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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LUIS LERMA, an Individual,
NICK PEARSON, an Individual,
On Behalf of Themselves and All
Others Similarly Situated,

Plaintiffs,

v.

SCHIFF NUTRITION
INTERNATIONAL, INC., a
Delaware Corporation and
SCHIFF NUTRITION GROUP, INC.,
a Utah Corporation,

Defendants.

CASE NO: 11-cv-1056-MDD

SUPPLEMENTAL BRIEF OF *AMICI
CURIAE* TRUTH IN ADVERTISING,
INC. AND AARP IN OPPOSITION TO
PROPOSED SETTLEMENT

Assigned to:
Magistrate Judge:
Hon. Mitchell D. Dembin

Date: May 15, 2015
Time: 10:00 a.m.
Courtroom: 1E

[defendant] in effect is seeking judicial approval of”). The settlement of a class action should not provide an outcome that is actually contrary to the goals of plaintiffs’ complaint challenging such deceptive advertising. *Id.* Thus, the same objections lodged by TINA.org and AARP in their original opposition—that the settlement should be rejected because the proposed injunctive relief is meaningless—apply equally to the second amended proposed settlement.

II

The Amendment’s Creation Of A Capped Settlement Fund With A Percentage-Of-The-Fund Attorneys’ Fee Provision Is Objectionable Because It Directly Reduces The Relief Available To The Class

The parties propose to change the previously uncapped settlement fund and flat \$3 million attorneys’ fee award structure to a settlement fund now capped at \$6,510,000 with a clear sailing attorney fee provision awarding 33% of the fund to the plaintiffs’ attorneys. *Compare* Amended Settlement Agreement, ¶ VI.A with Second Amended Settlement Agreement ¶ VI.A. This structural change, which now directly offsets the relief available to the class, requires a different legal analysis and raises additional fairness concerns not previously presented.¹

Under Ninth Circuit law, it is error for a district court to approve a settlement that fails properly to evaluate fees presented as part of a percentage-

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¹ Amici urge this Court not to be overly impressed with the fact that class counsel will walk away with one-third less in fees as a result of the proposed revision to the settlement. First, this Court would have reviewed the fee request for reasonableness even absent any objection. *See Staton v. Boeing Co.*, 327 F.3d 938, 972 (9th Cir. 2003) (holding “[i]n the course of judicial review, the amount of such attorneys’ fees can be approved if they meet the reasonableness standard when measured against statutory fee principles.”). Thus, until the lodestar calculation is performed, it is not clear what a reasonable fee would be. Perhaps the purported concession is merely the product of recognition by class counsel that the initially proposed \$3 million award was not supported by their lodestar, whereas the current fee calculation may be more in line with it. Second, class counsel may simply be seeking to escape additional judicial scrutiny that, along with the inadequate injunctive relief, could have imperiled the settlement. Regardless, Amici continue to take the position, as they did previously, that the entire settlement should be rejected because the injunctive relief is inadequate.

1 of-the-fund calculation. *See Staton v. Boeing Co.*, 327 F.3d 938, 972 (9th Cir.
2 2003) (reversing approval of settlement and remanding with instruction to
3 conduct proper fee award assessment). The Staton court held that:

4 the parties may negotiate and agree to the value of a common fund
5 (which will ordinarily include an amount representing an estimated
6 hypothetical award of statutory fees) and provide that, subsequently,
7 class counsel will apply to the court for an award from the fund,
8 using common fund fee principles. In those circumstances, the
9 agreement as a whole does not stand or fall on the amount of fees.
10 Instead, after the court determines the reasonable amount of
11 attorneys' fees, all the remaining value of the fund belongs to the
12 class rather than reverting to the defendant.

9 *Id.*

10 In this case, in which the injunctive relief in the proposed settlement is of
11 little to no value, awarding attorneys' fees in the amount of 33% of the fund is
12 unreasonable, particularly in light of the 25% benchmark applicable in the Ninth
13 Circuit. *See Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (finding
14 district court abused its discretion by awarding attorneys 30% of the settlement
15 fund, recognizing benchmark for percent-of-the-recovery attorneys' fees in the
16 Ninth Circuit is 25%); *Myles v. AlliedBarton Sec. Servs., LLC*, No. 12-cv-05761-
17 JD, 2014 U.S. Dist. LEXIS 159790, at *15-16 (N.D. Cal. Nov. 12, 2014)
18 (denying preliminary approval of class-action settlement where attorneys' fees
19 were set at 30% of the gross settlement amount, stating that there was no reason
20 to award more than the Ninth Circuit's 25% benchmark especially in light of "the
21 manifest problems with the proposed settlement"). *See also Resnick v. Frank (In*
22 *re Online DVD-Rental Antitrust Litig.)*, 779 F.3d 934, 949 (9th Cir. 2015)
23 (clearly stating that the Ninth Circuit's benchmark percentage for attorneys' fees
24 is 25%); *Jones v. GN Netcom, Inc. (In re Bluetooth Headset Prods. Liab. Litig.)*,
25 654 F.3d 935, 942 (9th Cir. 2011) (same); *Six (6) Mexican Workers v. Ariz.*
26 *Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (same); *Paul, Johnson,*
27 *Alston & Hunt v. Grauldy*, 886 F.2d 268, 272 (9th Cir. 1989) (same).

1 The benefit to the class in limiting the fees to the 25% benchmark is
2 manifest. Now that a fund has been established, reducing an award of attorneys'
3 fees to the accepted 25% will directly benefit the class by \$520,800.²

4 III

5 CONCLUSION

6 In sum, the proposed revisions fail to address the clearly inadequate
7 injunctive relief, establish a capped settlement fund, and provide for a
8 percentage-of-the-fund clear sailing attorneys fee provision that exceeds the 25%
9 benchmark for such attorneys' fees applicable in the Ninth Circuit. Accordingly,
10 the proposed second amended settlement agreement is even more unfair and
11 objectionable than it was when TINA.org and AARP filed its original amicus
12 curiae brief.

13 For the foregoing reasons and those previously articulated, amici curiae
14 TINA.org and AARP respectfully urge this Court to deny final approval of the
15 proposed settlement.

16 DATED: May 8, 2015

Respectfully submitted,

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27 ² Thirty-three percent of the \$6,510,000 Settlement Fund amounts to \$2,148,300. Twenty-five
28 percent of the fund amounts to \$1,627,500.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been filed electronically on this 8th day of May 2015 and is available for viewing and downloading to the ECF registered counsel of record:

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DATED: May 8, 2015

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