EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

JUAN COLLINS, et *al.*, Plaintiffs, vs. QUINCY BIOSCIENCE, LLC, Defendant.	:	Case No. 1:19-cv-22864
	:	**BRIEF OF AMICUS CURIAE TRUTH IN ADVERTISING, INC. IN OPPOSITION TO PROPOSED SETTLEMENT**
	:	DATE: November 17, 2020 TIME: 10:30 am LOCATION: Zoom
	:	Hon. Jonathan Goodman

INTRODUCTION

While the proposed settlement provides no meaningful benefit to the three million class members wronged by Quincy's deceptive marketing over the past thirteen years, it provides the company with everything it needs to continue profiting from its deceptive marketing of Prevagen. In 2019 alone, Quincy spent more than $67 million deceptively advertising Prevagen to those concerned about memory loss, and Prevagen sales from 2007 through mid-2015, minus refunds, totaled $165 million – sales that have continued from that time to the present. In June 2020, the month Quincy agreed to settle this case – including paying plaintiffs' counsel $4.2 million – it spent $5.2 million marketing Prevagen. And while many class members will never learn of this proposed settlement because of inadequate notice, even those that do will likely receive no monetary compensation from it, yet all will be forced to give up their litigation rights forever, as well as their ability to obtain any relief from the pending Federal Trade Commission and State of New York false marketing lawsuit against Quincy. And to make matters even worse, the parties are asking this Court to approve marketing claims that violate FTC law. In short, if this settlement is approved, Quincy will walk away with a lifetime hall pass to continue deceptively marketing Prevagen.

For these reasons, Truth in Advertising, Inc. ("TINA.org") opposes the proposed settlement, and respectfully urges the Court to reject it.

INTERESTS OF AMICUS CURIAE

TINA.org is a 501(c)(3) nonpartisan, nonprofit consumer advocacy organization whose mission is to combat systemic and individual harms caused by deceptive marketing. To further its mission, TINA.org performs in-depth investigations and files complaints with federal and state government agencies, among others, urging them to take action to put an end to various companies' deceptive marketing practices.[1]

As explained in detail in the attached Motion for Leave to File Brief as Amicus Curiae in Opposition to Proposed Settlement, TINA.org has an important interest and a valuable perspective on the issues presented in this case.[2]

BACKGROUND: PENDING CONSUMER PROTECTION LAWSUIT

In 2017, the FTC and the State of New York filed a consumer protection lawsuit against Quincy for making false and unsubstantiated claims that Prevagen improves memory, provides cognitive benefits, and is "clinically shown" to work. *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc*., No. 17-cv-00124, Complaint (S.D.N.Y. Jan. 9, 2017). According to federal and state regulators, Quincy, which engages in an extensive multimillion-dollar advertising campaign for Prevagen, relies on a study that failed to show that the supplement works better than a placebo on any measure of cognitive function.[3] *Id*. The regulators deemed the marketing scheme "a clear-cut fraud" that targets "vulnerable citizens like seniors in its advertising for a product that costs more than a week's groceries, but provides none of the health benefits that it claims." Press Release, FTC, New York State Charge the Marketers of Prevagen With Making Deceptive Memory, Cognitive Improvement Claims (Jan. 9, 2017).

Using complicated scientific terms to its advantage, Quincy then convinced the district court that the regulators were wrong, that clinical study results were not required

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[1] Since 2015, state and federal agencies have fined companies nearly $250 million based on TINA.org legal actions, and returned millions in ill-gotten gains to consumers.

[2] Neither party nor their counsel played any part in the drafting of this brief or contributed in any other way.

