25-12(L)

25-16(CON), 25-274(XAP)

United States Court of Appeals for the Second Circuit

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES,
Attorney General of the State of New York,

Plaintiff-Appellee-Cross-Appellant,

v.

QUINCY BIOSCIENCE HOLDING COMPANY, INC., a corporation,

Defendants-Appellants-Cross-Appellees,

(*caption continues on inside front cover*)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR PEOPLE OF THE STATE OF NEW YORK

LETITIA JAMES
Attorney General
State of New York
Attorney for People of the State of
New York
28 Liberty Street
New York, New York 10005
(212) 416-6312

BARBARA D. UNDERWOOD
Solicitor General
JUDITH N. VALE
Deputy Solicitor General
SARAH COCO
Assistant Solicitor General
of Counsel

Dated: July 17, 2025

(*caption continued from front cover*)

QUINCY BIOSCIENCE, LLC, a limited liability company, PREVAGEN, INC., a corporation doing business as Sugar River Supplements, QUINCY BIOSCIENCE MANUFACTURING, LLC, a limited liability company, MARK UNDERWOOD, individually and as an officer of Quincy Bioscience Holding Company, Inc., Quincy Bioscience, LLC, and Prevagen, Inc.,

Defendants-Appellants-Cross-Appellees,

MICHAEL BEAMAN, individually and as an officer of Quincy Bioscience Holding Company, Inc., Quincy Bioscience, LLC, and Prevagen, Inc.,

Defendant.

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Cases **Page(s)**

Laws **Page(s)**

Federal

State

Rule

Miscellaneous Authorities **Page(s)**

PRELIMINARY STATEMENT

For years, Quincy Bioscience and its president, Mark Underwood, used misleading advertisements to deceive consumers about the dietary supplement Prevagen. They claimed that Prevagen improves memory and cognition, reduces memory problems associated with aging, and has been clinically shown to have those beneficial health effects—despite lacking scientific evidence to support those claims.

In 2017, the State of New York and the Federal Trade Commission (FTC) commenced this civil enforcement action challenging Quincy's false and misleading advertising. The State alleged that eight statements used in Quincy's advertising violate state law, specifically, the prohibition of business fraud found in Executive Law § 63(12), and the prohibitions of deceptive business practices and false advertising found in General Business Law (GBL) §§ 349 and 350. After a twelve-day trial in the U.S. District Court for the Southern District of New York (Stanton, J.), a jury found Quincy liable for § 63(12) fraud for all eight of the challenged statements and liable for GBL violations for two of the challenged statements. The district court entered an injunction prohibiting Quincy from

using the eight statements and other similar statements in its marketing of Prevagen.

On defendants' appeal, this Court should affirm the district court's judgment of liability and entry of an injunction. The district court correctly upheld the jury's verdict finding liability for each of the challenged claims under § 63(12). The district court properly concluded that § 63(12) creates a separate cause of action for business fraud that does not require a violation of another statute or common law duty. Decades of New York precedent, and the statute's text, history, and purpose establish that § 63(12) creates a separate cause of action for fraud. The district court also properly upheld the jury's verdict finding liability under GBL §§ 349 and 350 as to two of the challenged statements, which the trial evidence demonstrated are materially misleading. Finally, this Court should affirm the district court's entry of an injunction, which provides defendants with ample notice of the conduct that is prohibited.

On the State's cross-appeal, this Court should reverse the district court's determination after trial that six of the eight challenged statements did not violate GBL §§ 349 and 350. The jury correctly found these statements misleading but mistakenly concluded that there was not

sufficient evidence that they would be material to a reasonable consumer. This Court should find that evidence at trial conclusively established that these six statements—just like the two statements for which the jury found liability—are both material and misleading.

This Court should also reverse the district court's pretrial dismissal of the State's claims against Underwood for lack of personal jurisdiction. Quincy engaged in deceptive advertising to New York consumers under Underwood's control and for his benefit, conduct that satisfies New York's long-arm statute. Finally, this Court should remand with instructions to permit briefing and a hearing on the State's request for monetary relief, which the district court erroneously denied without providing the State any opportunity to present evidence to support its request. The award of disgorgement and statutory penalties is routine where, as here, such relief is necessary to deter future violations.

ISSUES PRESENTED

1. Whether the district court properly upheld the jury's finding of liability under Executive Law § 63(12) as to all eight challenged statements because § 63(12) creates a cause of action for repeated and persistent fraud in the transaction of business.

2. Whether (i) the district court properly denied Quincy's motion for judgment as a matter of law as to two of the challenged statements for which the jury found liability under GBL §§ 349 and 350; and (ii) the district court should have granted the State's motion for judgment as a matter of law as to the six statements for which the jury did not find liability under GBL §§ 349 and 350.

3. Whether the district court had personal jurisdiction over Underwood for purposes of adjudicating the State's claims against him, and therefore erroneously dismissed those claims.

4. Whether the district court's injunction falls within its broad equitable discretion and is not vague.

5. Whether the district court erred in summarily denying the State's request for monetary relief without granting the State the opportunity to present evidence and without explaining its reasoning.

STATEMENT OF THE CASE

A. Statutory Background

New York's Legislature has enacted several statutes authorizing the State to bring enforcement actions to protect the public from deceptive practices and false advertising in business. At issue here are Executive Law § 63(12) and GBL §§ 349 and 350.

Executive Law § 63(12): The Legislature enacted Executive Law § 63(12) to protect the honesty and integrity of commercial marketplaces in New York. *See People v. Coventry First LLC*, 52 A.D.3d 345, 346 (1st Dep't 2008), *aff'd*, 13 N.Y.3d 108 (2009). To accomplish this public purpose, § 63(12) authorizes the State (through the New York Attorney General) to bring civil enforcement proceedings seeking equitable and monetary relief "[w]henever any person shall engage in repeated fraudulent *or* illegal acts or otherwise demonstrate persistent fraud *or* illegality in the carrying on, conducting or transaction of business." Executive Law § 63(12) (emphasis added). The statute thus covers two different types of business misconduct: fraud and illegality.

First, § 63(12)'s fraud prong broadly prohibits the use of "any device, scheme or artifice to defraud and any deception, misrepresenta-

tion, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." The fraud prong applies whether or not the conduct is also rendered illegal by another statute or common law. *See People v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409, 417-18 (1st Dep't 2016).

To establish § 63(12) fraud, the State must prove that the targeted act occurred in business, was repeated or persistent, and "has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *People v. General Elec. Co.*, 302 A.D.2d 314, 314 (1st Dep't 2003). The State is not required to prove the elements of common law fraud, such as the materiality of challenged statements or actual reliance on those statements by victims, to establish fraud in violation of § 63(12). *Trump Entrepreneur Initiative*, 137 A.D.3d at 417. The broad sweep of § 63(12) fraud reflects the Legislature's purpose "to protect not only the average consumer, but also the ignorant, the unthinking, and the credulous." *People v. Northern Leasing Sys., Inc.*, 193 A.D.3d 67, 75 (1st Dep't 2021) (quotation marks omitted).

Second, § 63(12)'s separate "illegality" prong allows the State to take action against persistent or repeated violations of federal, state, or

local laws in business, including common law violations. *See State v. Princess Prestige Co.*, 42 N.Y.2d 104, 106-07 (1977). To establish an illegality claim, the State must prove the elements of the underlying cause of action. For example, to establish a claim based on Personal Property Law § 428, the State would be required to show that the defendant denied its customers the right to cancel a sale, as required by that statute. *See id.* at 106.

Enforcement actions under § 63(12) may be brought only by the State. The State may bring distinct causes of action for § 63(12) fraud and illegality in a single case. *See, e.g.*, *People v. American Motor Club, Inc.*, 179 A.D.2d 277, 282 (1st Dep't 1992). The State may bring an enforcement action not only against a business entity, but also against the officers or directors of the business if they participated in the misconduct or had actual knowledge of it. *See People v. Apple Health & Sports Clubs, Ltd.*, 206 A.D.2d 266, 267 (1st Dep't 1994).

General Business Law §§ 349 and 350: The Legislature has also enacted consumer-protection laws authorizing both the State and individuals to seek equitable and monetary relief for violations. As relevant here, GBL § 349(a) prohibits "[d]eceptive acts or practices in the conduct

of any business, trade or commerce or in the furnishing of any service in this state." And GBL § 350 prohibits "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service."

Unlike § 63(12) fraud, the charged conduct under these laws must be "consumer-oriented" and there must be proof of materiality, i.e., conduct that is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25-26 (1995). However, proof of intent to defraud and reliance by individual consumers are not required. *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000).

The State may bring a § 63(12) fraud claim and claims under GBL §§ 349 and 350 based on the same conduct. The elements of liability for each claim differ. *See, e.g.*, *General Elec. Co.,* 302 A.D.2d at 314-15.

