



June 3, 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 settlement agreement in *Aliano v. CVS Pharmacy, Inc.*, No. 16-2624.¹ The parties to the *Aliano v. CVS Pharmacy, Inc.* litigation contend that the proposed settlement agreement “readily meets the standard for preliminary approval.” This statement is false. Preliminary approval of a settlement agreement requires, among other things, that the proposed agreement contain “no obvious deficiencies.” *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).

Here, the proposed settlement agreement contains at least three “obvious deficiencies”: it (1) fails to require CVS to effectively change the marketing at issue in the complaint; (2) condones continuing violations of a 2014 Federal Trade Commission (“FTC”) Order; and (3) provides insufficient monetary relief to class members.

¹ If the proposed settlement agreement is granted preliminary approval, TINA.org intends to file a brief opposing final approval of the proposed agreement as *amicus curiae*, as well as the accompanying motion for leave, as it has done in numerous other federal court false advertising class-action lawsuits in the past.

I. The Proposed Settlement Fails to Require CVS to Effectively Change the Marketing at Issue

The essence of plaintiffs' complaint is that CVS deceptively markets a supplement containing DHA as a treatment for memory improvement and brain health without proper and adequate scientific evidence to substantiate the claims. *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.") The parties' proposed settlement, however, will not materially alter any of CVS's deceptive marketing tactics as alleged in plaintiffs' complaint. That is so because the proposed settlement agreement (1) only bans two specific phrases ("clinically shown to improve memory" and "clinically shown memory improvement") from the label of one product (Algal-900 DHA); (2) contains an ambiguous caveat that CVS cannot market Algal-900 DHA using "claims at issue in this Action" while simultaneously allowing CVS to advertise the product as "Memory Support" on its label; (3) omits any restrictions with respect to marketing not found on the label that may be used to promote the product (e.g., online product listing); and (4) does not include any other CVS supplements containing the same composition and ingredients.

In other words, this proposed settlement will effectively authorize CVS to:

- Claim – in any and all marketing for Algal-900 DHA, so long as it's not on the label – that the product is "clinically shown to improve memory," the very language proscribed from being used on the product label by the proposed settlement agreement.
- Claim on the label of Algal-900 DHA that the product has a positive impact on memory and cognitive functioning, so long as the exact phrases "clinically shown to improve memory" or "clinically shown memory improvement" are not used.²
- State on the label of any other brain supplement containing the same formulation as Algal-900 DHA that it is "clinically shown to improve memory." *See* Stipulation of Settlement, at ¶ 3.3 ("...CVS created new labels for the Algal-900 DHA Product and ceased receiving product with the old labels....CVS agrees that any new Algal-900 DHA Product it orders shall use the new labels...").³

² Though, as explained above, the proposed settlement agreement also bans from the product label "claims at issue in this Action" (Stipulation of Settlement, ¶ 3.3), this prohibition is so vague and ambiguous that it apparently allows CVS to claim on the Algal-900 DHA label that it provides "Memory Support" – a phrase that implies that the product has a positive impact on memory. *See* CVS.com product listing for Algal-900 DHA, <https://www.cvs.com/shop/vitamins/health-goals/memory-support/cvs-health-algal-900-dha-softgels-prodid-1070656?skuId=794904>.

³ Further, nothing in the proposed settlement agreement prevents CVS from coming out with a new supplement containing the very same formulation and calling it, for example, "Memory Boost," and making the very same unsubstantiated claims at issue in this case.

As the Seventh Circuit pointed out in *Pearson v. NBTY, Inc.*, the benefit of this type of inadequate injunctive relief – i.e., relief that immaterially or incompletely affects the marketing at issue – inures solely to defendants, not the consumers who were, and will continue to be, deceived. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 785 (7th Cir. 2014) (“The 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, which [defendant] in effect is seeking judicial approval of.”)

II. Approval of the Proposed Settlement Would Effectively Condone Continuing Violations of an FTC Order

The proposed settlement as currently drafted condones ongoing violations of an FTC Order. Specifically, in 2014, the FTC entered an Order against two companies marketing the same product at issue in this litigation and making the identical “clinically shown memory improvement” claims.⁴ The FTC Order enjoins those companies:

directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product” from, among other things, making “*any representation, in any manner...* that [the

⁴ The 2014 FTC action was against I-Health, Inc. and Martek Biosciences Corp. *In the Matter of I-Health, Inc. and Martek Biosciences Corp.*, Docket No. C-4486, Complaint, available at <https://www.ftc.gov/system/files/documents/cases/140821ihealthmartekcmpt.pdf>. Martek Biosciences merged into its successor, DSM Nutritional Products, LLC. *Id.* DSM Nutritional Products manufactures and supplies *life’sDHA*TM. See http://www.dsm.com/markets/foodandbeverages/en_US/products/nutritional-lipids/life-dha.html. *life’sDHA*TM, when sold by CVS, is called Algal-900 DHA, as the image below shows:



[CVS’s Algal-900 DHA photographed by TINA.org on June 1, 2016.]

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.

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> (the Order defines "Covered Product" as "any dietary supplement, food, or drug promoted to prevent cognitive decline or improve memory, or containing decosaheptaenoic acid ("DHA"), including, but not limited to, BrainStrong Adult.") This catch-all prohibition in the FTC Order, which is in effect for 20 years, not only bans the marketing at issue in the *Aliano* complaint, but leaves no room for the vast amount of flexibility provided for in the *Aliano* proposed settlement agreement.⁵

In short, approval of this proposed agreement would effectively condone ongoing violations of a federal government-imposed order, which this Court should not do. *See, e.g., NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d 1990) ("We cannot condone an order which may encourage illegal [] practices and a violation of New York's [] laws.")

III. The Proposed Settlement's Monetary Relief is Insufficient

Lastly, in addition to the deficient injunctive relief outlined in the proposed settlement, the monetary relief (i.e., refunds to class members who retained proof of purchase; \$4 in cash or \$6.50 in vouchers to members who did not retain proof of purchase) is not sufficient to properly compensate deceived consumers. The majority of class members will not have kept their receipts and thus will only be eligible for the \$4 cash/\$6.50 voucher option for a product that currently costs \$13.49 for 30 pills or \$30.99 for 90 pills.⁶ *See Pearson*, 772 F.3d at 783 (indicating that receipts for supplement purchases are likely to be discarded). And such a small monetary award makes it unlikely that many class members will file claims. *Id.* 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.") The result – if the proposed agreement is approved – is that CVS will be required to pay next to nothing to the class and \$100,000 to plaintiffs' attorneys in exchange for a settlement agreement that allows the company to continue deceiving consumers and violating the law.

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 compensate consumers.

⁵ TINA.org will be notifying the FTC of such violations.

⁶ CVS.com product listing for Algal-900 DHA, <https://www.cvs.com/shop/vitamins/health-goals/memory-support/cvs-health-algal-900-dha-softgels-prodid-1070656?skuId=794904>.

For these reasons, we respectfully urge this Court to deny preliminary approval of the proposed settlement agreement.

Respectfully,

/s/Sean M. Fisher

Sean M. Fisher (SF0251)
Brenner, Saltzman & Wallman LLP
sfisher@bswlaw.com

/s/Laura Smith

Laura Smith, Esq. (4708319)
Legal Director
Truth in Advertising, Inc.
lsmith@truthinadvertising.org

Attorneys for Truth in Advertising, Inc.