[3] The FTC and State of New York also allege that Quincy's own studies show that the primary ingredient in Prevagen, apoaequorin, is rapidly digested in the stomach like any other dietary protein and cannot cross the blood-brain barrier or enter the human brain.

to substantiate its health claims, including memory improvement claims. Specifically, the district court was persuaded that *post hoc* analyses – separate retrospective analyses performed after a study has concluded to try to find patterns that were not primary objectives of the study – are sufficient to substantiate health claims, and that study results are not required. *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc*., No. 17-cv-00124, Opinion and Order Granting Motion to Dismiss, Document 45 (S.D.N.Y. Sept., 28, 2017) (Stanton, J.).[4]

Determining that the district court erred in dismissing the action, the Second Circuit Court of Appeals vacated the judgment and remanded the case for further proceedings. *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc.,* 753 Fed. App. 87, 89 (2d Cir. 2019) ("The FTC has stated a plausible claim that Quincy's representations about Prevagen are contradicted by the results of Quincy's clinical trial and are thus materially deceptive in violation of the FTC Act and New York General Business Law."). The case is currently pending in the Southern District of New York.[5]

ARGUMENT

The purpose of a class-action lawsuit is to provide compensation to a large number of people – in this case, elderly consumers concerned about memory loss – who suffered similar harm as a result of an illegal or wrongful act. *What is a Class Action Lawsuit?,* ClassAction.org, https://www.classaction.org/learn/what-is-a-class-action. However, for the reasons articulated below, the proposed settlement in this case does the exact opposite.

[4] Of note, the *post hoc* analyses in this case only showed a difference on a subset of memory tasks in individuals with either minimal or no cognitive impairment.

[5] In December 2019, the Commission opposed a proposed settlement that would have resolved three of the class actions filed against Quincy because of the settlement's inadequate monetary relief, burdensome claims process, requirement that consumers affirmatively opt out of the settlement in order to protect their ability to obtain relief in the FTC/NY case or any other government action, and broad releases that are not tied to compensation, among other things. *See* Letter from Michelle Rusk, Attorney, FTC, to Hon. Louis J. Stanton, U.S.D.J. and Hon. Ronnie Abrams, U.S.D.J., Docket No. 17-cv-00124 (S.D.N.Y. Dec. 4, 2019). The very same issues, as well as others, are present here.

The Class Was Inappropriately Expanded to Favor and Protect Quincy

The proposed settlement agreement seeks to expand the class certified by this Court so that Quincy can prohibit every one of its customers from ever suing it for deceptively marketing Prevagen. "The more claim preclusion the defendant can get for its settlement dollars, the happier the defendant." Howard Erichson, *Aggregation as Disempowerment*, 92 Notre Dame L. Rev. 859, 895 (2016). And where, as here, broad release provisions are "coupled with a large broadening of the class description so that now a nationwide class of users is releasing its claims instead of a [single state]-only class, it appears that [the] Settlement is crafted to provide protection to [Defendant] and not to benefit the unnamed Plaintiffs." *Allen v. Similasan Corp*., 318 F.R.D. 423, 428 (S.D. Cal. 2016). Meanwhile, "[c]lass action lawyers lose nothing by agreeing to 'represent' a larger pool of claimants in the settlement. If the prospect of expansive preclusion lubricates the deal, then acceding to a broader class definition enriches class lawyers by hastening the settlement, sweetening the fees, or both." Erichson, 92 Notre Dame L. Rev at 895 (designating an expanded class definition as a red flag for an unfair settlement).

While the proposed settlement seeks to resolve seven independent lawsuits filed in five different states, a nationwide class has never been certified.[6] Accordingly, the proposed settlement class is a pre-certification class and the settlement should be scrutinized for evidence of collusion or other conflicts of interest. *In re Bluetooth Headset Prods. Liab. Litig.,* 654 F.3d 935, 946 (9th Cir. 2011). *See also Dennis v. Kellogg Co.,* 697 F.3d 858, 867 (9th Cir. 2012) ("[P]re-certification settlement agreements require that we carefully review the entire settlement, paying special attention to 'terms of the agreement contain[ing] convincing indications that the incentives favoring pursuit of self-interest rather than the class's interest in fact influenced the outcome of the negotiations.") (quoting *Staton v. Boeing Co.,* 327 F.3d 938, 960 (9th Cir. 2003)).

