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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ED HAZLIN and KAREN ALBENCE on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

BOTANICAL LABORATORIES, INC. a Washington corporation, SCHWABE NORTH AMERICA, INC., a Wisconsin corporation and BOTANICAL LABORATORIES, L.C.C., a Delaware limited liability company and DOES 1-20,

Defendants.

CASE NO: 3:13-cv-00618-KSC

CLASS ACTION

MOTION OF TRUTH IN ADVERTISING, INC. FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN OPPOSITION TO PROPOSED SETTLEMENT

Assigned to:
Magistrate Judge:
Hon. Karen S. Crawford

Date: March 19, 2015
Time: 11:00 a.m.
Courtroom: 1C

Complaint Filed: March 15, 2013
Trial Date: Not Set

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

performs in-depth investigations and files complaints with federal and state government agencies, among others, urging them to take action to put an end to various companies' deceptive marketing practices.

With respect to the instant case, TINA.org is filing this motion and brief because the proposed settlement is fundamentally unfair to the class members. 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, and thus should be granted *amicus curiae* status. *See, e.g., Safari Club International 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 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

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amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide."); Barbara J. Rothstein and Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, 3d ed., (Fed. Judicial Ctr. 3d ed. 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, 2014 U.S. App. LEXIS 21874, at *27 (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. In short, the brief explains that the terms are unfair because the agreement merely precludes defendants from using eight phrases on the labels of its glucosamine supplements, many of which can simply be replaced with synonymous language to send the exact same message. In addition, defendants

[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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can return to the banned language in just three years while the nationwide class will be forever prohibited from suing defendants for false and deceptive advertising. And finally, defendants' other modes of marketing – e.g., their website and online promotional materials – are wholly unaddressed by the agreement and therefore may remain unchanged.

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, respectively).

DATED: February 10, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Defendants.

CASE NO: 3:13-cv-00618-KSC

CLASS ACTION

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

Assigned to:
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I

INTRODUCTION

The proposed settlement agreement in this case effectively allows defendants to continue with their deceptive marketing practices as alleged in the operative complaint. Pursuant to the terms of the agreement, defendants are only required to remove eight phrases from the labels of their glucosamine supplements, many of which can simply be replaced with synonymous language to convey the exact same message. In addition, defendants can return to the banned language in just three years while the nationwide class will be forever prohibited from suing defendants for false and deceptive advertising. And to further exacerbate the shortcomings of the proposed agreement, defendants' other modes of marketing – e.g., their website and online promotional materials – are wholly ignored by the agreement and, therefore, they may continue to falsely advertise their supplements as alleged in plaintiffs' complaint. For these reasons, Truth in Advertising, Inc., a national consumer advocacy organization dedicated to protecting consumers from false and deceptive advertising, respectfully opposes the proposed settlement, and urges the Court to deny approval of it.

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 performs in-depth investigations and files complaints with federal and state government agencies, among others, urging them to take action to put an end to various companies' deceptive marketing practices.

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As explained in detail in the attached Motion for Leave to File *Amicus Curiae* Brief in Opposition to Proposed Settlement, TINA.org has an important interest and a valuable perspective on the issues presented in this case.[1]

III

ARGUMENT

The essence of plaintiffs' complaint is that defendants charge a premium price for their glucosamine supplements based on marketing claims that the supplements protect and rebuild cartilage, support joint comfort, and improve joint health, movement, and flexibility, when there is no competent scientific evidence to support such marketing claims. Second Am. Compl. ¶¶ 1, 3, 20 and 23. According to plaintiffs, all available evidence shows that defendants' products have no efficacy at all; are ineffective in the improvement of joint health; and provide no benefits related to joint mobility, flexibility, or lubrication. *Id.* at ¶ 3. Nonetheless, the proposed settlement will not hinder defendants' ability to continue making the majority of these claims to millions of aging Americans that are experiencing joint degeneration. The parties' proposed settlement restricts defendants from using a mere eight phrases (and some related language) on their labels for a three-year period. Not only are defendants' other modes of marketing unaffected by the agreement, but during this short moratorium, defendants are permitted to simply replace several of these labeling phrases with synonymous language, thereby effectively eviscerating many of the perceived benefits of the injunctive relief. At the same time, this settlement will forever bind the hands of a nationwide class from doing anything about it. *See* Joint Stipulation of Settlement, at ¶ IX, A.