B. Factual Background

1. Mark Underwood founds Quincy to manufacture Prevagen.

Mark Underwood is the cofounder, president, chief operating officer, and largest individual shareholder of Quincy. (Joint Appendix (J.A.) Tr._126-127, 131.) In 2004, Underwood cofounded Quincy to investigate the use of apoaequorin, a protein that allows certain jellyfish to glow in the dark, to improve brain health. (J.A. Tr._135, 169-170.) Underwood came up with the idea to use apoaequorin based on research he did as a hobby while completing an undergraduate degree in psychology. (J.A. ECF_300_2, Tr._158, 171-172.) Quincy began selling Prevagen, a nutritional supplement that uses apoaequorin as its active ingredient, in 2007. (J.A. Tr._147, 753.)

2. Quincy and Underwood market Prevagen using false and misleading statements.

In 2012, Quincy began marketing Prevagen with the tagline "Improves Memory," claiming that the supplement helps with memory loss associated with aging. (J.A. PX_587_5-6, PX_597_16-17, Tr._96-98.) Underwood played a leadership role in Quincy's campaign to market Prevagen for memory loss, developing messaging about Prevagen's

effectiveness, participating in decisions about how to market Prevagen, and personally appearing in Quincy's television infomercials. (*See* J.A. ECF_240-2_64, ECF_240-6_8-9, ECF_240-9_16-17, Tr._127-128, 156-159.)

Quincy's and Underwood's marketing claims about Prevagen's effectiveness at fighting memory loss were based primarily on a single 2012 study conducted by Quincy, the Madison Memory Study. (*See* J.A. Tr._70-71.) This study tested 218 participants, ages forty to ninety-one, who self-reported memory concerns. (J.A. Tr._183.) Participants were sorted into a treatment group, who took Prevagen, and a control group, who took placebo pills. (J.A. Tr._185.) They were then tested on nine computer-assessed cognition tasks on the first day of the study, and at eight-, thirty-, sixty-, and ninety-day intervals. (J.A. Tr._195; *see* J.A. JX_31_2-4.)

According to a clinical trial synopsis prepared by Quincy, "no statistically significant results were observed over the entire study population" when comparing the treatment and placebo groups for each of the nine tasks. (J.A. JX_31_5.) Quincy nonetheless claimed in marketing statements that the study showed Prevagen was effective at

preventing memory loss. See *infra* at __. For example, Quincy's marketing stated that "[i]n a computer assessed, double-blinded, placebo controlled study, Prevagen improved memory." (J.A. PX_587_25; *see also* J.A. ECF_1_15, J.A. Tr._67-68, 71, 75, 78-80, 94, 97-98, PX_116, 217, 235, 256, 582, 584, JX_84 (advertising videos).)

The marketing materials failed to explain that Quincy's claims about its study purportedly showing Prevagen's effectiveness were based not on the results from the entire study population but rather on analyses of only certain cherry-picked slivers of the study population. As explained further below, after the study was completed, Quincy analyzed dozens of subgroups of participants, which were not identified beforehand in the study's protocol, searching for purportedly statistically significant results within certain subgroups for individual tasks to support its claims.

Quincy's marketing claims about the study appeared on Prevagen's packaging and website as well as in television, radio, print, and social media advertisements. (J.A. Tr._89, JX_95_3.) For example, Underwood appeared in a thirty-minute infomercial titled "The Better Memory Show." (J.A. Tr._156-158; *see* J.A. PX_582.) In the infomercial, Underwood, who is identified as a neuroscientist despite having only a bachelor's

degree in psychology, claims that "[a] large double blind, placebo-controlled trial . . . showed great efficacy for Prevagen, showing statistically significant improvements in word recall, in executive function, and also in short term memory. . . . In the clinical trial, we were showing those benefits after the first month and those continued to improve after the second and third months." (J.A. Tr._158; *see* J.A. PX_582, ECF_1_21-23.) This infomercial aired "hundreds of times," including on local television stations in New York in Albany, Buffalo, Elmira, New York City, Rochester, Syracuse, and Watertown. (J.A. Tr._90, 157.) Quincy's marketing claims resulted in sales of Prevagen totaling more than $400 million between 2011 and 2019, including sales of more than $25 million in New York. (J.A. ECF_240-4_12-13.)

C. Procedural Background

1. The Federal Trade Commission and the State of New York's complaint against Quincy

The FTC and the State filed this action against Quincy and Underwood in the U.S. District Court for the Southern District of New York in January 2017. (J.A. ECF_1_1-2, 31.) The FTC brought claims under provisions of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a), 52, 53(b), that prohibit unfair or deceptive practices or false advertising. (J.A. ECF_1_26-27.) The State brought claims for Executive Law § 63(12) fraud and violations of GBL §§ 349 and 350. (J.A. ECF_1_28-29.)

Plaintiffs alleged that Quincy and Underwood deceived and misled customers through eight deceptive marketing claims: that Prevagen improves memory; improves memory within ninety days; reduces memory problems associated with aging; provides other cognitive benefits; and is "clinically shown" to do each of those four things. (J.A. ECF_1_26-29.) Plaintiffs sought equitable and declaratory relief, including a permanent injunction to prevent Quincy from using the challenged claims in its marketing. (J.A. ECF_1_30.) The State also sought equitable monetary

relief, such as disgorgement of ill-gotten gains, and statutorily authorized penalties.[1] (J.A. ECF_1_31.)

The district court initially dismissed the complaint, concluding that it failed to state a claim as to the federal claims and declining to exercise supplemental jurisdiction over the state law claims. (J.A. ECF_45_10-13.) Plaintiffs appealed and this Court reversed, holding that the complaint plausibly alleged that "Quincy's representations about Prevagen are contradicted by the results of Quincy's clinical trial." *See FTC v. Quincy Bioscience Holding Co.*, 753 F. App'x 87, 89 (2d Cir. 2019).

2. The district court's dismissal of the State's claims against Underwood

On remand, Underwood moved to dismiss the claims against him on the grounds that the district court lacked personal jurisdiction over him. (J.A. ECF_72_7.) The district court denied Underwood's motion, explaining that the FTC Act provides for nationwide service of process and the exercise of nationwide personal jurisdiction for the FTC's federal

[1] In *AMG Capital Management, LLC v. FTC*, the Supreme Court held that 15 U.S.C. § 53(b) does not authorize the FTC to seek equitable monetary relief. *See* 593 U.S. 67, 70 (2021).

claims. (J.A. ECF_72_7-14.) As to the State's claims, the district court held that the exercise of personal jurisdiction over Underwood was proper under the doctrine of pendent personal jurisdiction because the state law claims and the federal claims "'derive[d] from a common nucleus of operative fact.'" (*See* J.A. ECF_72_14 (quoting *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993)).)

The court rejected Underwood's separate argument that the complaint failed to state a claim against him. As the court explained, the complaint plausibly alleged that Underwood was directly involved in Quincy's deceptive advertising because he "made final decisions on advertising claims, wrote advertising materials, . . . appeared in Prevagen advertisements[,] . . . [and] translated scientific data into marketing language." (J.A. ECF_72_16.)

At the close of discovery, Underwood moved for partial summary judgment on only the state law claims, again arguing that the court lacked personal jurisdiction as to those claims. The district court departed from its previous decision and granted Underwood's motion. The court reasoned that although all the claims shared a common nucleus of operative fact, the exercise of pendent personal jurisdiction was impermissible

because the state and federal claims were brought by two separate plaintiffs. (J.A. ECF_272_1-2.) The court rejected the State's separate argument that personal jurisdiction over Underwood was independently authorized under New York's long-arm statute, C.P.L.R. 302. (J.A. ECF_272_2-5.) The district court thus dismissed the state claims, but not the federal claims, against Underwood.

3. The trial

The district court held a twelve-day jury trial in February and March 2024 on the State's claims against Quincy. The FTC's federal claims against Quincy and Underwood were not directly at issue during the trial because the court concluded that there was a right to a jury trial only as to the State's claims. (J.A. ECF_170_1-2, 6.) However, because the court concluded that the jury's factual findings in the trial on the State's claims against Quincy would be binding as to the FTC's claims against Quincy and Underwood (J.A. ECF_340_11-13, 23-24), counsel for the FTC and for Underwood were permitted to participate in the trial (J.A. ECF_377_1-2).

At trial, the State called three fact witnesses: Kenneth Lerner, Quincy's principal investigator for the Madison Memory Study

(J.A. Tr._180-181; *see* J.A. Tr._180-266); Todd Olson, Quincy's marketing development director (J.A. Tr._60, *see* J.A. Tr._60-126); and Underwood (J.A. Tr._126-180).