[6] Moreover, only Prevagen purchasers in one state have ever been certified as a class. *Racies v. Quincy Bioscience, LLC,* No. 15-cv-00292-HSG, 2017 U.S. Dist. LEXIS 206807, at *20 (N.D. Cal. Dec. 15, 2017) (class later de-certified after a mistrial).

Class Notice is Fatally Flawed

The proposed notice does not meet the requirements of Federal Rule of Civil Procedure 23. Rather than provide the best notice that is practicable under the circumstances, as is required, notice to class members who purchased Prevagen from one of over 50,000 retail stores across the country[7] will be solely in the form of internet notice.[8] This is problematic for two reasons. First, consumers who purchased Prevagen, and thus need to be notified of this settlement, are seniors.[9] And according to research, more than a quarter – 27 percent – of adults over the age of 65, as well as 12 percent of adults age 50 to 64, did not use the internet as of 2019. *Internet/Broadband Fact Sheet,* PEW RESEARCH CTR. (June 12, 2009) https://www.pewresearch.org/internet/fact-sheet/internet-broadband/. This means it is likely that hundreds of thousands of class members will not learn about this proposed settlement. This fact alone renders the notice fatally flawed. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314-15 (1950) (due process requires that notice to absent class members must be "the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection.'"); *Mullane*, 339 U.S. at 315 ("[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."). *See also* Liv Kiser & Joe Regalia, *Rule 23's New Amendments: A New Era for Class Actions?*, AMERICAN BAR ASSOCIATION (Feb. 15, 2019), https://www.americanbar.org/groups/business_law/

[7] https://www.prevagen.com/about-prevagen/.

[8] The subset of class members who purchased Prevagen online directly from Quincy will also get individualized notice.

[9] Quincy calls this the "Prevageneration." *See* https://www.prevagen.com/prevagen-reviews/ (last visited Oct. 23, 2020). *See also* Global Council on Brain Health (2019). "The Real Deal on Brain Health Supplements: GCBH Recommendations on Vitamins, Minerals, and Other Dietary Supplements," available at www.GlobalCouncilOnBrainHealth.org.

publications/blt/2019/02/rule-23/ ("notice by electronic means may make sense in a class action asserting technology-based claims. But such means might not be appropriate in other contexts, especially when (for example) the notice is being provided to a special population, such as the elderly."); Alexander W. Aiken, *Class Action Notice in the Digital Age,* 165 U. PA. L. REV. 967, 996 (2017) ("[I]n class actions composed primarily of persons sixty-five or older, the internet is likely a poor means to disseminate notice… Parties and courts would do better to use traditional means of notice in such actions.").

Second, class notice fails to inform class members of the pending FTC/New York State lawsuit against Quincy, and does not inform them that if they do not affirmatively opt out of the proposed settlement, they are forfeiting their ability to obtain any relief from the regulatory lawsuit. *See* Settlement Agreement and Release at ¶ VI ("Settlement Class fully release … any claim …[they] ever had, now have, may have, or hereafter can, shall or may ever have against the Discharged Parties in any court,…or before any governmental and/or administrative body…on the basis of, arising from, or relating to the claims alleged in the Action."); *see also* Letter from Michelle Rusk to Hon. Louis J. Stanton, U.S.D.J. and Hon. Ronnie Abrams, *supra* (FTC opposing similar settlement terms that require consumers to affirmatively opt out of the settlement in order to protect their ability to obtain relief in the FTC/NY case). Such a material omission on its own is a fatal flaw in the proposed settlement agreement. *See Mullane,* 339 U.S. at 313 (holding due process requires that absent class members receive notice of material terms of class settlements); *Nat'l Super Spuds, Inc. v. New York Mercantile Exch.,* 660 F.2d 9 (2d Cir. 1981) (finding notice of settlement to be deficient due to misleading statements and omissions concerning certain provisions of the agreement, and reversing the district court's approval of the notice); *Shin v. Plantronics, Inc.,* Case No. 18-cv-05626, 2019 U.S. Dist. LEXIS 102022, at *18-19 (N.D. Cal. June 17, 2019) (denying preliminary approval of a class-action settlement due, in part, to a notice that did not adequately explain to class members what rights they would be releasing if they did not opt out).