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

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IV

THE PROHIBITED LANGUAGE IN THE PROPOSED SETTLEMENT DOES NOT ERADICATE THE DECEPTION

The proposed settlement agreement gives the false impression that defendants are making material changes to their marketing of glucosamine supplements when, in reality, the injunctive relief is illusory and only benefits defendants. Specifically, the settlement agreement prohibits defendants from using just eight phrases on their product labels:

- "Start to feel it in 7 days;"
- "improves joint health," and related "joint health" statements;
- "less joint discomfort;"
- "protects and rebuilds cartilage," and similar statements concerning the protection or rebuilding of cartilage;
- "for healthy joint support & mobility" or "for healthy joint support and flexibility;"
- "Glucosamine is necessary to protect and rebuild cartilage tissue and keep joints strong & healthy;" and
- "mobility, flexibility, & lubrication."

Joint Stipulation of Settlement ¶ IV.B.2. Only two of the prohibitions above include broader language that will ban defendants from using synonymous wording to convey the same message. The other five prohibitions simply preclude the exact quoted language from being used without any regard for the ability to send the same message using different words. For example, pursuant to the settlement agreement, defendants can no longer say "mobility, flexibility, & lubrication" on their product labels, but there is nothing that stops defendants from marketing their products as able to promote "joint movement." In fact, "Joint Movement" is precisely how defendants intend to continue naming and

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marketing the products at issue going forward, which sends the exact same message to consumers as the banned term "mobility." *See* Joint Stipulation of Settlement ¶ IV.B.3. Similarly, defendants have agreed to stop using the term "less joint discomfort" in their labeling of the products at issue, but there is nothing in the agreement that prohibits them from using phrases such as "more joint comfort," which, obviously, sends an identical message. And instead of saying "Start to feel it in 7 days," defendants can simply say "Feel improvement within days" or any other phrase that suggests the supplements deliver quick results.

Put simply, defendants' agreement to stop using eight phrases on their labeling does not benefit the class and, to the contrary, gives defendants the green light to continue sending the misleading message that their supplements improve joint comfort and mobility, among other things.

Similar injunctive relief was flatly rejected by the Seventh Circuit in a near identical class-action lawsuit. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 2104 U.S. App. LEXIS 21874 (7th Cir. 2014). In that case, the Court pointed out that because the injunctive relief only required cosmetic word edits to the labels of the glucosamine bottles, the benefits inured solely to defendants, not to consumers who were, and will continue to be, deceived:

> 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.

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Id. at *20. The same criticism is appropriately leveled 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 defendants from suggesting or implying in any manner that their supplements can improve joint comfort, mobility, flexibility, and lubrication means that changes to their labeling as a result of this settlement agreement will not affect their ability to continue with their deceptive marketing message. For this reason, the agreement is unfair to class members and should be rejected.[2]

V

THE INJUNCTIVE RELIEF IN THE PROPOSED SETTLEMENT IS ONLY TEMPORARY WHILE CLASS MEMBERS ARE FOREVER BANNED FROM SUING DEFENDANTS

To make matters worse, defendants' minor labeling restrictions are only binding for three years, while class members are required to give up their litigation rights forever. *See* Joint Stipulation of Settlement ¶ IV.B.2 ("Defendants agree not to make the following statements in the labeling of Wellesse Joint Movement Glucosamine products for a period of three years:"); ¶ IX ("Upon the Effective Date, and subject to fulfillment of all of the terms of this Settlement, each and every Releasing Party shall be permanently barred and

[2] In November 2014, TINA.org filed an *amicus curiae* brief opposing the terms of a similar proposed settlement agreement in another case regarding the alleged false advertising of glucosamine supplements. *Quinn, et al. v. Walgreen, Co., et al.,* Case No. 12-cv-8187, S.D.N.Y. Subsequently, the parties renegotiated the settlement agreement and 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 that will prohibit the glucosamine marketers in that case from conveying the message that its supplements can repair, strengthen, or rebuild cartilage. The duration of the injunctive relief was also amended: Instead of expiring after two years, the proposed injunction now continues 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 (attached to Supplemental Declaration of Todd S. Garber in Support of Motion for Final Approval of Class Action Settlement and in Support of Motion for Attorneys' Fees and Expenses), dated Jan. 30, 2015.

