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## Prevagen Maker Must Face Certified Class In Labeling Suit

By **Rachel Graf**

Law360, New York (December 18, 2017, 2:44 PM EST) -- A California federal judge on Friday certified a class of California consumers accusing a biotechnology company of falsely representing that its Prevagen supplement improves memory and supports brain function.

U.S. District Judge Haywood S. Gilliam Jr. found that the class meets the numerosity, commonality, typicality and adequacy requirements of class actions, and appointed named plaintiff Phillip Racies as class representative and the law firms Bonnett Fairbourn Friedman & Balint PC and Siprut PC as class counsel in the suit against Quincy Bioscience LLC. Racies' claims are typical of those of the class because he relied at least partly on the alleged misrepresentations when buying Prevagen, the court said.

"Because Prevagen is not marketed for uses other than improving brain health and memory, it follows that representations about these purported benefits were a 'substantial factor' in plaintiff's — and all consumers' — purchasing decision," the court said.

Labels for Prevagen indicate that the product has been clinically tested to improve memory and support "healthy brain function," a "sharper mind" and "clearer thinking," and will "help with mild memory problems associated with aging" and "improve memory within 90 days," according to court documents. But Racies alleges in his 2015 suit that the product's only reported active ingredient, a jellyfish protein called apoaequorin, is destroyed by the digestive system or occurs in too small an amount to affect memory or brain function, making the representations misleading.

The court on Friday approved the certification of California consumers who purchased Prevagen Regular Strength, Prevagen Extra Strength or Prevagen Mixed Berry Chewable within the statute of limitations.

Racies had attempted to include two other products, Prevagen Extra Strength Chewable and Prevagen Professional Strength, that weren't listed in the complaint, but the court determined that their addition in the class certification motion was too late.

Quincy **had argued** that the court should deny class certification because customers might have purchased Prevagen for reasons other than the alleged misrepresentations, such as the fact that the product was clinically tested.

But the court found that the labeling about the product's purported benefits would be material to a reasonable consumer, and all of the customers who bought the product would have been exposed to it.

"The predominant issue in this case is whether such representations are false or misleading, not whether consumers were also persuaded to purchase Prevagen because these representations were substantiated by clinical testing," the filing said.

The court further rejected Quincy's arguments that dissatisfied customers could simply return the product for a refund, noting that a refund isn't equivalent to adjudication.

Counsel for the parties didn't respond Monday to requests for comment.

Quincy is represented by Matthew R. Orr, William P. Cole and Joshua G. Simon of Call & Jensen.

Racies is represented by Patricia N. Syverson, Manfred P. Muecke and Elaine A. Ryan of Bonnett Fairbourn Friedman & Balint PC and Stewart M. Weltman of Siprut PC.

The case is Phillip Racies v. Quincy Bioscience LLC, case number 15-cv-00292, in the U.S. District Court for the Northern District of California.

--Editing by Dipti Coorg.

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