In short, due to the lack of adequate notice, the proposed settlement agreement should not be given final approval. Doing so would likely bind hundreds of thousands, if not millions, of class members to a settlement agreement that omits material terms and that they were never made aware of in violation of Rule 23 and the Due Process Clause.

The Injunctive Relief Condones Allegations of Wrongdoing

The proposed settlement agreement gives the false impression that Quincy is making material changes to its marketing of Prevagen when, in reality, the proposed settlement agreement permits Quincy to continue falsely marketing Prevagen as "clinically tested" and able to improve memory so long as it adds one of two false and legally ineffective disclaimers:

> Based on a clinical study of subgroups of individuals who were cognitively normal or mildly impaired. This product is not intended to diagnose, treat, cure, or prevent any disease.
>
> or
>
> Based on results from two subgroups of individuals who participated in a randomized double blind placebo controlled clinical study. Participants in the two subgroups were cognitively normal or mildly impaired. This product is not intended to diagnose, treat, cure, or prevent any disease.

Settlement Agreement and Release at ¶ IV.A.3.[10]

There are at least three independent problems with these proposed disclaimers. First, the proposed disclaimers indicate the memory improvement claims are based on "a clinical study" and "results." However, there is no dispute that Quincy's clinical study results failed to show a statistically significant improvement in the experimental group over the placebo group as a whole. Oral Argument at 20:08, Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc., 753 Fed. App. 87 (2019) (No. 17-3745), https://www.ca2.uscourts.gov/decisions/isysquery/d36f01b8-880b-4c40-8cb0-2f425ed7a7b7/741-750/list/ (Counsel for Quincy: "We don't dispute that if you look across the entire 211 people who completed the study there was no statistically significant difference but-" Court: "You couldn't. You couldn't dispute that." Counsel for Quincy: "And I'm not.") *See also* Sept. 28, 2017 Opinion and Order, ECF No. 45, at 10-11 ("It is common ground that the Madison Memory Study … failed to show a statistically significant improvement in the experimental group over the placebo group as a whole.").

[10] Of note, the proposed settlement agreement makes no mention of – and does not prohibit – the phrase "clinically tested," one of the claims alleged to be deceptive. Am. Compl. at ¶ 5; Settlement Agreement and Release at ¶ IV.A.3.

As a result of the failed study, Quincy's hired team of researchers went hunting through the data to see if they could find something to support Quincy's bold marketing message. To do so, the researchers conducted more than 30 *post hoc* analyses. *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc.,* 753 Fed. App. 87, 88 (2d Cir. 2019). However, *post hoc* analyses are not clinical study results. Rather, *post hoc* analyses are separate retrospective analyses of trial data performed after the study has concluded to try to find patterns that were not primary objectives of the study. *See* Henry L. Elliott, *Post Hoc Analysis: Use and Dangers in Perspective*, 14(2) J. Hypertension S21 (1996). Though important for generating hypotheses for future research, *post hoc* analyses are not definitive proof. *Id.* at S23 ("Post hoc analysis is of major importance in the generation of hypotheses. However, the hypothesis is created by the analysis and it has not been proved by any experiment….").[11] Thus, to disclose that Quincy's memory improvement claims are based on a clinical study or results is inaccurate and further propagates the deception at issue.

