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

Defendants.

Case No. 12-CV-1414H BGS

Class Action

PHILIPS ORAL HEALTHCARE, INC. AND PHILIPS ELECTRONICS NORTH AMERICA CORPORATION'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* BY TRUTH IN ADVERTISING, INC.

Hearing Date: November 4, 2013
Hearing Time: 10:30 a.m.
Location: Court Room 15A

In accordance with this Court's October 17, 2013 Order (Dkt. # 33), Defendants Philips Oral Healthcare, Inc. and Philips Electronics North America Corporation (collectively, "Philips") respectfully oppose "Truth In Advertising, Inc.'s" (sometimes abbreviated herein as "TINA") Motion for Leave to File Brief as *Amicus Curiae* In Opposition to Proposed Settlement (Dkt. # 32).

INTRODUCTION

By its submission, "Truth in Advertising, Inc." seeks to offer its deficient opinions on something that it does not even pretend to know anything about and, worse still, offers those opinions on behalf of no one. Despite extensive notice, not a single Settlement Class member has objected to the proposed Settlement, meaning that the sole voice complaining is one acting distinctly and directly *against* the interests of the Settlement Class. With eleven weeks to go before the claims submission deadline, Settlement Class Members have already submitted 753 claims, so that if "Truth in Advertising, Inc." has its way, those 753 Class Members would not be permitted to settle their grievances and, instead, must litigate a lawsuit that no one other than "Truth In Advertising, Inc." thinks should be litigated. As the press release announcing their *amicus* efforts attests (*see* Exhibit A, attached hereto), this is TINA's first foray at injecting its opinions into a litigation in which it represents no one.[1] Precisely because TINA's efforts are so inimical to constitutional notions of standing and Article III's "case" or "controversy" limitation, federal courts routinely reject efforts by interlopers to offer irrelevant opinions not sought by parties with standing. Truth in Advertising, Inc.'s efforts to intermeddle here — in direct opposition to the express desires of hundreds of Settlement Class Members — should be rejected.

[1] While "Truth in Advertising, Inc." states that it is a 504(c)(3) corporation, it fails to identify who owns it. While perhaps not required by the letter of Federal Rule of Civil Procedure 7.1 and Local Rule 40.2, which require that a corporate party disclose any parent corporations and any publicly held corporation owning 10% or more of its stock, the failure to disclose this information certainly undermines the spirit of the rules.

I. TRUTH IN ADVERTISING, INC. HAS NO CONSTITUTIONAL STANDING TO OBJECT TO THE PROPOSED SETTLEMENT.

Far from serving as a forum for generalized grievances, federal courts are of limited jurisdiction and can only adjudicate cases subject to the constitutional limitations of Article III. *See Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *U.S.* v. *Johnson*, 319 U.S. 302, 304 (1943) (prohibiting advisory opinions); *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) (prohibiting generalized grievances). At the core of Article III's "case" or "controversy" limitation is the requirement that litigants must have standing. *See Allen* v. *Wright*, 468 U.S. 737, 750 (1984). Not only does the standing requirement prevent the "conver[sion] of the Judiciary into an open forum for the resolution of political or ideological disputes," *U.S.* v. *Richardson*, 418 U.S. 166, 192 (1974), it improves judicial decision-making by ensuring that a litigant has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Most fundamentally, the standing requirement serves the value of fairness, by ensuring that litigants will raise only their own rights and concerns, and cannot be intermeddlers trying to protect others who do not want the protection sought. *Singleton* v. *Wulff*, 428 U.S. 106, 113-14 (1976) ("the 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.").

As a non-party who has suffered no actual or prospective injury, TINA lacks standing to object to a settlement agreed upon by the parties that was carefully negotiated under the hands-on oversight of Magistrate Judge Bernard G. Skomal, and preliminarily approved by this Court. Without a Settlement Class Member to represent, TINA simply has no constitutional standing to put forth its irrelevant and incorrect views. *See In re American Intern. Group Inc. Securities*

Litigation, 916 F. Supp. 2d 454, 467-68 (S.D.N.Y. 2013) (holding that New York Attorney General, who filed *amicus* brief after preliminary approval of the settlement, lacked standing to object to the settlement because he was neither a member of the settlement class nor a representative of any member); *U.S.* v. *State of Mich.*, 940 F.2d 143, 165-66 (6th Cir. 1991) (holding *amicus* "is without standing . . . to exercise any litigating rights equal to a named party/ real party interest" and that *amicus* "cannot create, extend or enlarge issue[s]").