Lerner testified about the results of the Madison Memory Study. According to Lerner's clinical trial synopsis, Quincy's official report of the study's results, the study found "no statistically significant results" over the entire study population. (J.A. JX31_5.) Lerner's report nonetheless claimed that Prevagen "improve[d] aspects of cognitive function in older participants." (J.A. JX31_9.) This conclusion was purportedly supported by Quincy's post hoc analysis of the results of individual tasks for cherry-picked subgroups of participants. (*See* J.A. JX31_9.) Lerner's report focused almost entirely on the results of these small subgroups, without offering any further discussion of the results of the study population as a whole. (*See* J.A. JX31_5-9.)

At trial, Lerner explained that the statistical analysis of the study used to support his conclusions was primarily conducted by Taylor Gabourie, a recent undergraduate who did not have a degree in statistics. (J.A. Tr._218-219.) For each of the nine tasks in the study, in addition to analyzing the results for the entire study population, Gabourie conducted

post hoc analyses of dozens of participant subgroups divided based largely on a memory self-assessment, known as the AD8, that participants completed before beginning the Madison Memory Study. (*See* J.A. Tr._190-191, 219-221, 223-227, PX_200_1-2; *see also* J.A. JX_95_5.) This self-assessment resulted in a score from zero to eight, with a score of zero indicating no self-reported memory problems. (J.A. Tr._190-192.) Neither the AD8 nor the subgroups were discussed in the study's protocol. (J.A. Tr._212-214; *see* J.A. JX_34_5.) And no participants were excluded from the study based on their AD8 score. (J.A. Tr._212.)

Gabourie's post hoc analyses showed no statistically significant improvements between the control group and the placebo group on any task for participants with self-reported AD8 responses of three or more. Instead, Gabourie identified only a few subgroups with AD8 responses of two or less that, according to Gabourie, reflected statistically significant improvements on a handful of tasks. Specifically, Gabourie's analysis claimed that the subgroup of study participants whose AD8 self-responses reflected a score of zero to one showed improvement on three out of nine tasks: the Groton Maze Recall (testing memory), Detection (testing psycho-motor function), and One Card Learning (testing visual learning) tasks.

(*See* J.A. JX_31_2, 9.) Gabourie's analysis also claimed that the subgroup of study participants whose AD8 self-responses reflected a score of zero to two—which included the participants in the zero-to-one subgroup—showed improvement on three out of nine tasks: the Identification (testing attention), Groton Maze Learning (testing executive function), and One Card Learning tasks. (J.A. JX_31_2, 9.) The study's protocol never mentioned that only individuals with AD8 scores of two or lower—those with minimal self-reported preexisting memory problems—would be included in the reported results. (J.A. Tr._212-214.)

Underwood and Olson testified about Quincy's advertising claims. For example, Olson acknowledged that Quincy advertised that Prevagen "can improve memory" and "has been clinically shown to improve memory" (J.A. Tr._67); that Prevagen "can help [consumers] with mild memory problems associated with aging" (J.A. Tr._75); that Prevagen "supports a healthier brain function, a sharper mind, and clearer thinking" (J.A. Tr._68); "that [in] a computer assessed double-blinded placebo-controlled study Prevagen improved recalled tasks in subjects" (J.A. Tr._70-71); and that in a "double-blinded placebo-controlled clinical study, Prevagen improved certain aspects of cognitive function over a 90-day

period" (J.A. Tr._110-111). Underwood and Olson testified that these advertisements played nationwide, including in New York, "hundreds of times." (J.A. Tr._ 157; *see* J.A. Tr._89-90.)

Olson testified that these claims were based primarily on the results of the Madison Memory Study (*see* J.A. Tr._70-71), even though the results for the study's entire population did not reflect any statistically significant effects from Prevagen. He acknowledged that Quincy's advertisements failed to disclose that the purported memory improvements Quincy touted were based solely on the two narrow subgroups of participants that Gabourie had selected among many subgroups. (J.A. Tr._91-94.)

Olson also admitted that a graph used on Prevagen's packaging and in its infomercials, which purported to represent the results of the study, did not reflect Quincy's analysis at all. The graph showed the results for the treatment group for the entire study population for a single task, even though Quincy's analysis found no statistically significant results between the treatment group and the placebo group for the entire study population as to that task (or any other task). (J.A. Tr._99-100, 105-08.) Moreover, the graph omitted the sixty-day testing interval data, which

did not show the same trend of improvement as the other data. (*See* J.A. Tr._71-72; *see also* J.A. Tr._124-125.) Olson testified that in his view, consumers would not be misled by these omissions because "savvy" consumers "are going to Google 'Prevagen'" and review the full write-up of the Madison Memory Study. (J.A. Tr._109.)

The State also called three expert witnesses to testify about the Madison Memory Study and about other evidence that purportedly supported Quincy's marketing claims: Dr. Janet Wittes (J.A. Tr._347-357, 378-519, 548-618); Dr. Mary Sano (J.A. Tr._266-344); and Dr. Jeremy Berg (J.A. Tr._619-719).

Dr. Wittes, an expert in the application of statistics to the design and analysis of clinical studies who previously worked at the National Institutes of Health, testified that Quincy did not conduct its statistical evaluation of the Madison Memory Study "in a competent and reliable manner." (J.A. Tr._348-350, 590.) Dr. Wittes further opined that "there is no . . . statistically significant evidence[] of benefit of Prevagen over placebo in any of the tests that were performed to look at cognition," either overall or for any subgroup. (J.A. Tr._352-353.)

Dr. Wittes explained that Quincy's post hoc subgroup analyses and selection of only a sliver of the results of those analyses was improper and failed to produce reliable results. Dr. Wittes compared Quincy's post hoc analyses to choosing which horse to bet on after a horse race is over because Quincy was relying on solely the narrow portions of the results that supported its claims while discarding the remainder. (*See* J.A. Tr._415, 436, 466-467; *see also* J.A. Tr._457-458.) As Dr. Wittes explained, Quincy's study protocol was "totally inadequate" and "gave permission to Quincy to do whatever they wanted with the data" because it failed to define the analyses that would be performed on the data collected or the methodology to be used. (J.A. Tr._388, 417; *see* J.A. Tr._395, 414, 486-487.) And the protocol inaccurately implied that all participant results would be reported, rather than only a selected set of subgroup results that purportedly supported Prevagen's efficacy. (J.A. Tr._398, 461-462.)

Dr. Wittes further testified that even for the discrete subgroups Quincy relied on, Quincy erred in identifying improvements as statistically significant. She explained that after applying a commonly used statistical correction, which was required to account for the fact that Quincy was doing multiple subgroup analyses, none of the subgroups

showed statistically significant improvements. (J.A. Tr._452, 455, 471, 476-477, 479-480, 486-487.)

Dr. Sano, a researcher in memory loss at Mount Sinai Hospital, testified that the Madison Memory Study "does not provide evidence of improvement of memory and cognition" for users of Prevagen. (J.A. Tr._267, 276.) She explained that "[t]he results of the entire study demonstrated no differences in any test of memory or cognition." (J.A. Tr._279.)

She further opined about multiple problems with Quincy's reliance on the results from its selected subgroups. Dr. Sano explained that the study's protocol did not mention the AD8 at all, much less indicate that only the results of participants with AD8 scores of two or less would be considered. Nor did the protocol include a plan to analyze results based on discrete subgroups. (J.A. Tr._286-288, 297, 333-334.)

Dr. Sano also explained that "the pattern of results does not suggest that [the subgroup results] are reliable or reproducible." (J.A. Tr._284; *see* J.A. Tr._290-291, 296.) For example, Dr. Sano emphasized that because there was substantial overlap in the participants included in each of the two subgroups Quincy relied on, she would expect them to

show substantially similar results, but in fact the groups did not show improvement in the same three tasks. (J.A. Tr._282-283, 296-297.) Further, if Prevagen were causing improvement in a particular area of cognition, she would expect to see improvement in multiple tasks in the same area of cognition. Instead, there were no statistically significant results for other tasks testing the same areas of cognition as those where Quincy found improvement. (J.A. Tr._283-284, 296-297.)

Dr. Berg, a professor of biology at the University of Pittsburgh and the author of several textbooks on biochemistry (J.A. Tr._624-625, 630-631), explained that, when taken orally, apoaequorin is quickly digested in the stomach into amino acids—destroying the calcium-binding properties that are critical to Quincy's explanation for the beneficial effects of apoaequorin. (J.A. Tr._647.) Even if that were not true, Dr. Berg testified, there is no mechanism for apoaequorin to enter the bloodstream from the stomach. (J.A. Tr._647, 672-673.) Dr. Berg's conclusions, which were confirmed by Quincy's own studies and experts (J.A. Tr._654-657, 661, 667; *see* J.A. Tr._147-148, 151-153, 875), are directly contrary to Quincy's theory that apoaequorin is a calcium-binding protein that improves memory by traveling from the stomach to the brain and regulating

calcium levels in brain cells, which are depleted with aging. (*See* J.A. PX_133_5, PX_587_15; *see also* J.A. Tr._708-712.)

