UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 19-22864-Civ-COOKE/GOODMAN

JUAN COLLINS and JOHN FOWLER,
on behalf of themselves and all others
similarly situated,

Plaintiffs,
v.

QUINCY BIOSCIENCE, LLC,
a Wisconsin limited liability company,

Defendant.
_____/

PLAINTIFFS' RESPONSE TO THE SOLE BRIEF OF AMICUS CURIAE TRUTH IN ADVERTISING, INC. [ECF No. 168]

Class Counsel are extremely proud to announce that out of the ***almost three million class members*** that all received the Court approved notice, there was only one (1) professional objector (which Class Counsel will address tomorrow), and one (1) amicus brief filed by the Truth in Advertising, Inc. ("TINA"). It is crucial to note that ***not one federal or state regulator*** has opposed and/or ***even questioned*** the Parties regarding the Settlement, after all being provided the appropriate notice pursuant to the Class Action Fairness Act. Even while there is a separate, pending litigation against Quincy Bioscience by the Federal Trade Commission regarding Prevagen, neither the Federal Trade Commission nor the New York Attorney General, have opposed any of the terms of this Settlement, including the economic and injunctive relief.

FACTUAL BACKGROUND OF TINA

Class Counsel has much respect for TINA, and the role it plays in trying to help curb false advertising and deceptive marketing practices. TINA has been attempting to ban all sales of Prevagen for almost seven years; writing numerous articles, filing complaints with the FTC, filing amicus briefs in the FTC litigation and sending letters to advertisers. https://www.truthinadvertising.org/?s=prevagen.

Class Counsel conducted a very constructive and productive call with TINA's General Counsel, prior to TINA's filing the amicus brief. Class Counsel certainly agreed with many of the allegations originally raised by TINA over the years about Prevagen, but in our telephone call, we all agreed that as Class Counsel, we not only serve as zealous advocates for the class, but we also need to represent the best interests of the class, and thus weigh the risks of continued litigation against any possible relief that we are able to obtain for the class. TINA were very appreciative and recognized such differences and thus explained that they were not going to seek to intervene in this case in order to appeal any Settlement that is eventually approved by the Court, but that they wanted to continue to raise their specific concerns about Prevagen and show their support for the pending FTC litigation. Class Counsel again applauds TINA's pro-consumer efforts, but also notes that we have reached an arm's length nationwide settlement that will directly benefit almost three million consumers who have not been satisfied with the product, and provides for injunctive changes to provide all consumers with more information going forward.

While some of TINA's written criticisms of this Settlement relate to the ultimate merits of this action, which would be decided at a jury trial and any subsequent appeals, TINA admitted on the call that it was not their job nor responsibility to fairly assess the Settlement in weighing the significant monetary and injunctive relief secured for Settlement Class Members against the risks of continued litigation. This is especially in light of the mistrial declared in the California *Racies* Prevagen action, due to a jury deadlock after a full trial on the merits of the same claims and evidence before this Court. Simply put, having Quincy agree to simply stop selling Prevagen was not a realistic outcome that could have been achieved through the Settlement process in this matter.

There is no dispute that the best notice practicable was approved by this Court and provided to Settlement Class Members of this Settlement, which was achieved only after months of hard-fought, arms'-length negotiations before a distinguished and highly-qualified mediator,[1] provides real and substantial benefits to Settlement Class Members, is fair,

[1] TINA certainly does nothing to rebut the presumption of "good faith" in the negotiating process that arises where, as here, the parties have negotiated the Settlement before a neutral third-party mediator. *Braynen v. Nationstar Mortgage*, LLC, 14-CV-20726, 2015 WL 6872519, at *10 (S.D. Fla. Nov. 9, 2015) (Goodman, M.J.) (citing *Saccoccio*, 297 F.R.D. at 692). Indeed,

adequate and reasonable in light of the risks of continued litigation, and does nothing to hinder the pending FTC Prevagen Action. The Court should therefore overrule the sole amicus brief filed by TINA, especially considering that three million consumers have approved the proposed Settlement,[2] and grant final approval of the proposed Settlement.

ARGUMENT

There is no dispute that TINA is ***not*** a Settlement Class Member and, therefore, lacks standing to object to the Settlement. *Braynen*, 2015 WL 6872519, at *11 (explaining "non-class members are not permitted to assert objections to a class action settlement") (citing *Ass'n For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 473 (S.D. Fla. 2002)); *see also San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1033 (N.D. Cal. 1999) (noting that "an amicus curiae is not a party to the litigation and technically has no standing to object to the settlement"). Nevertheless, TINA's specific complaints about the Settlement lack merit and the Court should reject them and grant final approval of the Settlement.

