

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 20-cv-23564-MGC

DAVID WILLIAMS, et al.,	:
	:
	:
Plaintiffs,	:
	:
vs.	:
	:
RECKITT BENCKISER LLC, et al.,	:
	:
	:
Defendants.	:

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

Truth in Advertising, Inc. (“TINA.org”) moves the Court under its inherent authority, and based on the fact the parties do not object, for leave to file an amicus curiae brief. In support of this motion, TINA.org states the following:

TINA.org is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat the systemic and individual harms caused by deceptive marketing. One focus of TINA.org’s work is ensuring that laws protecting consumers from deceptive advertising are effectively enforced. To that end, TINA.org monitors the activities (and inactions) of government regulators and litigation brought by consumers acting as private attorneys general and, when necessary, voices its opposition.

Drawing on its accumulated experience, TINA.org regularly participates as amicus curiae in cases involving deceptive marketing, both at the district court level (typically to alert courts of proposed settlements that are not “fair, reasonable, and adequate,”) as well as the appellate level.

See, e.g., Quinn v. Walgreen Co. No. 12-cv-8187 (S.D.N.Y.) (responding to TINA.org's concerns, the parties renegotiated their settlement agreement to make injunctive relief broader and perpetual); *Lerma v. Schiff Nutrition Int'l*, No. 3:11-CV-01056 (S.D. Cal.), Dkt. 120, 141 (plaintiffs, prompted by TINA.org's amicus submission, sought to withdraw settlement, which plaintiffs ultimately renegotiated); *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc.*, 753 Fed. App. 87 (2d Cir. 2019) (Second Circuit, after granting TINA.org's Motion for Leave, vacated district court's dismissal of lawsuit against Quincy and remanded the case for further proceedings); *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629 (5th Cir. 2016) (en banc) (Fifth Circuit, after granting TINA.org's Motion for Leave, affirmed certification of a RICO class 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); *Collins v. Quincy Bioscience, LLC*, 19-cv-22864 (S.D. Fla.) Oct. 27, 2020 Order (this Court granting TINA.org's Motion for Leave to File Amicus Curiae Brief in Opposition to Proposed Settlement).

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.truthin>

advertising.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. 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

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.

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 consumers that will be affected by it – a settlement that will provide a nominal sum to a small percentage of class members while inevitably leaving 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

Becker & Poliakoff
1 East Broward Blvd., Suite 1800
Ft. Lauderdale, FL 33301
Telephone: (954) 987-7550
jpolenberg@beckerlawyers.com

and

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.

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification to all parties registered to receive electronic notices via the Court's CM/ECF System.

/s/ Jon Polenberg

By: Jon Polenberg, Esq.