August 16, 2016

Clerk of Court
United States District Court for the Eastern District of New York
Courtroom 1214-S
225 Cadman Plaza East
Brooklyn, NY 11201

Attention: Magistrate Judge Marilyn D. Go

Re: *Aliano v. CVS Pharmacy, Inc.* Proposed Settlement Agreement, No. 16-2624

Dear Judge Go:

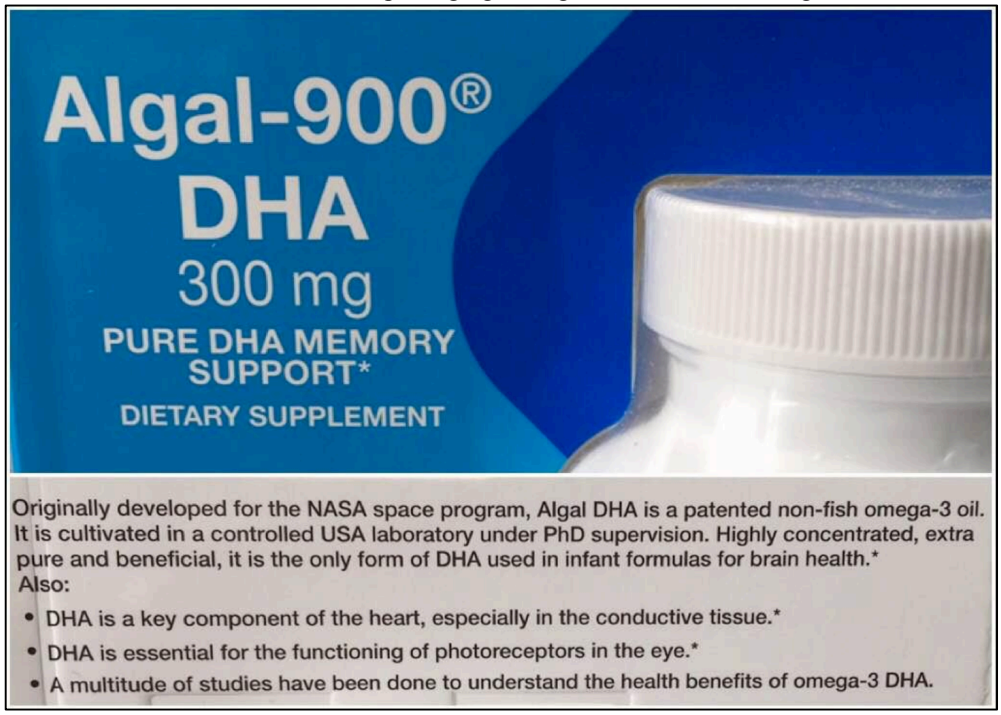
We write on behalf of Truth in Advertising, Inc. ("TINA.org") – a 501(c)(3) nonprofit, nonpartisan consumer advocacy organization whose mission is to protect consumers nationwide through the prevention and eradication of false and deceptive marketing – in order to oppose the proposed amended settlement agreement in *Aliano v. CVS Pharmacy, Inc*., No. 16-2624.[1] The parties to the *Aliano v. CVS Pharmacy, Inc.* litigation again contend that the proposed settlement agreement meets the standard for preliminary approval. The amended settlement, however, still contains at least two "obvious deficiencies" that mandate denying the parties' Motion for Preliminary Approval.[2] First, while the amended agreement now more broadly prohibits CVS from making express memory improvement claims about its DHA supplements, it still allows the use of implied memory improvement claims. Second, the amended agreement provides insufficient monetary relief to class members as it places unnecessary – and dissuasive – hurdles in the way of obtaining cash refunds for their purchases.

I. The Proposed Settlement Allows CVS to Make Deceptive Implied Memory Improvement Claims

The essence of plaintiffs' complaint is that CVS deceptively marketed a supplement containing DHA as a treatment for memory loss without proper and adequate scientific evidence to substantiate the claim.[3] However, the proposed amended settlement agreement, which requires class members to forever release their claims against CVS, simply gives lip service to the deceptive marketing at issue by banning express treatment claims while allowing CVS to send the same treatment message implicitly.

