

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

UNITED STATES OF AMERICA

Plaintiffs,
v.

BAYER CORPORATION,

Defendant

Civil Action No.: 07-0001 (JLL)

ORDER

THIS MATTER comes before the Court by way of the following motions: (1) the Government's motion for an Order to Show Cause as to why Defendant Bayer should not be held in civil contempt for violating a 2007 Consent Decree entered into by both parties and approved by the Court [Docket Entry No. 4]; (2) a motion for Leave to Appear Amicus Curiae by Natural Products Association [Docket Entry No. 22]; and (3) a motion for Leave to Appear Amicus Curiae and to File Brief Supporting Bayer Corporations Opposition by the Council for Responsible Nutrition [Docket Entry No. 24]. The Court has considered the submissions made in support of and in opposition to the foregoing motions and finds as follows:

1. As to the Government's motion for an Order to Show Cause, while the Court makes no findings at this time on the ultimate issue of whether Bayer has, in fact, violated the relevant terms of the 2007 Consent Decree (and thus whether Bayer should be held in civil contempt), the Court concludes that the Government has made a sufficient showing at this juncture to support its application for an Order to Show Cause. As such, the Government's motion for an Order to Show Cause [Entry No. 4] is **granted**. Bayer is hereby ordered to show cause why it should not be held

in civil contempt for violating the provision of the 2007 Consent Decree—requiring Bayer to, *inter alia*, possess “competent and reliable scientific evidence” to substantiate any representation it makes “about the benefits, performance, efficacy, safety or side effects” of any of its dietary supplements—when making specific claims about constipation, diarrhea, and gas and bloating in connection with its Phillips’ Colon Health product. The parties shall meet and confer and be prepared to propose a briefing schedule to the Court at the status conference scheduled for October 28, 2014.

2. As to the motions for Leave to Appear Amicus Curiae by Natural Products Association and the Council for Responsible Nutrition, the Court begins by noting that Bayer consents to both applications and the Government takes no position as to either.¹ As a general matter, District Courts may permit third parties to appear in court as amicus curiae where they “can contribute to the court’s understanding of the” issues being presented to the court. *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir. 1987). Proceeding amicus is a “privilege” that “rests in the discretion of the court which may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise.” *Community Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982)).² Amicus status is typically granted when: (1) the amicus has a

¹ It should be noted that although the Government formally takes no position as to either application for leave to appear amicus curiae, the Government *has* submitted briefs setting forth its position that the participation of these trade associations (Natural Products Association and/or the Council for Responsible Nutrition) is “unlikely to provide any assistance to the Court” in determining whether Bayer has violated the relevant terms of the 2007 Consent Decree. The Court has considered both briefs filed by the Government in this regard.

² See generally *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J.1985), *aff’d*, 782 F.2d 1033 (3d Cir. 1986).

“special interest” in the particular case; (2) the amicus’ interest is not represented competently or at all in the case; (3) the proffered information is timely and useful; and (4) the amicus is not partial to a particular outcome in the case. *See Sciotto v. Marple Newtown School Dist.*, 70 F. Supp. 2d 553, 554 (E.D. Pa. 1999) (citations omitted). While the partiality of an amicus is a factor to be considered by a court in deciding whether to allow participation, there is no rule that amici must be totally disinterested. *See Waste Mgmt. of Pennsylvania, Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995) (citations omitted). Having carefully considered all submissions, the Court finds that both trade associations have a strong interest in the outcome of this case, particularly as it relates to the federal regulatory and statutory scheme governing dietary supplements. Both trade associations have submitted thorough and informative briefs, which are of assistance to the Court, particularly in considering the implications of the ultimate outcome of this dispute on the entire dietary supplement industry. As such, in an exercise of discretion, the Court hereby grants the motions for Leave to Appear Amicus Curiae that have been filed by Natural Products Association and the Council for Responsible Nutrition, respectively [Entry Nos. 22 and 24].

Accordingly, **IT IS** on this **23rd day of October, 2014,**

ORDERED that the Government’s motion for an Order to Show Cause as to why Defendant Bayer should not be held in contempt for violating a 2007 Consent Decree entered into by both parties and approved by the Court [Docket Entry No. 4] is **granted**. The parties shall meet and confer and be prepared to propose a briefing schedule to the Court at the status conference scheduled for October 28, 2014; and it is further

ORDERED that the motions for Leave to Appear Amicus Curiae by Natural Products

Association [Docket Entry No. 22] and the Council for Responsible Nutrition [Docket Entry No. 24] are **granted**.

IT IS SO ORDERED.



Jose L. Linares
United States District Judge