change them. The injunction actually gives it protection by allowing it, with a judicial imprimatur (because it's part of a settlement approved by the district court), to preserve the substance of the claims by making—as we're about to see—purely cosmetic changes in wording, which [defendant] in effect is seeking judicial approval of. For the injunction seems substantively empty. In place of "support[s] renewal of cartilage" [defendant] is to substitute "contains a key building block of cartilage." We see no substantive change.

Id. at 785. The same criticism is appropriately levied at the proposed settlement in this case, which is to say that the injunctive relief is substantively empty. Specifically, the failure to include catch-all language in the agreement that would prohibit Pharmavite from suggesting or implying in any manner that its supplements can improve joint mobility, increase joint flexibility, or reduce joint pain and discomfort, means that changes to its labeling as a result of this settlement agreement will not affect its ability to continue with its deceptive marketing message. For this reason, the agreement is unfair to class members and should be rejected.[5] *See Koby v. ARS Nat'l Servs., Inc.*, 846 F.3d 1071, 1080

[4] It is also important to note that there is no evidence that these two words are material to consumers, that the removed language is more scientifically "untrue" than the retained language, or that consumers would be more harmed by one set of language over another. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014).

[5] In November 2014, TINA.org opposed the terms of a similar proposed settlement agreement regarding the alleged false advertising of glucosamine supplements. *Quinn, et al. v. Walgreen,*

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(9th Cir. 2017) (reversing a lower court's approval of a class-action settlement agreement and determining that injunctive relief that "does not obligate [the defendant] to do anything it was not already doing" does not provide value to the class).

ii. The Injunctive Relief Is Temporary While Class Members Are Forever Banned From Suing Pharmavite

To make matters worse, Pharmavite's insignificant labeling restrictions are binding for, at most, two years, while class members are required to give up their litigation rights forever. *See* Amended Settlement Agreement, at ¶ H. 1. ("Pharmavite shall not, for a period of twenty four (24) months commencing 180 days after the Effective Date,…use the following terms…"); ¶ IX. B. ("As of and through the Effective Date, the Releasing Persons are deemed to have fully released and forever discharged the Released Persons of and from all Released Claims, in accordance with the terms of this Settlement Agreement...")[6]

And to add insult to injury, by incorporating the leniency of previous settlement agreements reached in other cases filed (by the same attorneys) against other glucosamine marketers – Schiff and NBTY – the scope and duration of the injunctive relief in this case is further diminished. *Id.* at ¶ H. 7 IV. H. 8 ("If Schiff or NBTY are permitted to use…any of the terms set forth in [the instant

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Co., et al., Case No. 12-cv-8187, S.D.N.Y. Subsequently, the parties revised the injunctive relief (which previously banned only six words from the product labels for a two-year period) to include broader catch-all language and the duration of the injunctive relief was also amended to continue in perpetuity (until and unless the marketers become aware of scientific evidence to substantiate the preexisting cartilage claims and the Court allows them to reinstate the banned language). *See Quinn, et al. v. Walgreen, Co. et al.*, Case No. 12-cv-8187, S.D.N.Y., Amendment to Settlement Agreement and General Release, dated Jan. 30, 2015 (Dkt. 141-1).

[6] In addition to giving up their right to sue Pharmavite for false marketing of the supplements at issue, class members are also waiving clear statutory rights they have under state laws, such as Section 1542 of the Civil Code of the State of California, which prohibits general releases such as this one from being extended to claims unknown at the time of executing the release, even if they would have materially affected the settlement. *See* Amended Settlement Agreement, at ¶ IX.B.3.

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settlement agreement] or any of the terms that the Schiff Settlement or the NBTY Settlement enjoins Schiff or NBTY, respectively, from using, Pharmavite shall be permitted to use those terms as well, and any extant injunctive relief then in force with respect to Pharmavite shall be modified accordingly.") The injunctive relief in the *Schiff* agreement expires in November 2018,[7] at which point the company will be free to use any language it likes to market its glucosamine supplement. As such, pursuant to the terms of the proposed settlement, the injunctive relief in this case will also expire.

Allowing Pharmavite to continue using the very labels that are at issue in this litigation, and banning two – previously unused – words for a few months, while class members are permanently prohibited from suing the company over its false marketing of the products at issue is patently unfair and reversible error. *See Pearson*, 772 F.3d at 787 ("for a limited period the labels will be changed, in trivial respects unlikely to influence or inform consumers.")[8]; *see also Vassalle v. Midland Funding LLC*, 708 F.3d 747, 756 (6th Cir. 2013) ("the injunction only lasts one year, after which [the defendant] is free to resume its predatory practices should it choose to do so.").