I. The Class Was Appropriately Expanded.

There is nothing inappropriate about expanding the scope of a class action to nationwide where the parties negotiate for nationwide benefits. *See Poertner v. Gillette Co.*, 618 Fed. Appx. 624, 625 (11th Cir. 2015) (granting final approval of settlement where, "under the settlement agreement, Poertner filed a third amended complaint that gave the class nationwide scope"); *see also Fresco v. Auto Data Direct, Inc.*, 0361063CIV-MARTINEZ, No. 2007 WL 2330895, at *2 (S.D. Fla. May 14, 2007) (Martinez, J.) (granting preliminary approval of settlement and explaining that "[b]ecause the injunctive relief contemplated by the Settlement Agreement provides for nationwide benefits, the Settlement Agreement expands the Florida class to a nationwide class"). Indeed, this Settlement brought together all of the plaintiffs and counsel from six (6) other pending consumer class actions regarding Prevagen, each of which sought certification of nationwide and various state classes. This Court found that the factors of Rule 23 were met in a litigation context when it recommended certification of a Florida state class of Prevagen purchasers before the Parties attended

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"Parties colluding in a settlement would hardly need the services of a neutral third party to broker their deal." *Id.* (citing *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001)).

[2] Class Counsel will address tomorrow the sole objection by serial objector Mr. Steve Helfand, who is not a member of the class and thus does not even have standing to object.

mediation to negotiate this Settlement. [ECF No. 119]. This Court further appropriately certified the nationwide settlement class of consumers when preliminarily approving the settlement in this action. [ECF No. 158]. As the Settlement Class was appropriately expanded, the Court should reject TINA's arguments and finally approve the Settlement.

II. The Best Practicable Notice Was Provided to the Settlement Class.

In this matter, the Court approved Notice Administrator created a Notice plan to disseminate the best possible notice to the specific class members in this case. Notice was mailed directly to 140,202 names in the Class List provided by Quincy's counsel, and was emailed to 33,895. ECF No. 162-2, ¶¶ 6–10. Over 110 million internet impressions were served. *Id.*, ¶ 11; *see also* Supplemental Declaration of Jennifer Thornberry Re: Notice Procedures, attached as **Exhibit A**. These impressions were targeted to reach the appropriate demographic of class members as they appeared on websites including but not limited to, www.AARP.com, www.usatody.com, www.aol.com, www.huffingtonpost.com, www.investing.com, and www.thehill.com. Ex. A, ¶ 2. Moreover, TINA did Class Counsel and the Class a great favor, by publicizing all about this proposed Settlement on its own platforms and website, which greatly assisted in making sure that all of their contributors and readers were made fully aware of the Settlement and the Claims Process. *See* https://www.truthinadvertising.org/prevagen-products/.

The Court-approved Settlement Administrator maintained a dedicated settlement website and telephone hotline. ECF No. 162-2, ¶¶ 12–13. Overall, the Settlement Administrator's plan provided notice to 70% of the Settlement Class. Ex. A, ¶ 3. This comports with constitutional due process.

"[N]otice plans estimated to reach a minimum of 70 percent are constitutional and comply with Rule 23." *Edwards v. Nat'l Milk Producers Fed'n*, 11-CV-04766-JSW, 2017 WL 3623734, at *4 (N.D. Cal. June 26, 2017) (citing Federal Judicial Center, *Judge's Class Action Notice and Claims Process Checklist and Plain Language Guide* 2010 ("The lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70-95%.")). Courts in this District have followed this benchmark in approving class action notice plans. *Mahoney v. TT of Pine Ridge, Inc.*, 17-80029-CIV, 2017 WL 9472860, at *3 (S.D. Fla. Nov. 20, 2017) (Middlebrooks, J.) (finding "notice to the class was reasonable and the best notice

practicable under the circumstances" where settlement administrator estimated that notice "reached approximately 70.1% of the total Settlement Class"). Clearly, notice was designed to reach an appropriate amount of Settlement Class Members.

TINA references a Pew Research study they attach, which actually greatly supports that the ***vast majority of older adults use the internet*** (as of 2019, 88% of adults 50–64, and 73% of adults 65+). For adults 65+, internet usage increased to 73% in 2019 from 66% in 2018, a significant increase.[3] A similar increase from 2019 to 2020 would put the percentage over 80%, but, especially with more people staying at home during the coronavirus pandemic, that number has likely increased even more significantly during 2020.[4] Thus, the notice plan is constitutional and complies with Rule 23's requirements, the Court should reject TINA's arguments and finally approve the Settlement.