Specifically, while the amended agreement appears to address obvious holes in the original proposed settlement agreement by now prohibiting marketing claims for all DHA products across all marketing platforms "regarding the health benefits, performance, safety, or efficacy" of the products without having competent and reliable scientific evidence, it carves out an exception. It allows CVS to continue marketing Algal-900 DHA as "pure DHA memory support," implying that the product can improve memory loss.[4] CVS is also allowed to imply that such a claim is supported by scientific studies as the back of the packaging states "[a] multitude of studies have been done to understand the health benefits of omega-3 DHA."[5]

Portions of front and back packaging of Algal-900 DHA as of August 2016



Moreover, for more than seven years, CVS mislead consumers by marketing the product as "clinically shown to improve memory."[6] Yet, there are no provisions in the proposed settlement that require defendant to engage in any corrective marketing to dispel the longstanding and deceptive notion that this product treats memory loss. The new label, which still refers to studies and benefits to memory, does not remedy the misconceptions about this product. This is especially true when one considers that the target audience for this supplement are consumers suffering from memory loss.[7] It is also important to note that CVS's subtle shift in marketing is akin to the suggested marketing changes outlined in another supplement settlement agreement that was flatly rejected and fiercely criticized by the Seventh Circuit.[8]

Against this backdrop, there can be no dispute that CVS is continuing to give consumers the misleading marketing message that Algal-900 DHA improves memory. Defendants argue that "pure DHA memory support" is not a claim of memory improvement, but rather relates to "the well-recognized connection between DHA and brain health" and a

permissible structure/function claim. However, the U.S. Food and Drug Administration – which specifically bans misleading statements regarding dietary supplements – has stated that the word "support" may create an implied treatment claim if, *in the context it is used*, it implies an effect on disease.[9]

For these reasons, the amended proposed settlement agreement is unfair to consumers and continues to condone ongoing violations of a previous FTC Order that prohibits, among other things, "*any representation, in any manner*…that [the companies' *DHA products*] *improve[] memory* in adults [] or [] prevents cognitive decline in adults, unless the representation is non-misleading and, at the time of making such representation, [the companies] possess and rely upon competent and reliable scientific evidence to substantiate that the representation is true."[10]

II. The Proposed Settlement's Monetary Relief is Insufficient

In addition to the deficient injunctive relief in the proposed settlement, the monetary relief is also inadequate. Rather than provide class members automatic reimbursements for their purchases – which CVS is able to do for the vast majority of the class[11] – the proposed settlement imposes two unnecessary and onerous hurdles in the way of obtaining cash refunds. First, it requires class members to file claims, which is a rare occurrence in these types of cases, and one that is disfavored by Courts.[12] Second, it requires class members to have retained proof of purchase, which is similarly unlikely.[13] These two requirements result in the following monetary relief:

- If a class member fails to file a claim, that class member will receive absolutely nothing (even if CVS has a record of the class members' purchases and where to send a check).

- If a class member files a claim but failed to keep receipts and CVS has no record of the class member, he/she will receive either $4 in cash or $6.50 in vouchers, regardless of how many bottles of the supplement (which currently sell for more than $13 for 30 pills) were purchased.

- If a class member files a claim, failed to keep receipts, but CVS has a record of the member's purchases, then he/she is precluded from obtaining any cash and must instead take store credits or vouchers, thereby forcing the class member to purchase more products from the very store that deceived the consumer. In this scenario, CVS – not the deceived consumer – is the true beneficiary as it gets to keep the majority of the profits it made from the selling the deceptively marketed Algal-900 DHA and reaps the benefits of a settlement agreement that requires class members to continue to do business with the company.[14]

In short, the settlement creates a windfall for CVS – the unnecessary administrative burdens placed on consumers will ensure that CVS has to process very few claims (the vast majority of which will be in the self-serving form of store credits), and give $100,000 to plaintiffs' attorneys in exchange for a settlement agreement that allows the

company to continue deceiving consumers while shielding itself from future litigation. Accordingly, the monetary relief in the proposed settlement is inadequate and unfair to the class.

Conclusion

In sum, the proposed settlement agreement contains obvious deficiencies because it does not materially impact the very marketing claims at issue in the complaint, condones continuing violations of an FTC Order, and does not adequately or fairly compensate consumers. For these reasons, we respectfully urge the Court to deny preliminary approval of the proposed amended settlement agreement.

Respectfully,

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[1] TINA.org filed an opposition letter to the original proposed settlement agreement in this case (Docket No. 36-1) and, on June 7, 20106, this Court granted TINA.org's June 3, 2016 Motion for Leave to File Letter as *Amicus Curiae* (Docket No. 36).

