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21 **UNITED STATES DISTRICT COURT**  
22 **CENTRAL DISTRICT OF CALIFORNIA**

23 LOREAN BARRERA, On Behalf of  
24 Herself and All Others Similarly Situated  
25 and the General Public,

26 Plaintiff,

27 v.

28 PHARMAVITE LLC, a California  
limited liability company,

Defendant.

Case No. 2:11-cv-04153-CAS (AGrx)

**CLASS ACTION**

**PHARMAVITE LLC'S  
OPPOSITION TO THE MOTION  
OF TRUTH IN ADVERTISING,  
INC. FOR LEAVE TO SUBMIT  
AN *AMICUS CURIAE* BRIEF IN  
OPPOSITION TO THE  
PROPOSED SETTLEMENT**

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

The Hon. Christina A. Snyder

**INTRODUCTION**

1  
2 Defendant Pharmavite LLP respectfully requests that the Court deny the request  
3 of professional objector Truth in Advertising (“TINA”) to submit a brief as *amicus curiae*  
4 criticizing the proposed settlement of this action. Because TINA is not a member of the  
5 settlement class and does not represent a member of the settlement class, it lacks  
6 standing to object to the settlement. Moreover, TINA’s brief as *amicus curiae* will not assist  
7 the Court in evaluating whether the proposed settlement is fair, reasonable, and adequate,  
8 because it offers no unique information, largely parrots the same erroneous and/or  
9 irrelevant issues raised by the single objector, Justin Ference (who, unlike TINA, claims  
10 to be a member of the settlement class), or raises issues that were already addressed in the  
11 moving papers in support of the settlement.<sup>1</sup>

**ARGUMENT**

12  
13 **A. TINA lacks standing to object to the settlement because it is not a class**  
14 **member and does not represent a class member.**

15 Because TINA is not itself a member of the settlement class and does not  
16 represent a member of the settlement class, it lacks standing to object to the proposed  
17 settlement of this action. Rule 23(e)(5) of the Federal Rules of Civil Procedure governs  
18 settlements of class actions, and permits only class members to object to proposed  
19 settlements:

20 The claims, issues, or defenses of a certified class may be settled,  
21 voluntarily dismissed, or compromised only with the court’s approval.  
22 The following procedures apply to a proposed settlement, voluntary  
dismissal, or compromise:

23 ...

24 (5) Any *class member* may object to the proposal if it requires court  
25 approval under this subdivision (e); the objection may be withdrawn  
only with the court’s approval.

26  
27 <sup>1</sup> As addressed in the brief of plaintiff Lorean Barrera in support of her motion  
28 for final approval of the settlement, apparently Mr. Ference’s objection similarly is filed  
by a law firm that routinely objects to proposed class settlements.

1 Fed. R. Civ. Proc. 23(e)(5) (emphasis added).

2 As was the case in *Hazlin v. Botanical Labs, Inc.*, 2015 U.S. Dist. LEXIS 189687,  
3 at \*13; 2015 WL 11237634 (S.D. Cal. May 20, 2015), in which the court did not permit  
4 TINA’s brief in opposition to a class settlement, “[i]n this case, TINA.org does not  
5 represent any class member and therefore may not object on behalf of a class member  
6 pursuant to Rule 23(e)(5).” Similarly, as this Court held in *Lozano v. AT&T Wireless*  
7 *Services, Inc.*, 2010 WL 11515433 (C.D. Cal. Nov. 22, 2010), where the “objectors ... are  
8 not members of the ... Settlement Class..., [they] lack standing to object to the ...  
9 Settlement.” *Accord Bickley v. Schneider National, Inc.*, 2016 U.S. Dist. LEXIS 167145,  
10 at \*\*4-5 (N.D. Ca. Oct. 13, 2016) (“The Court finds that Mr. Pittman lacks standing to  
11 object to the proposed class action settlement of this case, because he is not a class  
12 member.”); *In re Tracfone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993 (N.D. Cal. July 2,  
13 2015) (“... Birner has no legal standing to object to the settlement because he has not  
14 demonstrated that he is an aggrieved class member.”).