Second, even if the proposed disclaimers used accurate language and properly informed consumers that the marketing claims are based on *post hoc* analyses rather than clinical study results, such a disclaimer ("not supported by clinical study results") would completely contradict the primary marketing message ("improves memory"), and thus

[11] The results of *post hoc* analysis are not reliable and "should be viewed with considerable skepticism." Elliott, *supra,* at S21. Once the study results are sliced and diced in multiple overlapping ways, the researchers have decreased their sample sizes and simultaneously increased the chances of getting a false positive. *See* Michèle B. Nuijten, *Five Ways to Fix Statistics: Share Analysis Plans and Results,* Nature.com, Nov. 28, 2017; *see also* Peter Sleight, *Debate: Subgroup Analyses in Clinical Trials: Fun to Look At, But Don't Believe Them!, 1*(1) Curr. Control Trials Cardiovasc. Med. 25, 26 (2000) ("The play of chance is even more likely to produce spurious results when we examine subgroups in a trial, because of the diminished power to detect real differences, the increase in the variance around the mean estimate, and the increasing statistical likelihood of a false finding when many subgroups are examined."); Richard Peto, *Current Misconception 3: That Subgroup-Specific Trial Mortality Results Often Provide a Good Basis for Individualising Patient Care,* 104(7) Br J. Cancer 1057, 1057 (2011) ("[A]pparent differences between the proportional risk reductions in different subgroups of the patient in a trial (or even in a meta-analysis of many trials) are often surprisingly unreliable…The play of chance often produces qualitatively wrong answers in particular subgroups in trials (or in meta-analyses of trials) that could, if interpreted incautiously, lead to millions of people being treated inappropriately or untreated inappropriately.").

would be ineffective at dispelling the deception at issue. *See, e.g., Fed. Trade Comm'n v. Age of Learning, Inc.,* Docket No. 20-cv-07996 Stipulated Order (C.D. Cal. Sept. 8, 2020) ("The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication."); *Fed. Trade Comm'n v. Excellent Marketing Results, Inc.,* Docket No. 20-cv-10249 Stipulated Order (D. Mass. Feb. 19, 2020)(same); Lesley Fair, *What the Headline Giveth,* FTC BLOG (June 2, 2011, 2:36 PM), https://www.ftc.gov/news-events/blogs/business-blog/2011/06/what-headline-giveth.

Finally, even if the disclaimer used accurate language *and* was consistent with the primary marketing claim, it must also be understandable to the intended audience for it to be effective. *See* FTC .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING, https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf (a clear and conspicuous disclosure must be "understandable to the intended audience."). There can be no dispute that the important distinction between clinical study results and *post hoc* analyses is a complicated matter – one that even a federal district court grappled with and got wrong. *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc.,* 753 Fed. App. at 90. If a seasoned and highly educated United States District Judge was misled by Quincy's creative and persuasive wordsmithing of complicated scientific terminology, what hope is there for the average elderly consumer concerned about memory loss? Quite simply, there is none.

In short, the proposed injunctive relief does not remedy the false impressions about Prevagen that Quincy has disseminated for more than thirteen years. This is especially true when one considers the target audience for Prevagen.[12] Such subtle and

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[12] 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* Fed. Trade Comm'n 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

meaningless shifts in marketing have been flatly rejected and fiercely criticized in the past. *See, e.g., Pearson v. NBTY, Inc.,* 772 F.3d 778, 785 (7th Cir. 2014) (reversing approval of settlement agreement, stating "[t]he injunction actually gives [defendant] 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…purely cosmetic changes in wording."); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013) (reversing approval of settlement agreement, stating "[t]he parties and their counsel negotiated a settlement that…provides nearly worthless injunctive relief."); *Vassalle v. Midland Funding LLC,* 708 F.3d 747, 756 (6th Cir. 2013) (reversing approval of settlement agreement, stating "the relief provided to the unnamed class is perfunctory at best" because, among other things, "it does not actually prohibit [defendant] from creating false affidavits; rather, it only requires [defendant] to change its policies and provides oversight of this process.")