Nor can TINA's efforts be accepted simply because it calls itself an "*amicus curiae*." It is well-established that "an *amicus curiae* is not a party to the action and cannot assume the functions of a party." 3B Susan L. Thomas, *Corpus Juris Secundum Amicus Curiae* § 14 (2013). Attaching the label "amicus" does not transmogrify a non-party into the status of a party. "Courts will not consider issues raised by *amici curiae* which are not raised by the parties. Relief beyond that which is sought by the parties cannot be requested by *amicus curiae*." *Id*; *see also F.T.C.* v. *Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003 n.4 (2013) (refusing to consider an argument raised by an *amicus* where the argument "was not raised by the parties or passed on by the lower courts"). Because TINA is neither a member of the settlement class, nor a representative of any member, it has no standing to object to the proposed settlement, just like the purported amicus in *In re American International Group*.[2]

Instead, TINA is a classic example of an intermeddler trying to "protect others", but where those supposedly in need of "protection" have not asked for the services offered. *See Singleton*, 428 U.S. at 113-14. TINA seeks this Court's permission to object in a case in which not a *single* Settlement Class

[2] Nor can TINA be said to have organizational standing, since it does not even allege that it has any members or who its members are, let alone that it or any of its members suffered any harm. *See, e.g.*, *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972) (denying standing to national environmental protection organization that wished to halt construction of a ski resort because it failed to allege harm to itself or any of its members).

Member has objected to the Settlement. TINA also hopes to undermine a settlement where 753 Settlement Class Members have already submitted proofs of claims, thus underscoring their support of the settlement. TINA thus improperly seeks "relief beyond that which is sought by the parties" by arguing that the proposed settlement should not be finally approved because it does not contain components such as disgorgement of profits and injunctive relief (*see Amicus* Brief In Opposition to Proposed Settlement, Dkt. # 32-1, at 6-7), and improperly seeks to derail a settlement that was negotiated at arm's length by the parties, carefully brokered by Magistrate Judge Skomal, and preliminarily approved by this Court. Therefore, the Court should not consider any of the arguments raised in TINA's Brief. *See, e.g.*, *National Comm'n on Egg Nutrition* v. *F.T.C.*, 570 F.2d 157, 160 n.3 (7th Cir. 1977) (refusing to consider issue raised by *amicus* that had not been raised by the parties in interest); *U.S.* v. *State of Mich.*, 940 F.2d at 165 ("*amicus* has been consistently precluded from . . . participating and assuming control of the controversy in a totally adversarial fashion.").

II. TRUTH IN ADVERTISING FAILS TO MEET BASIC STANDARDS APPLICABLE TO AMICUS SUBMISSIONS.

Aside from lacking Article III standing to object to the proposed settlement, TINA separately fails to meet the requisite *amicus* standards. Courts allow the submission of an *amicus* brief "when a party is not represented competently or is not represented at all, . . . or 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." *Merritt* v. *McKenney*, No. C 13-01491 JSW, 2013 WL 4552672, at *4 (N.D. Cal. Aug. 27, 2013) (citing *Miller-Wohl Co.* v. *Commissioner of Labor & Industry*, 694 F.2d 203 (9th Cir.1982)).

But here, by contrast, this Court has already held that Plaintiff is adequately represented, noting that "Plaintiff's counsel has extensive experience in consumer class actions" and appointing Plaintiff's counsel as class counsel. (*See*

July 11, 2013 Order, Dkt. # 24, at 9.) Furthermore, TINA's proposed *amicus* brief merely repeats and assumes as true Plaintiff's allegations in the complaint, and contains no new information whatsoever, let alone any "unique information." (*See Amicus* Brief, Dkt. # 32-1, at 2.) Nor can TINA be said to hold a perspective that is any different from those of the settlement class members, who are the very consumers that TINA purports to "protect" and "empower," and who affirmatively seek to have the settlement and the vouchers that TINA derides. *Merritt*, 2013 WL 4552672, at *4 (denying motion to file *amicus* brief by advocacy groups where "the proposed *amicus* brief does not provide the Court with any unique information or a unique perspective on the issues raised in this case"); *see also New England Patriots Football Club Inc.* v. *Univ. of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (the role of *amicus* is not to provide a highly partisan account of the facts, but to aid the court in resolving doubtful issues of law).