15 **B. The Court should deny TINA’s request for leave to be heard as an *amicus***  
16 ***curiae* because TINA does not have any unique information that will assist**  
17 **the Court in evaluating whether the proposed settlement is fair, reasonable,**  
18 **and adequate.**

19 While a trial court has discretion to consider the views of non-parties who  
20 otherwise lack standing to object to a proposed class settlement, “[*a*]micus briefs which  
21 are unhelpful or fail to present unique information or which raise issues not addressed by  
22 the parties may be disregarded.” *Hazlin*, 2015 U.S. Dist. LEXIS 189687, at \*13, citing  
23 *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712, 719 n.10 (9th Cir. 2003) (“In the  
24 absence of exceptional issues, ... we do not address issues raised only in an *amicus*  
25 brief.”); *Neonatology Assocs. v. Comm’r of Internal Revenue*, 293 F.3d 128, 133 (3rd Cir. 2002)  
(a court may “simply disregard” *amicus* briefs which are unhelpful).

26 As the Southern District of California explained in denying TINA.org’s request to  
27 submit an *amicus* brief objecting to a class settlement, to be granted leave to appear as an  
28 *amicus*, the information offered should be “timely and useful.” *Hazlin*, 2015 U.S. Dist.

1 LEXIS 189687, at \*\*12-13, citing *Waste Mgmt. of Penn, Inc. v. City of York*, 162 F.R.D. 34,  
2 36 (M.D. Pa. 1995). In *Hazlin*, “the majority of TINA.org’s arguments were premised on  
3 the *Pearson* decision” about which the court was “already aware ... by virtue of its own  
4 legal research and Plaintiffs’ moving papers.” *Id.* at \*13. The court thus held that,  
5 “[b]ecause TINA.org failed to raise unique or helpful information, the Court exercises its  
6 discretion to disregard the *amicus* brief.” *Id.* at \*14. *See also* Exhibit A hereto, *Perkins v.*  
7 *Phillips Oral Health Care, Inc.*, C.D. Ca. case no. 12-CV-1414-H (BGS), Nov. 4, 2013,  
8 Order Striking TINA’s Motion for Leave to File Brief as Amicus Curiae in Opposition to  
9 Proposed Settlement (Doc. 43) (“the Court exercises its discretion and denies without  
10 prejudice TINA’s request for leave to file its amicus brief” where the court found that it  
11 had adequately scrutinized the proposed settlement, including the coupon issues raised by  
12 TINA).

13         The cases cited by TINA in its motion are not to the contrary, and confirm that  
14 *amicus* briefs should be permitted only “when the amicus has unique information or  
15 perspective that can help the court beyond the help that the lawyers for the parties are  
16 able to provide.” *State of Missouri v. Harris*, 2014 U.S. Dist. LEXIS 89716, at \*9 (E.D. Cal.  
17 June 30, 2014) (quoting with approval, *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d  
18 1062, 1063 (7th Cir. 1997), and allowing *amici* brief that “provides focused legal analysis  
19 on two issues relevant to defendants’ and defendant-intervenors’ motions to dismiss:  
20 whether preventing animal cruelty is a legitimate state interest and whether the stated  
21 purposes for AB 1437 were pretextual”); *accord Safari Club Int’l v. Harris*, 2015 U.S. Dist.  
22 LEXIS 4467, at \*3 (E.D. Cal. Jan. 13, 2015) (allowing an *amicus* brief from The Humane  
23 Society and The Fund for Animals where the brief “contains information that is not part  
24 of Defendant’s motion”). Thus, for example, in *Ryan v. CFTC*, 125 F.3d 1062, 1064 (7th  
25 Cir. 1997), the court denied *amicus*’ request for leave where “the amicus brief does not tell  
26 us anything we don’t already know.” TINA’s citation to *Jamul Action Committee v. Stevens*,  
27 2014 U.S. Dist. LEXIS 107582 (E.D. Cal. Aug. 4, 2014), and *Neonatology Assocs., P.A. v.*  
28 *Comm’r of Internal Revenue*, 293 F.3d 128 (3d Cir. 2002), are inapposite, because in those

1 cases, the intervenors, unlike TINA, had an interest in the outcome of the litigation. *See*  
2 *Stevens*, 2014 U.S. Dist. LEXIS 107582, at \* 14; *Neonatology Associs., P.A.*, 293 F.3d at 133.