The Monetary Relief is Unfair to Class Members

The monetary relief process as proposed is patently unfair because it all but ensures that class members will receive next to nothing.

A. Compensation to Class Members is Unacceptably Disproportionate to the Harm Inflicted

While the proposed agreement seeks to bind all U.S. residents who purchased Prevagen for a more than 13-year period and preclude them from receiving any possible monetary relief in the FTC/NY case against Quincy, each class member may only seek damages for up to $70 despite the fact that a single month's supply of Prevagen can cost as much as $89.95. Am. Compl. at ¶ 21; Settlement Agreement and Release at ¶ IV.B. And obtaining $70 assumes the class member has (1) received notice of and understands the settlement terms, (2) has filed a valid claim, and (3) has retained proof of the

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the reader arises from the sum total of not only what is said but also of all that is reasonably implied."

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

purchases. Each requirement on its own is unlikely to happen,[13] leaving the combination of all three to the extremely rare case. This means that the vast majority of consumers will not obtain any money from the proposed settlement and, of those that do, most will not have receipts and therefore recover just $12, compensation equivalent to a handful of pills.[14] This is grossly insufficient when one considers that Prevagen, which had more than $165 million in sales revenue as of mid-2015, is a once-a-day supplement that is meant to be taken for extended periods of time. Am. Compl. at ¶ 21. In fact, according to customer reviews that Quincy currently features on its Prevagen website, there are consumers who have taken the supplement for more than a decade.[15] A consumer who

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[13] Receipts are likely to be discarded. *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.")

It is rare for class members to file claims. *See, e.g., Pearson,* 772 F.3d at 783 (indicating that the "very modest monetary award that the average claimant would receive," along with the notice and claim forms, "were bound to discourage filings."); *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 at 404 ("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").

[14] Prevagen costs $39.95-$89.95 per bottle of 30 capsules. Settlement Agreement and Release at ¶ IV.B.3.

[15] *See, e.g.,* https://www.prevagen.com/prevagen-reviews/yolonda-shares-her-story/ ("…Yolanda decided when she first saw televised reports on Prevagen that 'I should give my brain some help too, in addition to my body and my soul.' That was about 12 years ago and she's been using Prevagen ever since."); https://www.prevagen.com/prevagen-reviews/norm-shares-his-story/ ("We are still using it today, more than 10 years after that chance encounter in Baltimore."); https://www.prevagen.com/prevagen-reviews/trisha-shares-her-story/ ("Her discovery and use of the product goes back at least ten years when her only way to obtain Prevagen was by ordering it on-line."); https://www.prevagen.com/prevagen-reviews/les-shares-his-story/ ("Les knows the value

takes Prevagen daily for even one year spends, at a minimum, $479.40, excluding shipping and handling fees, all for a product that, according to the operative complaint, the FTC and the State of New York, has absolutely no effect on the brain as it is rapidly digested in the stomach and thus never crosses the blood-brain barrier. *See* Am. Compl. at ¶¶ 4-5, 10; *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc*., No. 17-cv-00124, Complaint at ¶ 31 (S.D.N.Y. Jan. 9, 2017).

B. Compensation to Class Members Is Unacceptably Disproportionate to the Proposed Attorneys' Fees

While class members are slated to receive a paltry fraction of what they have lost, if anything at all, the proposed agreement provides more than $4 million to plaintiffs' attorneys. *Id.* at ¶ V (In addition, the two Class Representatives will each receive $10,000). Given the meaningless injunctive relief, largely unobtainable and insufficient monetary compensation, and the overly broad and one-sided release of claims, such a large attorney award is not justified in this case. *See e.g., Dennis,* 697 F.3d at 861 (reversing district court's approval of a settlement that provided for, among other things, $2 million in attorneys' fees and a maximum of $15 to each class member, stating "[i]n a class action … any settlement must be approved by the court to ensure that class counsel and the named plaintiffs do not place their own interests above those of the absent class members."); *Redman v. RadioShack Corp*., 768 F.3d 622, 623 (7th Cir. 2014) (Posner, J.) (reversing district court's approval of settlement, the court stated "[w]e have emphasized that in determining the reasonableness of the attorneys' fee agreed to in a proposed settlement, the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation.").