During the trial, both parties moved for judgment as a matter of law on factual issues pursuant to Federal Rule of Civil Procedure 50(a). Among other things, Quincy argued that the State had failed to provide sufficient evidence for a reasonable jury to find that Quincy's statements were materially misleading in violation of GBL §§ 349 and 350. (J.A. Tr._745-747, 1322-1325.) As relevant here, the State argued that the district court should enter a directed verdict on the issue of whether Quincy's advertisements were material, because a presumption of materiality applies to express advertising claims involving health, which Quincy failed to rebut. (J.A. Tr._1329.) The district court reserved judgment and sent the case to the jury. (J.A. Tr._1347.)

After deliberating, on March 11, 2024, the jury held Quincy liable under Executive Law § 63(12)'s fraud prong for all eight challenged statements, finding that each of the statements was repeated or persistent and "had the capacity or the tendency to deceive" consumers. (J.A. ECF_421_7-9.) Although the jury was not asked to decide if Underwood should be held liable—because the State's claims against

Underwood had been dismissed—the jury nonetheless wrote Underwood's name into the verdict sheet, recognizing his central role in the deceptive marketing of Prevagen.[2] (*See* J.A. ECF_421_9.)

As to the State's claims under GBL §§ 349 and 350, the jury concluded that each of the eight challenged statements was misleading because it "lack[ed] support by 'competent and reliable scientific evidence.'" (J.A. ECF_421_2, 4-5.) However, the jury found Quincy liable for only two of the eight claims, specifically, that "Prevagen reduces memory problems associated with aging" and is "clinically shown" to do so. (J.A. ECF_421_2-3, 5-6.) As to the remaining six claims, the jury concluded that the claims, though misleading, would not have been material to the decision-making of a reasonable consumer, as required for liability under GBL §§ 349 and 350. (J.A. ECF_421_2-3, 5-6.)

[2] After trial, the district court struck Underwood's name from the verdict sheet. (J.A. ECF_476_1.)

4. The district court's posttrial decisions

After trial, both parties renewed their motions for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). The district court denied both motions. As relevant here, the court rejected Quincy's argument that the jury erred in considering liability for Executive Law § 63(12) fraud as to all eight challenged statements despite finding liability under GBL §§ 349 and 350 as to only two of the statements. The court explained that the jury properly applied the distinct standard of liability for Executive Law § 63(12) fraud. (J.A. ECF_457_2-3.) Subsequently, the district court ordered supplemental briefing on this issue and again upheld the jury's verdict. (J.A. ECF_491_2, 6.) The court explained that Executive Law § 63(12)'s text and state law appellate precedent both confirmed that the statute creates a standalone cause of action for fraud, separate from the illegality cause of action that is based on predicate violations of other statutes or common law. (*See* J.A. ECF_491_4-5.) Finally, the district court also rejected Quincy's argument that the State failed to provide sufficient evidence to support the jury's finding of liability on two of the State's GBL §§ 349 and 350 claims. (J.A. ECF_457_3; *see* J.A. ECF_450_1-2.)

The State's motion for judgment as a matter of law sought liability under GBL §§ 349 and 350 for the six statements that the jury determined were not material. The State argued that no reasonable jury could have found that these statements are not material because they are subject to a presumption of materiality, which Quincy failed to rebut at trial. (J.A. ECF_447_4-5.) The district court denied the motion. (J.A. ECF_457_2.)

The district court imposed liability for the FTC's claims premised on the two statements for which the jury had found liability under GBL §§ 349 and 350, concluding that federal law and GBL §§ 349 and 350 imposed the same requirements. (J.A. ECF_493_2-3.) The court then entered judgment permanently enjoining Quincy from using all eight challenged statements to promote Prevagen nationwide. (J.A. ECF_513_2.) The district court summarily denied the State's requests for monetary relief, without giving the parties any opportunity to present evidence or argument about monetary remedies. (J.A. ECF_513_2.)

The State and Quincy each moved to clarify or amend the judgment. The district court denied Quincy's request to limit the injunction to Quincy's marketing in New York. The court also denied the State's

request to present evidence regarding the State's entitlement to monetary relief. (J.A. ECF_524_1-4.)

Quincy and Underwood each appealed, and the State cross-appealed. (J.A. ECF_525_1-2, ECF_526_1-2, ECF_535_1-3.) Pending appeal, defendants moved for a stay of the injunction as it applies outside New York. This Court declined to issue a stay. *See* Order (May 13, 2025), ECF No. 78.

STANDARD OF REVIEW

The district court's order denying the State's and Quincy's posttrial motions for judgment as a matter of law is reviewed de novo, *see SEC v. Ginder*, 752 F.3d 569, 574 (2d Cir. 2014), as is the court's order dismissing the State's claims against Underwood for lack of personal jurisdiction, *see EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 97 (2d Cir. 2016). The district court's orders granting a permanent injunction and denying the State's request for monetary relief are reviewed for abuse of discretion. *See S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 237 (2d Cir. 2001); *SEC v. Pentagon Cap. Mgmt. PLC*, 725 F.3d 279, 287-88 (2d Cir. 2013).

SUMMARY OF ARGUMENT

I. The evidence at trial established Quincy's liability for each of the State's § 63(12) fraud and GBL claims.

A. The district court properly upheld the jury's verdict finding Quincy liable for Executive Law § 63(12) fraud as to each of the eight challenged statements. As the jury correctly found, and as Quincy does not dispute here, Quincy repeatedly and persistently made these statements about Prevagen's purported effects on cognition and memory, and each statement had a tendency or capacity to deceive.

Quincy incorrectly argues that § 63(12) does not create a standalone cause of action for fraud that is separate from an underlying violation of another statute or common law duty. As the district court correctly determined, appellate courts in New York have long recognized that § 63(12) creates a statutory cause of action for fraud, including in a recent decision explicitly rejecting an argument identical to Quincy's here. The text, history, and purpose of § 63(12) further confirm that the statute creates a cause of action for fraud that is separate from a cause of action for illegality and that does not require a predicate violation of another statute or common law duty.

In arguing otherwise, Quincy primarily relies on precedents that addressed the statute of limitations for different types of § 63(12) claims rather than whether § 63(12) creates a standalone cause of action for fraud. In any event, the reasoning of these statute-of-limitations cases directly undermines Quincy's argument.

B. Evidence at trial made clear that each of the eight challenged marketing statements also violates GBL §§ 349 and 350. As the jury correctly concluded, all eight of the challenged statements are misleading because they are not supported by competent and reliable scientific evidence. The State's expert witnesses testified that Quincy's Madison Memory Study, and the other scientific evidence the company relied on, failed to provide support for its claims that would be accepted by the relevant scientific community. And all eight statements are also entitled to a presumption of materiality because they expressly claimed that Prevagen has beneficial effects on consumers' health. Quincy failed to present any evidence to rebut the presumption of materiality. Finally, contrary to Quincy's arguments, it is well established that the State need not produce evidence that individual consumers actually relied on these misleading statements.

Accordingly, the district court properly denied Quincy's motion for judgment as a matter of law as to the two advertising statements for which the jury found Quincy liable under the GBL, but erred in denying the State's posttrial motion for judgment as a matter of law as to the remaining six statements. This Court should find that all eight statements violate GBL §§ 349 and 350.

II. The district court erred in dismissing the State's claims against Underwood for lack of personal jurisdiction.

A. New York's long-arm statute provided the district court with personal jurisdiction over Underwood, and the State therefore should have been allowed on that basis to litigate its state law claims against Underwood. New York's long-arm statute applies to Underwood because Quincy acted as his agent in marketing Prevagen to New York consumers using the eight misleading statements. Underwood exercised significant control over Quincy's marketing of Prevagen, including supervising the director of sales and marketing and playing a leadership role with the marketing team. And Underwood personally appeared in an infomercial for Prevagen that contained misleading statements and that was aired on local television stations in New York.

B. Alternatively, the exercise of personal jurisdiction over Underwood was appropriate under the doctrine of pendent personal jurisdiction. That doctrine permits the federal court to exercise personal jurisdiction over a defendant for state law claims that share a common nucleus of operative fact with federal claims for which a federal statute authorizes nationwide service of process, like the State's and the FTC's claims here. Exercising pendent personal jurisdiction is particularly appropriate because Underwood was already participating in the same trial about the same eight misleading marketing statements.

III. The district court's injunction was properly entered because it gives defendants ample notice of the prohibited conduct—namely, using the listed eight misleading statements, and any statements similar to those eight statements, in future advertising. Contrary to defendants' arguments, the court was not required to identify every hypothetical misleading statement that might violate the injunction.

IV. Finally, the district court erred in summarily denying the State's request for monetary relief. Together, Executive Law § 63(12) and GBL §§ 349 and 350 authorize courts to award disgorgement and statutory penalties to deter future wrongdoing. The district court abused

its discretion by summarily denying such monetary relief without giving the State any opportunity to present evidence in support of its request, and without explaining the reasoning for its denial.