III. The Settlement Relief is Fair, Adequate and Reasonable.

TINA raises various complaints as to the monetary and injunctive relief secured in this Settlement, all of which merely amounts to an argument that the Settlement "might have" provided more. However, as this Court is well aware, a generic desire to receive "more" money or a "better" result is not a proper objection. *See Braynen*, 2015 WL 6872519, at *12 (citing *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1382 (S.D. Fla. 2007) (overruling objections of class members who "desired to 'have a better deal'")). "Such objections lack merit because the objectors could simply opt out and file their own individual lawsuits if they have concerns about releasing their claims." *Id*. (citing *Diaz v. HSBC USA, N.A.*, No. 13-21104, 2014 WL 5488161, at *3 (S.D. Fla. Oct. 29, 2014)).

Here, the Parties have fully briefed the benefits the Settlement affords to the Settlement Class—including in supplemental briefing the Court specifically requested to evaluate the proposed injunctive relief before preliminarily approving the Settlement—which Plaintiffs expressly incorporate herein. *See* [ECF Nos. 147, 154, 155, 162]. The fact that TINA would prefer greater cash benefits for the class or different injunctive relief "has no bearing on whether the terms of the Settlement Agreement itself are fair and reasonable." *Hall v. AT&T*

[3] Adults between the ages of 50 and 64 showed an increase as well.

[4] *See, e.g.,* https://www.forbes.com/sites/markbeech/2020/03/25/covid-19-pushes-up-internet-use-70-streaming-more-than-12-first-figures-reveal/?sh=16ffa3a3104e ("COVID-19 Pushes Up Internet Use 70%")

Mobility LLC, No. 07-5325(JLL), 2010 WL 4053547, at *8 (D.N.J. Oct. 13, 2010). The latter determination must be made based on the *Bennett* factors[5] as Plaintiffs detailed in their papers in support of final approval, which overwhelmingly favor approval of the Settlement in this case. [ECF No. 162].

Even TINA agrees that there was certainly no guarantee that Plaintiffs and Settlement Class Members could ever obtain ***any*** relief, let alone the significant monetary and injunctive relief afforded through this Settlement, had litigation continued. Indeed, the *Racies* court declared a mistrial after a full jury trial presenting these same arguments and evidence because the jury was deadlocked over whether the California *Racies* class should be entitled to any relief. The *Racies* court then decertified the class. This Settlement eliminates the substantial uncertainties of continued litigation and a trial on the merits while securing substantial monetary relief and meaningful injunctive relief for the Class. It also provides this relief now instead of after years of protracted litigation, trial and any appeals.

In other words, TINA in their papers overlook that a "compromise is the essence of a settlement. The trial court should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." *Braynen*, 2015 WL 6872519, at *12 (quoting *Cotton*, 559 F.2d at 1330). A class settlement can thus "be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery." *Id.* (citing *Behrens*, 118 F.R.D. at 542).

As the Settlement relief is fair, adequate and reasonable, the Court should reject TINA's arguments and finally approve the Settlement.

IV. Class Counsel's Requested Fees are Reasonable.

TINA's complaints about Class Counsel's requested fee is "based on [its] flawed valuation of the settlement pie: limiting the monetary value to the amount of [Quincy's] actual payments to the class along with excluding the substantial nonmonetary benefit." *Poertner v.*

[5] Namely, (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Braynen*, 2015 WL 6872519, at *6 (citing *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)).

Gillette Co., 618 Fed. Appx. 624, 630 (11th Cir. 2015); *Braynen*, 2015 WL 6872519, at *2 (finally approving Class Counsel fee award based on amount "*made available* to the Class by the Settlement (and an even lower percentage when taking into account the value of the injunctive relief)"); *see also Lee v. Ocwen Loan Servicing, LLC*, No. 14-cv-60649, 2015 WL 5449813, at *18 (S.D. Fla. Sept. 14, 2015) (Goodman, M.J.) ("A settlement's fairness is judged by the opportunity created for the class members, not by how many submit claims.").

While Class Counsel provided the conservative estimate of $36 million as the amount of monetary relief made available to the class (based on 3 million Settlement Class Members each making a claim for $12 with no proof of purchase), the ***total*** amount made available is much higher because each Settlement Class Member is entitled to make a claim with proof of purchase for up to $70. Thus, it can hardly be said that a fee award constituting 12% of the amount made available to the class at the low end is in any way excessive or unreasonable, especially given that the Prevagen Actions have been litigated in various courts across the country for years and could continue by almost eight different law firms across the country.