In short, it is clear that the temporary injunctive relief proposed in this settlement functions merely as window dressing attempting to cover up the litigation restrictions being placed on the nationwide class and as justification for

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[7] The "Effective Date" in the *Schiff* settlement is May 2016. The injunctive relief then began in November 2016 (6 months after the Effective Date) and expires November 2018 (24 months later).

[8] After this Seventh Circuit decision, the parties in the *Pearson* case negotiated a revised settlement agreement that, among other things, included permanent injunctive relief. *Pearson v. Rexall Sundown, Inc. and NBTY, Inc.*, 11-cv-07972, N.D. Ill., Settlement Agreement and General Release, dated April 10, 2015; Final Judgment and Order, Aug. 25, 2016, available at https://www.truthinadvertising.org/wp-content/uploads/2016/01/Pearson-v-Rexall-Sundown-final-approval-order.pdf.

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the more than $4 million attorney fee award. Accordingly, the proposed agreement is unfair to class members and, as such, this Court should not grant approval.

C. The Proposed Monetary Relief Is Unfair To Class Members

i. Compensation To Class Members Is Inadequate And Unacceptably Disproportionate To The Proposed Attorneys' Fees

While the agreement proposes to bind all U.S. residents who purchased Pharmavite's products for a ten-year period (between May 13, 2007 and June 5, 2017), the class may only seek damages for up to four bottles of the supplement (which, according to the complaint, costs $15-$40 per bottle), and the *most* cash any class member can obtain from this settlement is $100.[9] *See* Second Am. Compl. at ¶ 10; Amended Settlement Agreement, at ¶¶ III.A.; IV. D. And that amount assumes the class member has (1) received notice of and understands the settlement terms, (2) has filed a valid claim, and (3) has retained proof of the purchases, the combination of which is unlikely to happen.[10] For the vast majority of consumers who do not have receipts, the most cash that can be obtained with this settlement is $50 from a $1 million cash award fund.

[9] While class members are capped at $100 *per household*, the named plaintiff will receive one hundred times more, or $10,000. *See* Amended Settlement Agreement, at ¶ IV. D.

[10] Receipts are likely to be discarded**.** *See Pearson*, 772 F.3d at 783 (indicating that receipts for supplement purchases are likely to be discarded); *In re TJX*, 584 F. Supp. 2d 395, 405, n.15 (D. Mass. 2008) (stating "[c]ommon sense indicates that, [for] a relatively small-scale purchase, an average consumer is unlikely to keep [proof of purchase] documentation for years.")

It is rare for class members to file claims. *See, e.g.*, *Pearson* at 783 (indicating that the "very modest monetary award that the average claimant would receive," along with the notice and claim forms, "were bound to discourage filings."); *De Leon v. Bank of Am., N.A.*, Case No. 09-cv-1251, 2012 U.S. Dist. LEXIS 91124, at *44 (M.D. Fla. Apr. 20, 2012) ("The proposed settlement administrator in this case … has indicated that the claims-rate in consumer class settlements range from 2% to 20%, depending on a variety of factors, including the amount a claimant will receive, the difficulty of obtaining information required to complete a claim form and even the requirement to submit a claim form."); *In re TJX*, 584 F. Supp. 2d 395, 404 (D. Mass. 2008) ("only a fraction of any given class is likely to claim the benefits provided for in a settlement. Indeed, '[i]t is not unusual for only 10 or 15% of the class members to bother filing claims'"); *Sylvester v. Cigna Corp.*, 369 F. Supp. 2d 34, 52 (D. Me. 2005) ("'[C]laims made' settlements regularly yield response rates of 10 percent or less").

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Though the settlement also includes a "Product Award" option for class members to receive Pharmavite products, the value ascribed to the Product Award fund – $5.9 million – is inflated as it includes the cost of shipping and handling of the products, which is not a tangible class benefit, and does not accurately reflect the actual cost of the products to Pharmavite as the products have been ascribed their retail value. *See* Amended Settlement Agreement, at ¶¶ II.Z. and IV. F. Further, the product award option disproportionately benefits Pharmavite by allowing it to increase brand loyalty through the captive class and allows the company to keep a larger percentage of its ill-gotten gains. *See Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006) (noting that in-kind compensations are generally cause for scrutiny and are "worth less than cash of the same nominal value.") (quoting *In re Mexico Money Transfer Litigation*, 267 F.3d 743, 748 (7th Cir. 2001)); *Wilson v. DirectBuy, Inc.*, 2011 U.S. Dist. LEXIS 51874, at *24, 26 (D. Conn. 2011) ("As with most in-kind benefits, the dollar amount ascribed to the benefit does not represent its actual cost to [the defendant]...[and] the value to the class is often overstated…"). *See also* In re HP Inkjet Printer Litigation, 716 F.3d 1173, 1179 (9th Cir. 2013) (noting that settlements involving variables that affect the true value of relief "provide[] class counsel with the opportunity to puff the perceived value of the settlement so as to enhance their own compensation.").