III. TRUTH IN ADVERTISING, INC.'S PROPOSED *AMICUS* BRIEF IS REPLETE WITH FACTUAL ERRORS AND BASELESS CONCLUSIONS.

Because TINA lacks standing, it has no incentive to ensure the factual accuracy of the allegations in its proposed *amicus* brief—in other words, TINA has nothing to gain by being right, and nothing to lose by being wrong. It is thus unsurprising that TINA's proposed *amicus* brief is replete with factual inaccuracies and unsupported conclusions. This is precisely the type of irresponsible conduct resulting from lack of standing that the Supreme Court has warned against. *See Baker* v. *Carr*, 369 U.S. at 204 (the standing requirement ensures "a personal stake in the outcome of the controversy . . . which sharpens the presentation of issues."). Below is a list—by no means exhaustive—of the numerous factual inaccuracies and unsupported conclusions that pervade TINA's proposed *amicus* brief.

First, TINA repeatedly claims that the proposed settlement provides "nominal vouchers" that do not provide "any meaningful benefit" or "adequate

compensation" to settlement class members. (Brief at 2-4.) But TINA's argument completely ignores not only the 753 claims already submitted by Settlement Class Members who feel differently, but also the following substantial benefits conferred by the vouchers:

- The vouchers are fully transferrable;
- The vouchers can be used to obtain scores of Philips and Avent-branded products;
- The vouchers can be used at most retailers, including some of the largest retailers in the nation;
- The vouchers can be combined with other promotions;
- The vouchers are valid for the substantial time period (twelve months); and
- The voucher value is sufficient to obtain a number of products without any additional payment by the consumer. Contrary to TINA's claims, class members do not have to "purchase" another Philips product to receive a benefit under the settlement. (*See* Brief at 4, 6.) Class members can receive a number of Philips or Avent products simply by presenting a voucher and without spending any money.

Most importantly, TINA ignores the fact that the vouchers confer a definite, guaranteed benefit upon the Settlement Class members, when — due to the weakness of Plaintiff's case — it is by no means certain that the class members would have received *any* benefit at all if the litigation had proceeded without settlement. *See Hanlon* v. *Chrysler Corp.*, 150 F.3d 1011, 1026 (courts consider "the strength of the plaintiffs' case" when determining whether a proposed settlement is "fair, adequate and reasonable"); *Shames* v. *Hertz*, No. 07-CV-2174-MMA(WMC), 2012 WL 5392159 at *5-6 (S.D. Cal. Nov. 5, 2012) (granting final approval of coupon settlement where plaintiffs faced "myriad challenges" and

"risk of nonrecovery at trial"); *Nat'l Rural Telecomms. Coop.* v. *DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) (the court shall "compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future . . . It has been held proper to take the bird in hand instead of a prospective flock in the bush"). Here, it is Defendants' strong view that Plaintiff did not even suffer any injury, as she declined to take advantage of Philips' "100% satisfaction guaranteed or full refund" policy, and instead filed this lawsuit. In addition, the few of Plaintiff's claims that survived Philips' motion to dismiss suffer from numerous deficiencies, including relying on non-actionable puffery, and failing to adequately plead reliance, which was required under California law for each of Plaintiff's theories of liability. Moreover, Plaintiff's proposed class was not certifiable for a number of reasons, including that proof of reliance would have presented individual issues and owing to the fact that, for some, the AirFloss would demonstrably have improved their oral health. In sum, Plaintiff's case faced "myriad challenges" that may well have precluded settlement class members from receiving *any* benefit, had the parties not decided to settle.

Second, TINA's claim that the proposed settlement does not provide "meaningful and adequate compensation" is belied by the substantial participation of class members in the claim program over the last three months, and the lack of *any* objections from class members to the proposed settlement. Statistics from the claims administrator show that in the October alone, the participation rate in the claim program by people with direct notice increased from 14.3% (as of September 29, 2013) to 18.6% (as of October 27, 2013). To date, not a single Settlement Class Member has objected to the settlement, and just four have opted out. The fact that Settlement Class Members are continuing to exercise their rights under the proposed settlement by submitting claims, and that eleven weeks still remain for class members to submit claims, further shows that the proposed settlement will provide "meaningful and adequate compensation" to the Settlement Class. Indeed,

TINA's assertion that "aggrieved consumers who have been deceived by Philips will not want to purchase more products from the company" (Brief at 5-6) is made without the slightest bit of evidence and is contradicted by its own inconsistent statement, on the very same page, that "the result" of the proposed settlement "will be increased sales and *brand loyalty* to Philips." (*Id.* at 6 (emphasis added).) It simply can't be both.

CONCLUSION

For the reasons stated above, Philips respectfully requests that the Court deny TINA's Motion for Leave to File Brief as *Amicus Curiae* in Opposition to the Proposed Settlement.

Dated: October 31, 2013

Respectfully Submitted,

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