For these reasons, and the factors enumerated in the Motion for Final Approval [ECF No. 162 at 15-20], Class Counsel's fee request is reasonable. The Court should reject TINA's arguments and finally approve the Settlement.

V. The Settlement's Standard Class Action Release is Fair and Reasonable.

The Release provision of the Settlement is a standard class action settlement release provision that does nothing more than finally resolve the dispute between Quincy and Settlement Class Members that gave rise to the Prevagen Actions:

> Upon the Effective Date, and except as to such rights or claims as may be created by this Agreement, and in consideration for the Settlement benefits described in this Agreement, Plaintiffs and the Settlement Class fully release and discharge the Settling Defendants, and all of their present and former parent companies, subsidiaries, special purpose entities formed for the purpose of administering this Settlement, shareholders, owners, officers, directors, employees, agents, servants, registered representatives, attorneys, insurers, affiliates, and successors, personal representatives, heirs and assigns, retailers, suppliers, distributors, endorsers, consultants, and any and all other entities or persons upstream and downstream in the production/distribution channels (together, the "Discharged Parties") from **all claims, demands, actions, and causes of action of any kind or nature whatsoever**, whether at law or equity, known or unknown, direct, indirect, or consequential, liquidated or unliquidated, foreseen or unforeseen, developed or undeveloped, arising under common law, regulatory law, statutory law, or otherwise, whether based on

> federal, state or local law, statute, ordinance, regulation, code, contract, common law, or any other source, or any claim **that Co-Lead Class Counsel, Plaintiffs' Counsel, Class Representatives, Additional Plaintiffs or Settlement Class Members ever had**, now have, may have, or hereafter can, shall or may ever have against the Discharged Parties in any other court, tribunal, arbitration panel, commission, agency, or before any governmental and/or administrative body, or any other adjudicatory body, on the basis of, **arising from, or relating to the claims alleged in the Action and the Prevagen Actions**.

See Settlement Agreement, Section VI (emphasis added).

First, the claims alleged in this and the other Prevagen Actions are solely consumer protection claims for economic damages arising from Prevagen being an allegedly worthless product. The release therefore does not encompass personal injury or property damage claims, for instance. "In other words, the Settlement release here is specific to the subject matter addressed in this Action . . . and does not contemplate a general release of any and all claims of any kind against these Defendants." *Burrow v. Forjas Taurus S.A.*, 16-21606-CIV, 2019 WL 4247284, at *5 (S.D. Fla. Sept. 6, 2019).

While TINA criticizes the Settlement for not mentioning the pending FTC enforcement action, that is of no moment as the Settlement could not release the claims at issue in that action, which involve lack of substantiation of Prevagen's advertising claims. *Racies v. Quincy Bioscience, LLC*, 15-CV-00292-HSG, 2015 WL 2398268, at *3 (N.D. Cal. May 19, 2015) (dismissing lack of substantiation claims and explaining that "[p]rivate plaintiffs are not authorized to demand substantiation for advertising claims") (citing *Nat'l Council Against Health Fraud Inc. v. King Bio Pharms. Inc.,* 107 Cal.App. 4th 1336, 1345 (2003)); *see also* [ECF No. 27] at 5–6 (Plaintiffs' opposition to Quincy's motion to dismiss making clear that this action does not and cannot include claims for lack of substantiation). While it is true that Settlement Class Members who do not opt out will be precluded from bringing their own separate actions for economic damages arising from their purchases of Prevagen, they are not precluded from bringing actions for personal injury or for participating in receiving any relief obtained by the FTC on the claims in their enforcement action. Defendants have made no argument otherwise.

TINA's complaints about the Settlement stems from the FTC's objection to a prior proposed settlement in the SDNY Actions (*Vanderwerff*, *Spath*, and *Karathanos*), which expressly required the FTC to define, agree to and approve injunctive relief in that settlement.

See [ECF No. 95-5] (December 4, 2019 letter from Michelle Rusk, counsel for FTC, filed in the SDNY Actions, objecting to that proposed settlement). ***Notably, the FTC has not similarly provided any input regarding this Settlement,*** let alone any objections, and it is frankly not for TINA to object on behalf of the FTC, who is clearly able to object when it finds a proposed settlement objectionable. It is telling that the FTC was provided with notice of this settlement has not objected to or opposed this resolution in any way. Nor has any other state or federal regulator.

CONCLUSION

Plaintiffs respectfully request that this Honorable Court reject TINA's arguments and enter an Order granting final approval of the Settlement.

Dated: November 9, 2020 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 9, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court, Southern District of Florida, by using the CM/ECF system, which will serve a copy on all counsel of record.

By: /s/ *Adam M. Moskowitz*
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