At the same time, the agreement provides over $4 million to plaintiffs' attorneys. *Id.* at ¶¶ VI. A-B.[11] Given the meaningless – and momentary –

[11] Class counsel in this case have filed numerous other class-action lawsuits making nearly identical allegations against other marketers of glucosamine supplements, collectively providing these attorneys over $10 million in fees. *See, e.g., Lerma v. Schiff Nutrition International Inc.*, Case No. 11-cv-01056, S.D. Cal. ($1,627,500 attorneys' fees); *Quinn v. Walgreen Co.*, Case No. 12-cv-08187, S.D.N.Y. ($933,333 attorneys' fees); *Mullins v. Direct Digital, LLC*, Case No. 13-cv-1829, N.D. Ill. ($1,427,469 attorneys' fees); *Pearson v. Target Corp.*, Case No. 11-cv-07972, N.D. Ill. ($2,475,000 attorneys' fees). To date, the attorneys'

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injunctive relief, the exceedingly modest amount of monetary award, and a product option that benefits Pharmavite, such exorbitant fees are simply not justified in this case. *See e.g.*, *Dennis v. Kellogg Co*., 697 F.3d 858, 861 (9th Cir. 2012) (reversing district court's approval of a settlement that provided for, among other things, $2 million in attorneys' fees and a maximum of $15 to each class member, stating "[i]n a class action … any settlement must be approved by the court to ensure that class counsel and the named plaintiffs do not place their own interests above those of the absent class members."); *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) (reversing district court's approval of proposed consent decree that awarded $3.85 million to class counsel while awarding approximately $1,000 to each unnamed class member, and injunctive relief that largely incorporated already-existing company programs rather than creating new ones, stating "[p]recisely because the value of injunctive relief is difficult to quantify, its value is also easily manipulable by overreaching lawyers seeking to increase the value assigned to a common fund," and increase their fees); *Redman v. RadioShack Corp.*, 768 F.3d 622, 623 (7th Cir. 2014) (Posner, J.) (reversing district court's approval of settlement that awarded over $990,000 in fees for class counsel while class members received a $10 coupon, stating "[w]e have emphasized that in determining the reasonableness of the attorneys' fee agreed to in a proposed settlement, the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation."). *See also In re Dry Max Pampers Litig.*, 724 F.3d 713, 721 (6th Cir. 2013) (reversing district court's approval of a settlement that awarded $2.73 million to class counsel while unnamed class members received relief of only negligible value, determining that the agreement benefited class counsel

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fee award proposed in the instant settlement agreement is the single largest amount class counsel has received from this line of glucosamine class actions.

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"vastly more than it [did] the consumers who comprise the class," and therefore was unfair); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d at 947 (vacating district court's approval of class-action settlement that provided for, among other things, $800,000 in attorneys' fees but no monetary compensation to unnamed class members, noting that a sign of collusion among the negotiating parties is "when counsel receive a disproportionate distribution of the settlement.")

The result – if the proposed agreement is approved – is that Pharmavite will be required to pay a nominal amount to the class, make absolutely no changes to its marketing or labeling, and handsomely reward plaintiffs' counsel for providing it a clear path on which to continue its deceptive marketing.

ii. The Cy Pres Award Is Inappropriate

Recognizing that the monetary relief is insufficient to incentivize class members to file claims in this case, the parties anticipate the need for a cy pres award, which is equally problematic because it is appropriate and feasible for all (and more) of the money to be distributed to class members who were harmed by Pharmavite's deceptive marketing and are not being fully compensated for their damages through this proposed agreement. *See In re BankAmerica Corp. Secs. Litig.*, 775 F.3d 1060 (8th Cir. 2015) (vacating district court's approval of settlement agreement that provided for a cy pres award even when a further distribution to the class was feasible); *In re Baby Prod. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013) (vacating approval of settlement agreement that provided for a cy pres award in lieu of further compensation to the class, stating"[c]y pres distributions, while in our view permissible, are inferior to direct distributions to the class because they only imperfectly serve the purpose of the underlying causes of action—to compensate class members."); *Klier v. Elf Atochem N. Am. Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) (reversing court's order distributing unused funds to third-party charities, stating "[b]ecause the settlement funds are