ARGUMENT

POINT I

THE EVIDENCE AT TRIAL ESTABLISHED LIABILITY FOR EACH OF THE STATE'S CLAIMS AGAINST QUINCY

A. Each of the Challenged Statements Violate Executive Law § 63(12), Which Creates a Standalone Cause of Action for Fraud.

As the jury correctly concluded, the trial evidence established that Quincy engaged in Executive Law § 63(12) fraud by repeatedly and persistently using deceptive statements to market Prevagen. See *supra* at 25-26. On appeal, Quincy does not dispute that the eight statements it used to advertise Prevagen were repeated and persistent, or that the statements had a tendency to deceive consumers. Instead, Quincy's sole argument is that the State was required to prove a predicate violation of GBL §§ 349 or 350 for each challenged statement in order to establish liability for § 63(12) fraud for that statement. Br. for Defs.-Appellants-Cross-Appellees (Quincy Br.) 32-44. In other words, Quincy contends that

§ 63(12) does not establish a statutory cause of action for repeated or persistent fraud that is separate from a cause of action for repeated or persistent illegality.

Quincy's interpretation of this state statute is plainly incorrect, as the district court properly determined. (*See* J.A. ECF_491_4-6.) As New York's appellate courts have already made clear, the text, history, and purpose of § 63(12) establish that the statute creates a cause of action for fraud that is separate from a cause of action for illegality.

1. As New York appellate courts have determined, § 63(12)'s text, history, and purpose demonstrate that the statute creates a separate cause of action for fraud.

Decisions of New York's intermediate appellate courts "are a basis for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *East Fork Funding LLC v. U.S. Bank, N.A.*, 118 F.4th 488, 497 (2d Cir. 2024) (quotation marks omitted). Here, as the district court correctly recognized (J.A. ECF_491_4), New York's intermediate appellate courts have already determined that § 63(12) establishes a standalone cause of action for fraud that does not require proving a predicate violation of another statute or common law fraud and

there is every indication that the New York Court of Appeals would reach the same result.

Specifically, in *Trump Entrepreneur Initiative*, the Appellate Division, First Department addressed an argument identical to Quincy's argument here and unequivocally rejected it—concluding that § 63(12) provides for an independent cause of action for fraud. *See* 137 A.D.3d at 416-18. As the Appellate Division ruled, § 63(12) not only provides additional remedies for preexisting causes of action but also creates a standalone cause of action that is based on a broad definition of fraud and that does not require proof of the elements of either common law fraud or another statutory violation. *See id.* at 417.

Moreover, as the First Department further explained, decades of appellate precedent in New York, including from the New York Court of Appeals, have permitted standalone § 63(12) fraud claims to proceed. *See, e.g.*, *People v. Greenberg*, 21 N.Y.3d 439, 446 (2013); *Northern Leasing Sys.*, 193 A.D.3d at 75; *Coventry First*, 52 A.D.3d at 346; *People v. Applied Card Sys., Inc.*, 27 A.D.3d 104, 106 (3d Dep't 2005); *General Elec. Co.*, 302 A.D.2d at 314; *Apple Health & Sports Clubs*, 206 A.D.2d at 267; *see also People v. College Network, Inc.*, 48 N.Y.S.3d 266, 266 (Sup. Ct. Albany

County 2016) ("[T]he Third Department has consistently found a stand-alone cause of action for fraud under Executive Law § 63(12)."). And appellate precedent further makes clear that § 63(12) fraud is broader than a claim for common law fraud and does not require proof of the elements of common law fraud, such as materiality, reliance, and intent. *See State v. Sonifer Realty Corp.*, 212 A.D.2d 366, 367 (1st Dep't 1995) (reliance); *General Elec. Co.*, 302 A.D.2d at 314-15 (materiality); *People v. Greenberg*, 95 A.D.3d 474, 483 (2012), *aff'd*, 21 N.Y. 3d 439 (2013) (materiality); *Trump Entrepreneur Initiative*, 137 A.D.3d at 417 (reliance, intent).

This established state appellate precedent is dispositive, particularly when there is every indication that the New York Court of Appeals would reach the same result. *See Greenberg*, 21 N.Y.3d at 446 (allowing § 63(12) fraud claim to proceed); *People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 110 (2008) (affirming liability, including as to § 63(12) fraud claim). Indeed, § 63(12)'s text, history, and purpose each further confirms that § 63(12) creates a standalone cause of action for fraud.

On its face, § 63(12)'s text makes plain that the statute authorizes a cause of action "whenever any person shall engage in repeated fraudu-

lent *or* illegal acts . . . in the carrying on, conducting or transaction of business." Executive Law § 63(12) (emphasis added); *see id.* (liability when person "otherwise demonstrate[s] persistent fraud *or* illegality . . . in business." (emphasis added)). The statute thus "authorizes the Attorney General to sue in two distinct (though possibly overlapping) circumstances": where the defendant has engaged in illegality by "violat[ing] the provisions of some other statutory or common-law duty" *or* has "engaged in repeated fraudulent acts or persistent fraud, regardless of whether such conduct violates another statute" or common law duty. *People v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 636 (2018) (Feinman, J., concurring) (quotation marks, alterations, and emphasis omitted).

The statute's text also contains all of the elements of a distinct cause of action for fraud not premised on any underlying predicate statutory or common law violation. The statute expressly enumerates the broad array of fraudulent acts that it prohibits, including "any deception, misrepresentation, concealment, suppression, [or] false pretense." Executive Law § 63(12). It identifies the misconduct that triggers liability for fraud, i.e., persistent or repeated fraudulent acts in business. The statute authorizes the Attorney General to commence an "action or proceeding"

"[w]henever any person shall engage" in such misconduct. *Id.* And it specifies the forms of relief that the Attorney General may seek for the misconduct. *See id.; Trump Entrepreneur Initiative*, 137 A.D.3d at 417-18 (§ 63(12)'s plain language authorizes a cause of action for fraud).

History and context further confirm that § 63(12) creates a standalone cause of action for fraud. Since its enactment in 1956, the statute has granted the Attorney General authority to address separately both fraudulent conduct *and* illegal conduct. *See* Ch. 592, 1956 N.Y. Laws 1336, 1336. Moreover, in 1965, § 63(12) was amended to add a broad definition of fraud that mirrored the longstanding definition of fraud in the Martin Act—which was enacted in 1921 to combat fraud in the securities markets. *See* Ch. 666, 1965 N.Y. Laws 1678, 1678; Ch. 649, 1921 N.Y. Laws 1989, 1989-94; *Credit Suisse*, 31 N.Y.3d at 633. The Martin Act's broad definition of fraud indisputably creates a standalone statutory cause of action for securities fraud that did not previously exist and that does not require proof of common law fraud elements such as scienter or actual reliance. *See Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 18 N.Y.3d 341, 350 (2011). Section 63(12)'s incorporation of the same sweeping definition of fraud shows the legislature's intent to

create a similar statutory cause of action for fraud in business outside the securities markets—a cause of action that does not require proof of the elements of common law fraud and also does not require proof of the elements of another statutory violation (such as GBL §§ 349 or 350 here). *See Trump Entrepreneur Initiative*, 137 A.D.3d at 417-18.

Section 63(12)'s purpose and legislative history support the same conclusion. The Legislature enacted § 63(12) to protect the honesty and integrity of commercial marketplaces in New York by stopping both fraudulent and illegal business conduct. *See Coventry First*, 52 A.D.3d at 346. When the statute was amended to incorporate the Martin Act's broad definition of fraud, commentators recognized that the Attorney General's authority to address fraudulent conduct under § 63(12) reached "well beyond the common law concept of a fraud." N.Y. State Dep't of Com. Recommendation (June 24, 1965), *in* Bill Jacket for ch. 666 (1965). As the New York City Bar Association advised the Governor at the time, the proposed amendment was consistent with existing case law, which had already recognized that the Attorney General's § 63(12) authority extends to all activities understood to be fraudulent under the ordinary meaning of that term and is "'not limited . . . [to] those which by express

statute are either described as fraudulent or defined as illegal.'" Letter from Ass'n of the Bar of the City of N.Y., to Hon. Sol Corbin (June 18, 1965), *in* Bill Jacket for ch. 666, *supra*, at 5-6 (quoting *Prudential Advert. Inc. v. Attorney-General of State of N.Y.*, 22 A.D.2d 737, 737 (3d Dep't 1964)).

2. Quincy's contrary arguments lack merit.

Quincy incorrectly conflates § 63(12) liability for fraud with § 63(12) liability for illegality in arguing that the State was required to prove the elements of a GBL §§ 349 or 350 violation for each challenged statement to establish any § 63(12) liability for that statement. As explained above, § 63(12)'s fraud prong is separate from § 63(12)'s illegality prong, and the fraud prong creates a distinct cause of action that does not require any predicate violation of another statute or common law duty. In arguing that § 63(12) does not create a standalone cause of action for fraud, Quincy misconstrues the statute and state court decisions.