The focus of this opposition is on the substance of the settlement terms. Other potential issues with the proposed amended settlement agreement, such as procedural issues or class notification, are not addressed.

[2] *See, e.g., Yim v. Carey Limousine NY, Inc.,* 2016 U.S. Dist. LEXIS 47134 at *9 (E.D.N.Y. Apr. 7, 2016); *Zink v. First Niagara Bank, N.A.,* 2015 U.S. Dist. LEXIS 174613 at *15 (W.D.N.Y. Oct. 20, 2015).

[3] *See* Am. Class Action Compl., Apr. 15, 2016, at ¶ 25 ("Despite substantial evidence to the contrary, Defendant advertises that Algal-900 DHA improves adult memory and brain function and is clinically proven to do so.")

[4] Am. Stipulation of Settlement, Doc. No. 42-2, at ¶ 3.3.

[5] It is important to note that even if it is true that "a multitude of studies have been done to understand the health benefits of omega-3 DHA," the inclusion of this statement – as well as other impressive, yet irrelevant references to the NASA space program and a patent – on the packaging of a purported brain supplement that "supports" memory renders the marketing message misleading, regardless of literal truth. *See, e.g., Suchanek v. Sturm Foods, Inc.,* 764 F.3d 750, 761-62 (7th Cir. 2014). *See also U.S. v. Ninety-Five Barrels,* 265 U.S. 438 (1924) ("Deception may result from the use of statements not technically false or which may be literally true.")

[6] *See* Am. Stipulation of Settlement, Doc. No. 42-2, ¶ 2.40 ("'Settlement Class Period' means the period of time from and including November 15, 2008, up to and including the Preliminary Approval Date."); ¶ 3.3 ("In a process that culminated in December 2015 … CVS created new labels for the Algal-900 DHA Product…").

[7] When representations are targeted to a specific audience, the Federal Trade Commission – the government agency tasked with enforcing truth in advertising laws – determines the effect of the practice on a reasonable member *of that group*. *See* FTC Policy Statement on Deception, https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

In determining what a reasonable consumer takes away from a marketing pitch,

> [i]t is . . . necessary . . . to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. "The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied."

Fed. Trade Comm. v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963) (quoting, in part, *Aronberg v. Fed. Trade. Comm.,* 132 F. 2d 165, 167 (7th Cir. 1942).

[8] *See Pearson v. NBTY, Inc.,* 772 F.3d 778, 785 (7th Cir. 2014) ("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.")

[9] *See* U.S. Food and Drug Administration Guidance for Industry: Structure/Function Claims, Small Entity Compliance Guide, available at http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/DietarySupplements/ucm103340.htm ("…words such as 'restore,' 'support,' 'maintain,' 'raise,' 'lower,' 'promote,' 'regulate,' or 'stimulate' might create an implied disease claim if, in the context they are used, they imply an effect on disease."); 21 U.S.C. 343(r)(6)(B) ("…a statement for a dietary supplement may be made if…the manufacturer of the dietary supplement has substantiation that such statement is truthful and not misleading.").

[10] *See* TINA.org's June 3, 2016 Opposition Letter to the Court, Docket No. 36-1; *In the Matter of I-Health, Inc. and Martek Biosciences Corp.,* Docket No. C-4486, FTC Decision and Order, available at https://www.ftc.gov/system/files/documents/cases/140821ihealthmartekdo.pdf.

[11] CVS has records for approximately 77% of class members. *See* CVS's June 20, 2016 Letter to the Court, Docket No. 38 ("The class of purchasers of the Product numbers approximately 197,000. … [It is] estimated that there are approximately 152,000 class members for whom valid e-mail or postal address information exists.")

[12] **It is rare for class members to file claims.** *See, e.g., De Leon v. Bank of Am., N.A.,* Case No. 09-cv-1251, 2012 U.S. Dist. LEXIS 91124, at *44 (M.D. Fla. Apr. 20, 2012) ("The proposed settlement administrator in this case … has indicated that the claims-rate in consumer class settlements range from 2% to 20%, depending on a variety of factors, including the amount a claimant will receive, the difficulty of obtaining information required to complete a claim form and even the requirement to submit a claim form."); *In re TJX,* 584 F. Supp. 2d 395, 404 (D. Mass. 2008) ("only a fraction of any given class is likely to claim the benefits provided for in a settlement. Indeed, '[i]t is not unusual for only 10 or 15% of the class members to bother filing claims'"); *Sylvester v. Cigna Corp.,* 369 F. Supp. 2d 34, 52 (D. Me. 2005) ("'[C]laims made' settlements regularly yield response rates of 10 percent or less").