3 Of note, TINA cites no decisions permitting *amicus* briefs in connection with a  
4 motion to approve a class action settlement, and cites no decisions in which a court  
5 permitted TINA to submit an *amicus* brief. The only decision cited by TINA involving  
6 claims for alleged false labeling, *Korolsbteyn v. Costco Wholesale Corp.*, 2017 U.S. Dist. LEXIS  
7 135303, at \*4-5 (S.D. Cal. Aug. 23, 2017), was one in which the *amicus*, The Council for  
8 Responsible Nutrition, sought leave to submit a brief in connection with the defendant’s  
9 motion for summary judgment, not a motion to approve a class settlement. The court  
10 allowed the brief because it “focuses entirely on the law applicable to Plaintiff’s false  
11 advertising claims and does not argue expressly that Defendant should win summary  
12 judgment” or “advocate a point of view.”<sup>2</sup>

13 Here, TINA raises in its *amicus* brief the same issues already raised by objector  
14 Justin Ference (who claims to be a class member, and the only purported member of the  
15 class to object); the few issues not also discussed by Mr. Ference were addressed in the  
16 moving papers in support of the settlement or are of no assistance to the Court in  
17 evaluating this settlement. That is, both Mr. Ference and TINA raise meritless objections  
18 to the amount of the cash payment to the class, the scope and length of the injunctive  
19 relief, and the *cy pres* award provision of the settlement—all of which are addressed in  
20 Plaintiff’s Memorandum in Support of Unopposed Motion for Final Approval of  
21 Settlement (“Plaintiff’s Memorandum”).

22 Both Mr. Ference and TINA also object to the amount of attorneys’ fees awarded  
23 to Plaintiff’s counsel—which again is addressed in Plaintiff’s Memorandum filed  
24 herewith. In accordance with Section VI.A of the Settlement Agreement, “Pharmavite

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25  
26 <sup>2</sup> The final decision cited by TINA (an unreported decision that it did not attach  
27 to its moving papers), *Thalheimer, et al. v. City of San Diego*, No. 09-cv-2862 (S.D. Cal. Jan.  
28 19, 2010), is merely a summary disposition of the court’s order permitting the ACLU to  
submit an *amicus* brief, and contains no analysis or discussion.

1 will not oppose an application in this amount [\$3.475M].” However, regardless of what  
2 orders the Court makes on attorney fees, expenses, or incentive award, Pharmavite  
3 nonetheless respectfully requests Final Approval of the Settlement in accordance with  
4 Section VI.D of the Settlement Agreement, which provides as follows:

5 Any order or proceedings relating to the applications for the Attorneys’  
6 Fee Award, the Litigation Expenses Reimbursement, and the Incentive  
7 Award, or any appeal from any order relating thereto or reversal or  
8 modification thereof, will not operate to terminate or cancel this  
9 Settlement Agreement, or affect or delay the finality of the Final Order  
And Judgment approving the Settlement Agreement, and is not a basis  
for anyone withdrawing from the Settlement Agreement.

10 TINA raises only two objections not also raised by Mr. Ference, neither of which  
11 will assist the Court in evaluating whether the proposed settlement is fair, reasonable, and  
12 adequate. First, TINA acknowledges that the Notice to the class members correctly  
13 informed them that Pharmavite is not permitted to use certain terms in labeling its  
14 products, but complains that the Notice did not specifically identify the terms that are  
15 prohibited. This is irrelevant, as explained in more detail in Plaintiff’s Memorandum,  
16 because the Notice satisfied the Rule 23 requirements inasmuch as it was reasonably  
17 calculated to apprise the Settlement Class of the pendency of the settlement and to afford  
18 them an opportunity to present their objections or opt-out, and generally described the  
19 terms of the settlement in sufficient detail to alert those with adverse viewpoints to  
20 investigate and to come forward and be heard. Further, the entire Settlement Agreement  
21 was posted on the settlement website for the Settlement Class to review.

22 Second, TINA objects that the settlement class is broader than the liability class  
23 certified by the Court. However, as explained in Plaintiff’s Memorandum, broadening the  
24 scope of a class for settlement purposes is appropriate, and this objection thus is of no  
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# EXHIBIT A



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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

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

Plaintiff,

vs.