First, Quincy errs in relying (Quincy Br. 34-37) on the Court of Appeals' decisions in *State v. Cortelle Corp.*, 38 N.Y.2d 83 (1975), and its progeny. As an initial matter, these decisions addressed whether to apply a three- or six-year statute of limitations to different types of § 63(12) claims—not whether § 63(12) creates a standalone cause of action for

fraud. *See* 38 N.Y.2d at 85; *Princess Prestige Co.*, 42 N.Y.2d at 108; *Credit Suisse*, 31 N.Y.3d at 632-33. And these statute-of-limitations decisions were overtaken by the Legislature's subsequent enactment of a uniform six-year statute of limitations for all § 63(12) claims. *See* C.P.L.R. 213(9).

In any event, the reasoning in these statute-of-limitations cases supports the State's position here rather than Quincy's. Specifically, the Court of Appeals recognized in *Cortelle* that § 63(12) creates a cause of action and remedies for both (i) existing statutory and common law fraud claims (i.e., illegality claims) and (ii) new statutory fraud claims under § 63(12)'s broad definition of fraud. 38 N.Y.2d at 87; *see Trump Entrepreneur Initiative*, 137 A.D.3d at 416. And the Court explained that application of the three- or six-year statute of limitations depended on which type of § 63(12) claim is at issue. Specifically, the three-year limitations period for liability "'imposed by statute'" did not apply to the § 63(12) claim in *Cortelle* because that claim sounded in promissory estoppel, a common law theory that preexisted § 63(12)'s enactment and was thus not created by that statute. 38 N.Y.2d at 86-87 (quoting C.P.L.R. 214(2)); *see id.* at 86 ("*[a]s applied to the allegations in this case*" § 63(12) created "no new claims" (emphasis added)). Instead, the Court

applied the six-year statute of limitations for claims that, like promissory estoppel, did not have a specific limitations period set by the Legislature. *Id.* at 89 (citing C.P.L.R. 214(1)).

The Court in *Cortelle* did not, as Quincy incorrectly contends, rule that *all* types of § 63(12) claims merely "provide particular remedies and standing," *id.* at 86, to the Attorney General to sue for violations of common law duties or other statutes. To the contrary, the Court explained that § 63(12) "may in part expand the definition of fraud so as to create a new liability in some instances," *id.* at 87—to which the then-existing three-year statute of limitations would have applied.

The Court's *Credit Suisse* decision likewise drew a sharp distinction between § 63(12) claims based on conduct already illegal under the common law (to which the six-year limitations period would apply) and § 63(12) claims based on conduct newly prohibited by the statute's broad statutory definition of fraud (to which the three-year limitations period for statutorily created liability would apply). *See* 31 N.Y.3d at 634. As the Court explained, the Martin Act securities fraud claim alleged in *Credit Suisse* was subject to the three-year limitations period because the Martin Act's broad definition of fraud "encompasses

'wrongs' not cognizable under the common law." *Id.* at 632-33. Likewise, if the § 63(12) claim in *Credit Suisse* alleged fraud under the same broad statutory definition of fraud used in the Martin Act—i.e., "broader liability than condemned at common law," *id.* at 633—then the shorter statute of limitations would apply. And the Court remanded for the lower courts to determine which type of § 63(12) claim was at issue in *Credit Suisse*—a remand which would have been unnecessary if § 63(12) claims could be based only on predicate illegality under the common law or statute.

Judge Feinman's concurrence in *Credit Suisse*, joined by Judge Fahy, further emphasized the point. In an opinion "entirely consistent with the majority's holding," *id.* at 635, he explained that § 63(12) creates "two distinct" causes of action: (i) for illegality, "where the defendant has violated the provisions of some other statutory or common-law duty," and (ii) for conduct that meets § 63(12)'s broad definition of fraud, "regardless of whether such conduct violates another statute." *Id.* at 636. As the concurrence explained, this distinction was first recognized in *Cortelle*, which acknowledged that § 63(12) created "new liability" in addition to providing new remedies for "preexisting liability." *Id.* at 637-38.

The other appellate decisions on which Quincy relies (Quincy Br. 36-37) are inapplicable. They each addressed § 63(12) illegality claims premised on violation of a statute, and thus had no occasion to address whether § 63(12) creates a separate fraud claim. *See Princess Prestige Co.*, 42 N.Y.2d at 106 (illegality claim premised on violation of Home Solicitation Sales Act); *People v. Frink Am., Inc.*, 2 A.D.3d 1379, 1380 (4th Dep't 2003) (illegality claim based on violation of Labor Law); *People v. One Source Networking, Inc.*, 125 A.D.3d 1354, 1355 (4th Dep't 2015) (illegality claim based on violation of GBL § 349); *State v. Wolowitz*, 96 A.D.2d 47, 52 (2d Dep't 1983) (illegality claim based on illegal lease provisions). To the extent those decisions contain dicta seemingly supporting Quincy's argument, they rely on the same misreading of *Cortelle* urged by defendants here. *See Frink Am.*, 2 A.D.3d at 1380; *Wolowitz*, 96 A.D.2d at 61.

Second, Quincy errs in relying on legislative history solely from the statute's initial enactment in 1956. *See* Quincy Br. 39-40. Even the first iteration of § 63(12) went beyond authorizing remedies against partnerships and unincorporated associations that were similar to those authorized against corporations under the General Corporations Law;

from the beginning, the statute also created a new cause of action against such partnerships and unincorporated associations for "fraudulent and illegal acts." *Compare* Ch. 592, 1956 N.Y. Laws at 1336, *with* General Corporations Law § 91 (1943). (*See also* J.A. ECF_474-9_4.)

In any event, amendments to the statute repeatedly expanded the Attorney General's authority. For example, the statute was amended in 1959 to delete the reference to partnerships and unincorporated associations and to authorize the Attorney General to proceed against "any person," including corporations. Ch. 242, 1959 N.Y. Laws 999, 999; *see* Letter from Ass'n of the Bar of the City of N.Y. to Hon. Roswell Perkins (Mar. 24, 1959), *in* Bill Jacket for ch. 242 (1959), at 7. And, importantly, the statute was amended in 1965 to incorporate the Martin Act's broad definition of fraud, i.e., "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretence, false promise or unconscionable contractual provisions." Ch. 666, 1965 N.Y. Laws at 1678. That broad definition serves no purpose unless it is understood to authorize a cause of action for fraud separate from a cause of action for illegality.

Third, there is no basis for Quincy's argument (Quincy Br. 40-44) that the liability standards for § 63(12) fraud and GBL §§ 349 and 350 must be the same. It is well established that different standards of liability apply under the two statutes. *See General Elec. Co.*, 302 A.D.2d at 314-15. Those differences reflect the Legislature's different statutory choices and policy goals. The Legislature enacted § 63(12) to broadly protect honest businesses and the integrity of business markets, *see Coventry First*, 52 A.D.3d at 346, whereas the Legislature enacted GBL §§ 349 and 350 to protect consumers. The consumer-oriented focus of GBL §§ 349 and 350 is reflected in the Legislature's creation of a private cause of action for injured consumers, *see* Ch. 345, 1980 N.Y. Laws 1302, 1302-03; Ch. 346, 1980 N.Y. Laws 1303, 1303, and the requirement that liability requires proof of "consumer-oriented" conduct, *Oswego*, 85 N.Y.2d at 25. By contrast, there is no private right of action under § 63(12), and no requirement that misconduct be directed at consumers rather than, for example, other businesses. *See, e.g.*, *People v. Ernst & Young LLP*, 114 A.D.3d 569, 569-70 (1st Dep't 2014).

Similarly, GBL §§ 349 and 350 prohibit deception of objectively reasonable consumers, i.e., liability requires that challenged conduct be

"likely to mislead a reasonable consumer acting reasonably under the circumstances." *Oswego*, 85 N.Y.2d at 25. This standard aligns with the FTC Act's prohibition against deceptive practices "likely to mislead reasonable consumers under the circumstances"—on which the GBL provisions were modeled. FTC Policy Statement on Deception 2 (Oct. 14, 1983); *see* 15 U.S.C. § 45; *Oswego*, 85 N.Y.2d at 26. By contrast, § 63(12) is not modeled on FTC liability and uses the different liability standard of whether the challenged conduct has a "capacity or tendency to deceive, or creates an atmosphere conducive to fraud," *General Elec. Co.*, 302 A.D.2d at 314.[3] *See* Richard A. Givens, Supplementary Practice Commentaries to General Business Law art. 22-A (Westlaw 2003 ed.) ("There is no indication in any statute or in case law that FTC rules or policies in any way limit the Attorney General's authority to obtain injunction against 'repeated fraudulent' as well as illegal acts under Executive Law § 63(12).").