The requirement to file claims is disfavored by Courts. *See, e.g., De Leon,* 2012 U.S. Dist. LEXIS 91124, at *42 (recommending denying approval of settlement stating, among other things, "[c]onsidering the predictable claims-rate in this case, it is more than likely that funds will be returned to Defendant after all payments are made."); *Ferrington v. McAfee, Inc.,* No. 10-cv-1455, 2012 U.S. Dist. LEXIS 49160, at *40 (N.D. Cal. Apr. 6, 2012) (denying final approval of a claims-made settlement due to, among other things, "a low rate of claims participation," stating that '[g]ranting final approval would require an unknown subset of the class to relinquish its claims against Defendants for no consideration"); *Sylvester,* 369 F. Supp. 2d at 53 (denying approval of a settlement agreement that required class members to file claims in part because of the negative impact the requirement has on payouts to the class, stating "[t]his Court is simply not willing to approve such a settlement and thereby disregard the small amount actually paid to Class Members…") and *Sylvester v. Cigna Corp.,* No. 03-cv-176-P-S, Docket No. 116, Nov. 9, 2005 Plaintiffs' Mot. for Final Approval of Revised Settlement and for Class Certification, and Docket No. 124, Nov. 21, 2005 Order Approving Revised Settlement & Final Order of Dismissal with Prejudice and Judgment (approving the parties' Revised Settlement Agreement that required defendants to automatically send checks to all class members for whom a valid address was available); *cf. In re Elec. Books Antitrust Litig.,* Case No. 1:11-MD-2293, 2014 U.S. Dist. LEXIS 180344 (S.D.N.Y. Nov. 21, 2014), *aff'd In re Elec. Books Antitrust Litig.*, 2016 U.S. App. LEXIS 2642 (2d Cir. N.Y., Feb. 17, 2016) (granting – and affirming – final approval of a settlement agreement [the terms of which are set forth in Docket No. 557, Memo. in Support of Plaintiffs' Mot. for Final Approval of Apple Settlement and Distribution Plan] that gives class members automatic awards without the need to file claims or take any other action); *Oxina v. Lands' End, Inc.,* Case No. 14-cv-2577-MMA (S.D. Cal. Apr. 6, 2016), Docket No. 36, Order Granting Joint Motion for Preliminary Approval of Class Action Settlement (granting preliminary approval of a class-action settlement agreement that provides refunds to class members without the need to file a claim; final fairness hearing is scheduled for October 2016); *Murr v. Capital One Bank (USA), N.A.,* Case No. 13-cv-01091-LMB-TCB (E.D. Va. June 26, 2015), Docket No. 145, Final Judgment and Order Approving Settlement (granting final approval of a class-action settlement agreement that provides automatic pay-outs to class members for whom defendant has current address information); *In re Checking Account Overdraft Litig.,* 830 F. Supp. 2d 1330, 1351 (S.D.

Fla. 2011) (approving a settlement that did not require class members to submit claims or take any other affirmative step to receive relief, stating "the absence of a claims-made process…supports the conclusion that the Settlement is reasonable."). *See also* Managing Class Action Litigation: A Pocket Guide for Judges, 3d ed., Federal Judicial Ctr. 2010, at 30 ("[C]onsider whether a claims process is necessary at all. The defendant may already have the data it needs to automatically pay the claims of at least a portion of class members who do not opt out."); *Pearson,* 772 F.3d at 784 ("[K]nowing that 4.72 million people had bought at least one bottle of its pills, [defendant] could have mailed $3 checks to all 4.72 million postcard recipients.").

[13] *See Pearson,* 772 F.3d at 783 (indicating that receipts for supplement purchases are likely to be discarded); *In re TJX,* 584 F. Supp. 2d 395, 405, n.15 (D. Mass. 2008) (stating "[c]ommon sense indicates that, [for] a relatively small-scale purchase, an average consumer is unlikely to keep [proof of purchase] documentation for years.")

[14] *See Redman v. Radioshack Corp.,* 768 F.3d 622 (7th Cir. 2014). *But see In re Online DVD-Rental Antitrust Litig.,* 779 F.3d 934, 951-52 (9th Cir. 2015).