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enjoined from initiating, asserting, and/or prosecuting any Released Claim against any Released Party in any court or any other forum.")[3] And to add insult to injury, the proposed settlement agreement allows defendants to continue selling their products that are currently on the shelves in stores, regardless of the labels and regardless of how long that stockpile lasts, effectively decreasing the three-year injunction by a potentially significant amount of time. *See* Joint Stipulation of Settlement ¶ IV.B.4.

Allowing defendants to continue selling what is in stores and then resume use of the very labels that are at issue in this litigation in just three years, while class members are permanently prohibited from suing the companies over their false marketing of the products, is patently unfair and reversible error. *See Pearson v. NBTY, Inc.*, at *28 ("for a limited period the labels will be changed, in trivial respects unlikely to influence or inform consumers."); *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.")[4] In fact, the *Pearson* Court advocated for a perpetual injunction, stating:

> The 30-month…cutoff means that after 30 months [defendant] can restore the product claims that form the foundation of this suit. It says it will be reluctant to do that because then fresh class actions will be brought against it. But if so, why would it prefer a 30-month injunction to a perpetual injunction? Were the injunction perpetual, [defendant] could ask the district court to modify it should new research reveal that its allegedly false claims were true after all.

[3] In addition to giving up their right to sue defendants 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. Joint Stipulation of Settlement. ¶ IX.D.

[4] While there have been district courts that have approved settlements that include such short-term injunctive relief in the past (*see, e.g., Dennis v. Kellogg Co.*, 2013 U.S. Dist. LEXIS 163118 (S.D. Cal. Nov. 14, 2013), most recently, Judge Posner in the Seventh Circuit took the better view.

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Pearson, at *19-20. In short, it is clear that the temporary relief proposed in this case functions merely as window dressing in an attempt to cover up worthless injunctive relief. Accordingly, the proposed agreement is unfair to class members and this Court should not grant approval.

VI

THE INJUNCTIVE RELIEF IS INADEQUATE IN SCOPE AS IT ONLY ADDRESSES DEFENDANTS' LABELING

While the operative complaint alleges that defendants convey their deceptive marketing message through a variety of media (including their website and online promotional material), and seeks a corrective advertising campaign, among other things, the proposed settlement agreement only addresses labeling issues and wholly ignores defendants' other forms of deceptive marketing. *See* Joint Stipulation of Settlement ¶ IV.B.2. ("…Defendants agree not to make the following statements in the **labeling** of Wellesse Joint Movement Glucosamine products…") (emphasis added); Second Am. Compl. ¶ 7 ("Defendants convey their uniform, deceptive message to consumers through a variety of media including their website and online promotional materials…"); ¶ 79 ("Defendants violated the [Consumers Legal Remedies] Act by representing and failing to disclose material facts on the Wellesse JMG labeling and packaging and associated advertising…); ¶ E under "Prayer for Relief" ("Wherefore, Plaintiffs pray for a judgment…Ordering Defendants to engage in a corrective advertising campaign"). Accordingly, the proposed settlement agreement is inadequate in scope as well as substance and duration, and should not be approved.

VII

CONCLUSION

In sum, the proposed agreement is patently unfair to class members because it does not remedy the false marketing of the glucosamine supplements

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at issue, but rather shields defendants' deceptive marketing from future challenges. For these reasons, TINA.org respectfully urges this Court to deny approval of the proposed settlement.

DATED: February 10, 2015

Respectfully submitted,

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Defendants.

CASE NO: 3:13-cv-00618-KSC

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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 March 19, 2015, at 11:00 a.m. in the above-entitled court.

DATED: February 10, 2015

Respectfully submitted,

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