[3] The Court of Appeals in *Oswego* further explained that the objectively-reasonable-consumer standard under GBL § 349 reduces "the potential for a tidal wave of litigation against businesses" by private parties. 85 N.Y.2d at 26. Because § 63(12) does not create a private cause of action, there is no risk of a tidal wave of private litigation under that statute.

Quincy also errs in arguing that applying different standards of liability would "nullify" GBL § 349 because the State would always be incentivized to bring § 63(12) fraud claims rather than GBL § 349 claims. In fact, the two different causes of action have different advantages and disadvantages, and neither has displaced or nullified the other. GBL §§ 349 and 350 authorize the Attorney General to seek statutory penalties of up to five thousand dollars for each violation, *see* GBL § 350-d(a), which are not available for § 63(12). And § 63(12) specifically requires that fraudulent conduct be "repeated" or "persistent," whereas conduct subject to liability under GBL § 349 "does not require a repetition or pattern of deceptive behavior," *Oswego*, 85 N.Y.2d at 25. In any event, the Legislature has authorized both types of claims, and it is common for the same conduct to violate multiple statutes, as it does here. Indeed, GBL § 349 explicitly provides that it is not intended to replace any other cause of action available to the Attorney General. *See* GBL § 349(g).

Finally, Quincy's cursory argument (Quincy Br. 33 & n.2) that the jury's § 63(12) verdict and the district court's decisions upholding that verdict are inconsistent with the district court's jury instructions is irrelevant. The jury's verdict is consistent with the instructions on the

verdict sheet, which explicitly instructed the jury to adjudicate the State's § 63(12) claims even if the jury found no liability as to the GBL §§ 349 and 350 claims. (*See* J.A. ECF_421_1, 4.) Quincy now argues that the verdict was nonetheless inconsistent with the district court's jury instructions, but Quincy failed to preserve that argument by raising it immediately after the verdict was announced.[4] *See Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 46 (2d Cir. 2015). In any event, Quincy did not seek a new trial as a remedy for this purported inconsistency—instead, the sole remedy Quincy sought is judgment as a matter of law. (J.A. ECF_450_1.) As explained, the court correctly denied Quincy's motion and upheld the jury's verdict because § 63(12) provides a standalone cause of action for fraud, and this Court should affirm.

In sum, § 63(12)'s text and history, and the state court decisions interpreting it, are clear. But if this Court concludes that there is ambiguity as to whether the statute creates a standalone cause of action for fraud, the Court should certify that question to the New York Court

[4] To the extent it is relevant, the State preserved an objection to the court's jury instruction at the charge conference. (*See* J.A. Tr._1344-1346.)

of Appeals. *See, e.g.*, *Barenboim v. Starbucks Corp.*, 698 F.3d 104, 109 (2d Cir. 2012).

B. Each of the Challenged Statements Violate General Business Law §§ 349 and 350.

In assessing liability under GBL §§ 349 and 350, the jury found that all eight of the challenged statements were misleading, but that only two would be material to the decision-making of a reasonable consumer. See *supra* at 26. Accordingly, the jury found liability under GBL §§ 349 and 350 for only those two statements. (J.A. ECF_421_1-6.) After the verdict, both parties filed renewed motions for judgment as a matter of law based on the sufficiency of the evidence presented at trial. See *supra* at 27-28. Judgment as a matter of law on a factual issue after trial is proper where "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis" to find for the non-moving party. *See Ginder*, 752 F.3d at 574 (quotation marks omitted).

Quincy argued that the evidence at trial failed to establish liability as to any of the eight challenged statements, including the two statements for which the jury found liability. The State argued that evidence at trial established liability as to all eight challenged statements. As

discussed further below, the district court properly denied Quincy's motion but erred in denying the State's motion. This Court should conclude that all eight challenged statements violate GBL §§ 349 and 350. As the jury correctly concluded, each of the statements is misleading because it was not supported by competent and reliable scientific evidence. And each of the statements is also material to the decision-making of a reasonable consumer. A presumption of materiality applied to each of the eight challenged statements, which Quincy failed to rebut with evidence at trial that a reasonable consumer would *not* consider these claims when deciding whether to purchase Prevagen.

1. The district court properly denied Quincy's motion for judgment as a matter of law as to the two statements for which the jury found liability.

The jury properly found Quincy liable under GBL §§ 349 and 350 for its deceptive statements that Prevagen "reduces memory problems associated with aging" and is "clinically shown" to do so. As the jury concluded, those statements are misleading because they lack scientific support and they would be material to the decision-making of a reasonable consumer. (J.A. ECF_421_2-6.) Accordingly, the district court correctly denied Quincy's motion for judgment as a matter of law and

upheld the liability determinations, which are amply supported by the trial evidence. (*See* J.A. ECF_457_2-3, ECF_481_4-5.) This Court should affirm that ruling.[5]

To establish liability under GBL §§ 349 and 350, advertisements must be both (i) misleading to a reasonable consumer and (ii) material to the decision-making of a reasonable consumer. See *supra* at 8. As the jury was properly instructed here (J.A. Tr._1445 (jury charge)), statements about the efficacy of a nutritional supplement are misleading where an advertiser lacks "a reasonable basis" for their claims, meaning that the claims are not supported by "competent and reliable scientific evidence,"[6] *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1156 (9th Cir. 1984); *see POM Wonderful, LLC v. FTC*, 777 F.3d 478, 493-96 (D.C. Cir. 2015); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1498 (1st Cir. 1989). In particular, the advertiser "must possess evidence sufficient to satisfy

---

[5] Quincy cannot challenge on appeal the district court's decision denying summary judgment on this factual issue. *Contra* Quincy Br. 50. "Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion." *Ortiz v. Jordan*, 562 U.S. 180, 184 (2011).

[6] New York courts have recognized that interpretations of the FTC Act are relevant in determining violations of the GBL, which is modeled on the FTC Act. *See Oswego*, 85 N.Y.2d at 26.

the relevant scientific community of the claim's truth." *POM Wonderful*, 777 F.3d at 491 (quotation marks omitted). (*Cf.* J.A. DX_526_10 (FTC guidance).)

A statement is material if it "pertains to an issue that may bear on a consumer's decision to participate in a particular transaction." *North State Autobahn, Inc. v. Progressive Ins. Grp. Co.*, 102 A.D.3d 5, 13 (2d Dep't 2012). (*See* J.A. Tr.1446 (jury charge).) To decide materiality, which is an objective standard, *see Oswego*, 85 N.Y.2d at 26, courts and juries may examine "the substance of the alleged misrepresentations and deceptions," *People v. Image Plastic Surgery, LLC*, 210 A.D.3d 444, 445 (1st Dep't 2022).

Certain types of claims are presumed to be material, including claims that are stated expressly and those involving health. *See Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000); FTC Policy Statement on Deception at 5. (*See* J.A. Tr._1446-1447 (jury charge).) As the Supreme Court has explained, "[m]ost businesses . . . are unlikely to underwrite promotional advertising that is of no interest or use to consumers." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 567 (1980). Similarly, claims about the effect of a product on consumers'

health are presumed to be material because it is assumed that such claims affect consumers' decision-making. *See* FTC Policy Statement on Deception at 5. To show that such a claim is not material, defendants must rebut this presumption with evidence that it would not affect the decision-making of a reasonable consumer. *See FTC v. National Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1203 (N.D. Ga. 2008), *aff'd*, 356 F. App'x 358 (11th Cir. 2009).

The trial evidence supports the jury's conclusion that Quincy's statements that Prevagen reduces memory problems associated with aging, and is clinically shown to do so, are misleading. Dr. Sano, a researcher in memory loss, testified that the Madison Memory Study, Quincy's primary support for these claims, "does not provide evidence of improvement of memory and cognition" for users of Prevagen (J.A. Tr._267, 276). Similarly, Dr. Wittes, an expert in the application of statistics to the design and analysis of clinical studies, testified that the study did not provide any "statistically significant evidence[] of benefit of Prevagen over placebo in any of the tests that were performed to look at cognition," either overall or for any subgroup. (J.A. Tr._348, 352-353.) She also explained that Quincy failed to conduct its statistical evaluation of the

Madison Memory Study "in a competent and reliable manner." (J.A. Tr._590.)

Dr. Sano's and Dr. Wittes's testimony is further supported by Quincy's own clinical trial synopsis, which found that "no statistically significant results were observed over the entire study population" when comparing the treatment and placebo groups for each of the nine tasks. (J.A. JX_31_5.) In fact, Olson, Quincy's marketing director, acknowledged that Quincy's advertisements failed to disclose that the memory improvements Quincy touted were identified only for isolated subgroups of participants. (J.A. Tr._91-94.)