C. Compensation to Class Members is Unacceptably Disproportionate to Quincy's Ability to Pay

In the July 10, 2020 Supplemental Submission to the Court in Support of Plaintiffs' Amended Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of the Settlement Class, plaintiffs' counsel states that the proposed monetary relief "was all done solely to facilitate Quincy's ability to pay for all

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of taking in every moment, so when his own memory began to slip a bit about five years ago as can happen with age, he decided to give Prevagen a try.")

of the associated relief under the proposed Settlement."[16] However, in June 2020, the very same month Quincy agreed to pay $4.2 million in attorneys' fees (and whatever minimal consumer compensation will result from the proposed settlement), the company spent $5.2 million in advertising for the supplement. Kantar Media, Prevagen Advertising Spend Data, 2019-2020, attached hereto as Exhibit A. In fact, Quincy spent more than $67 million advertising Prevagen just in 2019. *Id.* In short, any suggestion that the inadequate monetary relief in the proposed settlement is due to Quincy's limited ability to pay is simply disingenuous.

The Release Provision is Overly Broad and Patently Unfair

The release included in the proposed settlement agreement seeks to bind a nationwide class of three million consumers who purchased Prevagen over a more than thirteen year period from ever exercising any legal rights not only against Quincy, but against all entities related to Quincy yet not named in the complaint, including unspecified "all other entities or persons upstream or downstream in the production/distribution channels." Settlement Agreement and Release at ¶ VI. This means that if, for example, Walgreens – which was not sued in this case and therefore not a "Settling Defendant" bound by the proposed settlement agreement, but which is part of the downstream Prevagen distribution channel and thus released from liability – continues to advertise Prevagen as clinically shown to improve memory, as it currently does, three million Prevagen consumers may never do anything about it. *See* https://www.walgreens.com/store/c/prevagen-regular-strength-capsules/ID=prod6063898-product (last visited Oct. 23, 2020) ("…Clinically tested. In a computer assessed, double-blinded, placebo controlled study, Prevagen improved memory.")

Further, the class will also be giving up their right to recover any monetary relief from the pending FTC/New York AG lawsuit against Quincy.

> …Plaintiffs and the Settlement Class fully release and discharge the Settling Defendants…and any and all other entities or persons upstream and downstream

[16] In the same motion, plaintiffs' counsel also states that the proposed settlement "makes available monetary relief of up to $210 million dollars in value to the proposed class of three million consumers ($70 per class member with receipts and $12 per class member with no receipts.)." However, for the reasons explained above, Quincy will be paying out very little, if anything at all, to class members, making $210 million a preposterous figure.

> in the production/distribution channels…from all claims, demands, actions, and causes of action of any kind or nature whatsoever…known or unknown…foreseen or unforeseen…arising under common law, regulatory law, statutory law, or otherwise…or any claim that…Settlement Class Members ever had, now have, may have, or hereafter can, shall or may ever have against the Discharged Parties in any court, tribunal, arbitration panel, commission, agency, or before any governmental and/or administrative body…on the basis of, arising from, or relating to the claims alleged in the Action.

Settlement Agreement and Release at ¶ VI.[17] Incredibly, the proposed settlement strips millions of consumers of this right of recovery without providing any class member with any information about the FTC/NY lawsuit against Quincy or the fact that they must affirmatively opt out of this proposed settlement in order to protect their ability to obtain relief in that case or any other government action.