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

Defendants.

CASE NO. 12-CV-1414-H  
(BGS)

**ORDER STRIKING TRUTH  
IN ADVERTISING, INC.’S  
MOTION FOR LEAVE TO  
FILE BRIEF AS AMICUS  
CURIAE IN OPPOSITION TO  
PROPOSED SETTLEMENT**

[Doc. No. 32]

On October 7, 2013, Plaintiff Lilia Perkins (“Plaintiff”), on behalf of herself and the provisional certified class (together “Plaintiffs”), filed a motion for final approval of class settlement and a motion for approval of attorneys' fees, costs, and service award. (Doc. Nos. 27, 28.) Defendants Philips Oral Health Care, Inc. and Philips Electronics North America Corporation (“Defendants” or “Philips”) did not oppose the motions.

On October 15, 2013, Truth in Advertising, Inc. (“TINA”) requested leave of the Court to file a brief as amicus curiae in opposition to the proposed settlement. (Doc. No. 32.) On October 17, 2013, the Court issued an order granting the leave to the

1 parties to file briefs opposing TINA’s filing on or before the final settlement hearing.  
2 (Doc. No. 33.) On October 31, 2013, Defendants filed an opposition to TINA’s motion.  
3 (Doc. No. 35.) On November 1, 2013, Plaintiffs filed an opposition to TINA’s motion.  
4 On November 2, 2013, TINA filed a reply in response to the parties’ motions.

5 TINA objects to the proposed settlement on the grounds that the vouchers do not  
6 provide meaningful benefit to the proposed class members and that the class is not  
7 protected from future deceptive advertising because Philips is not enjoined from  
8 making the marketing claims at issue. (Doc. No. 32-1 at 3-7.) The parties have  
9 responded by asserting that TINA, unlike a prospective class member, lacks standing  
10 to object to the proposed settlement. (Doc. No. 35 at 3-6.) Additionally, the parties  
11 dispute TINA’s characterization of the settlement, and argue that the proposed  
12 settlement confers meaningful benefits for all class members. (Doc. No. 35 at 7-9; Doc.  
13 No. 40 at 2-4.) The parties also note that as of October 20, 2013, no class members  
14 have filed objections to the proposed settlement, but class members have submitted 724  
15 proof of claim forms to the settlement administrator.

16 “The privilege of being heard amicus rests solely within the discretion of the  
17 court.” Merritt v. McKenney, C 13-01391 JSW, 2013 WL 4552672 (N.D. Cal. Aug. 27,  
18 2013) (quoting In re Roxford Foods Litig., 790 F.Supp. 987, 997 (E.D.Cal.1991)).  
19 TINA urges the Court to deny approval of the proposed settlement because class  
20 members will receive coupons. (Doc. No. 32-1 at 8.) The Court acknowledges its duty  
21 under CAFA to scrutinize class action settlements that provide class members with  
22 coupons. See 28 U.S.C. 1712(e) (“In a proposed settlement under which class  
23 members would be awarded coupons, the court may approve the proposed settlement  
24 only after a hearing to determine whether, and making a written finding that, the  
25 settlement is fair, reasonable, and adequate for class members.”)

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28 ///

1 In this case, the Court has adequately scrutinized the proposed settlement and  
2 conducted the fairness hearing required by CAFA. The Court has determined that the  
3 coupons Defendants will provide to class members provide sufficient benefit to class  
4 members such that final approval of the settlement is warranted. Accordingly, the Court  
5 exercises its discretion and denies without prejudice TINA's request for leave to file  
6 its amicus brief.

7 **IT IS SO ORDERED.**

8 DATED: November 4, 2013

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11 MARILYN L. HUFF, District Judge  
12 UNITED STATES DISTRICT COURT  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 27<sup>th</sup> day of November, 2017, I electronically filed  
**PHARMAVITE LLC'S OPPOSITION TO THE MOTION OF TRUTH IN  
ADVERTISING, INC. FOR LEAVE TO SUBMIT AN *AMICUS CURIAE*  
BRIEF IN OPPOSITION TO THE PROPOSED SETTLEMENT**  
with the Clerk of the court using the CM/ECF system, which will send a notification  
of such filing (NEF) to the following:

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