

action challenging the multilevel marketing scheme) (*cert. denied S.G.E. Mgmt., L.L.C. v. Torres*, 138 S. Ct. 76 (Oct. 2, 2017); *Frank v. Poertner*, No. 15-765 (S. Ct.), Brief Amicus Curiae for Truth in Advertising, Inc. Supporting Petitioner, (Jan. 14, 2016) (*cert. denied* 136 S. Ct. 1453 (2016)); *Bostick v. Herbalife Int’l of Am., Inc.*, 13-cv-02488 (C.D. Cal.) May 14, 2015 Order (TINA.org granted permission to file brief opposing proposed settlement agreement over parties’ objection); *Aboltin v. Jeunesse, LLC*, 17-cv-01624 (M.D. Fla.) Dec. 5, 2018 Order (TINA.org granted permission to file brief opposing proposed settlement agreement).

With respect to the use of unsubstantiated health claims in marketing, TINA.org has pursued more than 70 companies using deceptive health claims, has more than 65 databases on its website collectively cataloguing thousands of unsubstantiated health claims made about products, has sent dozens of warning letters to companies, and has filed numerous complaints with federal and state regulators. *See, e.g.*, TINA.org’s Prevacen Action, <https://www.truthinadvertising.org/prevagen-summary-of-action/>. As a result of TINA.org’s efforts in this area, thousands of unsubstantiated health claims have been removed from the internet, companies have revamped their product labeling and other marketing materials, state and federal agencies have fined companies millions of dollars, and industry trade associations are more closely monitoring member companies’ marketing. TINA.org has also been invited to speak at numerous national conferences on the use of unsubstantiated health claims in marketing, including “The Evolving Phenomenon of Direct-to-Consumer Neuroscience” conference in February 2018 hosted by The Banbury Center to help identify and address key regulatory and ethical issues related to the growth of brain health products sold directly to consumers.

In short, TINA.org has unique expertise in the area of deceptive marketing and the impact it has on consumers, all of which will assist this Court in better understanding the issues raised by the parties’ proposed settlement.¹ *See, e.g.*, *Bayshore Ford Trucks Sales, Inc. v. Ford Motor Co.*, 471 F. 3d 1233, 1249 fn. 34 (11th Cir. 2006) (“[D]istrict courts possess the inherent authority to appoint ‘friends of the court’ to assist in their proceedings.”); *Florida Immigration Coal. et al. v. Mendez*, No. 09-cv-81280, Order (S.D. FL. Nov. 23, 2009) (granting nonprofit organization’s motion for leave to file as amicus curiae); *Resort Timeshare Resales, Inc. v.*

¹ TINA.org’s Motion for Leave and accompanying amicus brief are entirely independent and are not supported or motivated in any way – financially or otherwise – by any outside parties or organizations.

Stuart, 764 F. Supp. 1495 (S.D. FL. May 21, 1991) (granting motion for leave to appear as amicus curiae, stating that an amicus participates “for the benefit of the court” and that it is “within the discretion of the court to determine the fact, extent, and manner of participation by the amicus.”). *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 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.”).

TINA.org’s sole motivation for its filing is to provide the Court with its unique expertise and perspective as to the impact that the proposed settlement will have on the approximately three million consumers that will be affected by it – a settlement that appears to provide no meaningful relief to class members but will inevitably leave defendants better off than if they had never been sued. 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 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 . . .”); *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.”). Finally, due to the onerous process for class members to file objections to the proposed settlement, including, among other things, a need for class members – most elderly and concerned about memory loss – to assert factual *and* legal grounds for their position, as well as send letters to three different locations, the odds of class members filing their own objections

are quite low, particularly during a pandemic (and that is even assuming class members are aware of the pending settlement and understand what is at stake). *See* Settlement Agreement and Release, Ex. B (Notice); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L REV. 71, 73 (2010) (Class member “[s]ilence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low.”)

For these reasons, TINA.org moves for leave to appear as amicus curiae and submits 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**).

LOCAL RULE 7.1(a)(3) CERTIFICATION

Though not a party to this action and merely seeking to assist the Court as amicus curiae in evaluating the proposed settlement agreement, TINA.org has nonetheless conferred with counsel for Plaintiffs and Defendant regarding the instant Motion for Leave. Both plaintiffs' and defense counsel have stated that they do not object to TINA.org's motion.²

Dated: October 27, 2020

Respectfully,

By: /s/ Hal K. Litchford
Hal K. Litchford
Baker Donelson
200 South Orange Avenue, Suite 2900
Orlando, FL 32801
Telephone: (407) 422-6600
hlitchford@bakerdonelson.com

Laura Smith, Legal Director
(District of Conn. Bar No. ct28002, not admitted in Florida)
Truth in Advertising, Inc.
115 Samson Rock Drive, Suite 2
Madison, CT 06443
Telephone: (203) 421-6210
lsmith@truthinadvertising.org

Attorneys for Truth in Advertising, Inc.

² Plaintiffs' counsel stated their position telephonically. Defense counsel stated via email that Quincy will not oppose TINA.org's motion for leave, but does not consent to the request either.