CONCLUSION

As this Court has acknowledged,

> [A]busive class action settlements in which plaintiffs receive …nominal damages while class counsel receive large fees are all too commonplace. The risk of such abusive practices is particularly pronounced in the class action context because these suits often involve numerous plaintiffs, each of whom has only a small financial stake in the litigation. As a result, few (if any) plaintiffs closely monitor the progress of the case or settlement negotiations, and these cases become "clientless litigation," in which the plaintiff attorneys and the defendants have "powerful financial incentives" to settle the "litigation as early and as cheaply as possible, with the least publicity." These financial incentives create inequitable outcomes.

Figueroa v. Sharper Image Corp., 517 F. Supp. 2d 1292, 1328-29 (S.D. Fla. Oct. 11, 2017), citing S. Rep. 109-14, at 32 (denying approval of a class-action settlement). This is precisely the scenario presented in the instant case. Three million American consumers – most elderly and concerned about memory loss – purchased a digestible protein capsule under the guise of a proven memory improvement pill, resulting in more than $165 million in sales revenue for Quincy as of mid-2015. Rather than appropriately notify

[17] In addition to giving up their right to sue Quincy for false marketing of Prevagen, class members are also waiving clear statutory rights they have under state laws, such as Section 1542 of the Civil Code of the State of California, which prohibits general releases such as this one from being extended to claims unknown at the time of executing the release, even if they would have materially affected the settlement. *See* Settlement Agreement and Release at ¶ IX.

consumers of this litigation and the pending FTC/NY action, and adequately compensate them for their losses, the proposed settlement merely requires Quincy to generously reward plaintiffs' counsel in exchange for a clear path on which to continue its deceptive marketing campaign. As such and for the reasons articulated above, TINA.org respectfully urges the Court to deny approval of the proposed settlement.

Dated: October 27, 2020

Respectfully,

By: /s/ *Hal K. Litchford*

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EXHIBIT A

Report Type: Trend
Report Completed: 9/25/2020 10:10:09 AM EDT
Reported Time Period: 1/1/2019-8/31/2020 (US Internet Display final dollars and impressions through 8/31/2020)

PARENT	ADVERTISER	MEDIA	TOTAL DOLS	2019 DOLS	JAN 2020 DOLS	FEB 2020 DOLS	MAR 2020 DOLS
Quincy Bioscience	Prevagen	Network TV	19246400	11522700	849800	1039900	1278600
Quincy Bioscience	Prevagen	Spot TV	13781390	8380641	752307	657799	660454
Quincy Bioscience	Prevagen	Cable TV	26079091	18811336	906174	1136490	1409218
Quincy Bioscience	Prevagen	Syndication	38977273	26094709	2325459	1408623	1845033
Quincy Bioscience	Prevagen	Magazines	1793592	1270132	34120	34120	136430
Quincy Bioscience	Prevagen	B-to-B	292899	205475	21856		21856
Quincy Bioscience	Prevagen	Network Radio	494602	250002	106000	46145	92455
Quincy Bioscience	Prevagen	Local Radio	813437	533485	34209	46692	80500
Quincy Bioscience	Prevagen	Int Display	42118	2690			133
Quincy Bioscience	Prevagen	Mobile Web	5776				
Quincy Bioscience	Prevagen	Online Video	35138	34152			
Quincy Bioscience	PrevagenOutlet.com	Int Search	36407	29134	586	2548	2321
GRAND TOTAL			101598123	67134456	5030511	4372317	5527000

 q_id: 5467432 Stradegy Online
Mobile Web dollars and impressions start April 1 2015
All media not complete for requested time period

APR 2020 DOLS	MAY 2020 DOLS	JUN 2020 DOLS	JUL 2020 DOLS	AUG 2020 DOLS
1137900	913000	1319300	1185200	0
450662	452134	534726	677077	1215590
734264	931917	1009763	1139929	0
1900028	1685322	2099380	1618719	0
34120	74120	136430	40000	34120
	21856	21856		
612	979	15802	52876	48282
570	44	15201	14047	9435
		1460	871	3444
986				
1818				
4260960	4079372	5153918	4728719	1310871