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the property of the class, a cy pres distribution to a third party of unclaimed settlement funds is permissible 'only when it is not feasible to make further distributions to class members'…except where an additional distribution would provide a windfall to class members with liquidated-damages claims that were 100 percent satisfied by the initial distribution." (quoting ALI § 3.07)); *In re Hydroxycut Mktg. and Sales Practices Litig.*, 2013 U.S. Dist. LEXIS 165225 (S.D. Cal. Nov. 19, 2013) (rejecting proposed settlement agreement because it provided for a cy pres award while the claimants had not been fully compensated for their damages). *See also Pearson*, 772 F.3d at 784 ("A cy pres award is supposed to be limited to money that can't feasibly be awarded to the intended beneficiaries, here consisting of the class members."); *Dennis*, 697 F.3d at 865 (9th Cir. 2012) (holding that cy pres distribution in settlement agreement was improper); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011) (same).[12]

D. Notice To Class Members Is Fatally Flawed

The settlement should be rejected for the separate and independent reason that notice to the class is defective because it omits material information regarding the injunctive relief. *See* Joint Stipulation Regarding Modification of Summary Notice, Dkt. No. 421-2, Ex. A, Notice ("Pharmavite has agreed to provide a $1,000,000 monetary fund and $5,900,000 in free product and shipping and handling costs; not to use certain terms in labeling its Covered Products; and to pay $325,000 or more for notice and administration costs, as well as attorneys' fees of up to $3,475,000, expenses up to $600,000, and plaintiff's incentive award up to $10,000.") (emphasis added). The notice wholly fails to inform class members that Pharmavite is only banned from using two words for a few

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[12] Upon information and belief, the parties have not even conferred with AARP, the named recipient of the cash cy pres award, regarding cy pres designation.

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months.[13] This material omission leads to the misleading impression that the settlement is providing for material permanent injunctive relief that will benefit consumers when it is not.

The basic terms of the injunctive relief are material terms of the settlement that must be included in the notice to inform class members' consideration of whether or not to object to the settlement. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (holding due process requires that absent class members receive notice of material terms of class settlements); *Nat'l Super Spuds, Inc.*, 660 F.2d 9 (2d Cir. 1981) (finding notice of settlement to be deficient due to misleading statements and omissions concerning certain provisions of the agreement, and reversing the district court's approval of the notice). In short, without making it clear that class members are trading a permanent right to sue for a temporary benefit, the notice is fatally flawed and the proposed agreement should not be approved.[14]

IV

CONCLUSION

In sum, the proposed settlement should be rejected because it does not remedy the deceptive marketing alleged in the operative complaint, publishes inadequate notice to the class, provides paltry monetary relief to class members,

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[13] And class members are unlikely to gain additional information elsewhere due to the gag order included in the proposed agreement, which bans the named plaintiff and class counsel from issuing any press releases or making any statements to any media or press regarding the settlement agreement. *See* Amended Settlement Agreement, at ¶ XIII. K.

[14] Of course, the parties could easily remedy this flaw by enhancing – in both substance and duration – the injunctive relief.

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and allows for an inappropriate cy pres award, all while handsomely rewarding plaintiffs' counsel so they will go away. For these reasons, TINA.org respectfully urges this Court to reject the proposed settlement.

DATED: November 13, 2017

Respectfully submitted,

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EXHIBIT 2

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LOREAN BARRERA, On Behalf of Herself and All Others Similarly Situated,

Plaintiff,

v.

PHARMAVITE, LLC, a California limited liability company,

Defendant.

CASE NO: 11-cv-04153-CAS

NOTICE OF *AMICUS CURIAE* TRUTH IN ADVERTISING, INC.'S INTENT TO APPEAR AT FINAL FAIRNESS HEARING

Assigned to:
Hon. Christina A. Snyder

Date: December 4, 2017
Time: 10:00 a.m.
Courtroom: 8D

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TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that proposed amicus curiae Truth in Advertising, Inc., hereby files this written Notice of its Intent to Appear, through its counsel, at the Final Fairness Hearing on December 4, 2017, at 10:00 a.m., in the above-entitled court.

DATED: November 13, 2017

Respectfully submitted,

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