The trial evidence also supports the jury's conclusion that Quincy's statements that Prevagen improves memory loss associated with aging would be material to the decision-making of a reasonable consumer. The district court and the jury appropriately relied on evidence presented by the State about the "substance" of these statements, *see Image Plastic Surgery,* 210 A.D.3d at 445. Evidence at trial also showed that Quincy intended these statements to influence consumer decision-making. Olson, Quincy's marketing director, explained that the purpose of Quincy's advertising was to "create a quick impression to help a consumer move

towards the product," by asking "[i]f they see what's on the package, if they see a commercial, would they make a move and go learn more?" (J.A. Tr._106.) And he acknowledged that only "savvy" consumers would be able to avoid being misled by Quincy's marketing, by Googling "Prevagen" after seeing one of Quincy's advertisements and reviewing the full write-up of the Madison Memory Study on Quincy's website. (J.A. Tr._109.) Finally, with respect to these two statements, the jury properly applied the presumption that express statements and statements about health are material to a reasonable consumer. (*See* J.A. Tr._1446-1447 (jury charge on presumption of materiality).)

Each of Quincy's contrary arguments lacks merit. *First,* Quincy argues (Quincy Br. 50-53) that there was not sufficient evidence that the challenged statements are materially misleading because the State did not produce consumer surveys showing how individual consumers interpreted the statements. But it is well settled that GBL §§ 349 and 350 claims do not require evidence of actual reliance, i.e., that individual consumers were subjectively misled by the challenged advertising statements. *See Stutman*, 95 N.Y.2d at 29; *Oswego*, 85 N.Y.2d at 26. Rather, the test is whether a reasonable consumer would *likely* have been

misled—an objective standard that can be determined by reference to the content of the challenged statements. *See Oswego*, 85 N.Y.2d at 26; *Image Plastic Surgery,* 210 A.D.3d at 445.

Quincy misplaces its reliance on this Court's decision in *Bustamante v. KIND, LLC*, which affirmed the dismissal of private plaintiffs' claims under (inter alia) the GBL alleging that snack producer KIND misled consumers by advertising its granola bars as "All Natural" despite the bars containing certain chemicals. 100 F.4th 419, 423-24 (2d Cir. 2024). The Court explained that the *Bustamante* plaintiffs had "fail[ed] to present a coherent definition" of the phrase "All Natural"—it could mean "not synthetic," "made from whole grains, nuts, and fruit," or "literally plucked from the ground." *Id.* at 432-33. Without any baseline understanding of what reasonable consumers would expect the phrase "All Natural" to convey, the Court concluded that it was impossible to determine if that phrase would have been misleading to reasonable consumers.[7] *Id.* at 424.

---

[7] Other cases relied on by Quincy (Quincy Br. 50) are also inapposite. In *Chufen Chen v. Dunkin' Brands, Inc.*, the Court applied the reasonable consumer standard as a matter of law without reference

(*continued on the next page*)

Here, there has never been any dispute about what reasonable consumers would understand Quincy's challenged statements to mean. Quincy's advertisements expressly stated that Prevagen will reduce memory loss associated with aging and that the supplement's efficacy has been clinically proven. Quincy's claims, unlike the claim that a granola bar is "All Natural," are clear and not subject to multiple interpretations. (*See* J.A. ECF_481_3; *cf.* J.A. DX_526_8 (FTC guidance recognizing that, "[i]n many cases, . . . the implications of the ad are clear enough to determine the existence of the claim by examining the ad alone, without extrinsic evidence" of "how consumers actually interpret an ad").) Instead, the dispute here is about whether Quincy's express claims about the clinically proven efficacy of Prevagen are misleading to a reasonable consumer because they are unsupported by competent and reliable scientific evidence. The jury's findings on that issue were amply supported by the trial evidence, including the testimony of Dr. Sano and Dr. Wittes.

---

to extrinsic evidence of consumer perception. *See* 954 F.3d 492, 500 (2d Cir. 2020). And in *Hughes v. Ester C Co.*, the court concluded that evidence of consumer perception was necessary only to determine whether a reasonable consumer would have understood the vague phrase "immune support" to specifically convey that the product prevented common diseases. 330 F. Supp. 3d 862, 866, 871 (E.D.N.Y. 2018).

Second, Quincy contends (Quincy Br. 53-55) that the company's post-2016 advertising claims were not misleading because Prevagen was reformulated in 2016 to include vitamin D. But the record makes plain that Quincy's misleading statements were about the effect of apoaequorin, not vitamin D. As defendants' own expert explained, "it wouldn't matter if Vitamin D didn't have an effect there because . . . Prevagen is not a Vitamin D supplement." (J.A. Tr._1166.)

In any event, Dr. Sano, a researcher in memory loss, testified based on her review of the scientific literature that "there's no reliable evidence that Vitamin D improves memory or cognition" in the general population to whom Prevagen was marketed—those who are not "severely impaired" or young. (J.A. Tr._292-293.) Quincy errs in arguing that Dr. Sano's testimony was rebutted by defendants' expert, Dr. Mindy Kurzer, a nutritionist. Quincy's argument at most raises credibility and factual disputes that do not entitle it to judgment as a matter of law. *See This Is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2d Cir. 1998). The jury's credibility determination is particularly supported here because Quincy acknowledged at trial that Dr. Kurzer, consistent with her limited expertise, was "not going to be offering the ultimate opinion that . . . vitamin D improves

cognition." (J.A. Tr._965.) Moreover, Dr. Kurzer did not testify that there is scientific evidence showing that vitamin D reduces memory problems associated with aging. Instead, she concluded that there was, at most, a "beneficial association" between vitamin D and cognitive function, which "doesn't mean that Vitamin D causes cognitive improvement." (J.A. Tr._1036; *see* J.A. Tr._1040.)

Third, Quincy mistakenly argues (Quincy Br. 55-59) that the State's experts applied a higher standard than that required by the FTC in evaluating whether Quincy's statements were substantiated by scientific evidence because the FTC does not necessarily require randomized-control trials to prove a supplement's efficacy.

As an initial matter, it is well established that where an advertiser asserts that it has a specific level of support—such as a randomized controlled clinical trial—then the advertiser must have the level of support they claim. *See Removatron Int'l Corp.*, 884 F.2d at 1492 n.3. (*Cf.* J.A. DX_256_13 (FTC guidance).) Here, Quincy's own advertisements repeatedly touted that Prevagen is "clinically shown" to improve memory and "[c]linically tested in a computer-assessed double-blinded placebo-controlled study"—clear references to the Madison Memory Study.

(J.A. Tr._67, 97-98; *see* J.A. Tr._91.) Indeed, Quincy did not begin advertising Prevagen as improving memory until after completing the Madison Memory Study. Because Quincy's advertisements explicitly asserted that its statements were supported by a clinical trial, there can be no dispute that the existence of support from such a trial was necessary. (*See* J.A. DX_256_9.)

More generally, as discussed above (*supra* at 53-54), under the FTC Act, advertising claims about the health effects of a nutritional supplement are misleading unless they are supported by competent and reliable scientific evidence, defined as "evidence sufficient to satisfy the relevant scientific community of the claim's truth." *POM Wonderful,* 777 F.3d at 491 (quotation marks omitted). (*Cf.* J.A. DX_526_14 (FTC guidance).) FTC guidance recognizes that all claims that are "related to consumer health" and "difficult for consumers to assess on their own," like Quincy's statements, are subject to a higher level of substantiation. (J.A. DX_256_12.) "[W]ell-controlled human clinical studies are the most reliable form of evidence" for such claims. (J.A. DX_256_14.) *See POM Wonderful*, 777 F.3d at 494-97 (requiring randomized controlled trial as support for similar claim).

The jury and the district court properly applied that standard here. The State's witnesses are experts in the relevant scientific communities who opined on the level of support needed to substantiate Quincy's statements and concluded that Quincy's studies did not provide that support. For example, Dr. Sano, a memory loss researcher, explained that to substantiate a statement that a supplement improves memory, "the appropriate evidence would come from a randomized controlled trial." (J.A. Tr._271.) She further testified that the Madison Memory Study, Quincy's only randomized controlled trial, "does not provide evidence of improvement of memory and cognition." (J.A. Tr._276.) And Dr. Wittes, an expert in the application of statistics to clinical studies, likewise testified that the study provided "no evidence" that Prevagen benefited cognition. (J.A. Tr._352-353.)

Quincy also incorrectly contends (Quincy Br. 56-57) that the State's experts did not consider Quincy's animal, in vitro, and open label studies. But Dr. Sano specifically testified that those studies would not change her opinion that there was no adequate scientific substantiation for Quincy's marketing statements because the studies "do not speak to an effect on humans." (J.A. Tr._330; *see* J.A. Tr._293-295.) And defendants'

own expert agreed. Dr. David Schwartz, a consultant who advises clients on how to provide legally sufficient substantiation for their claims (J.A. Tr._1123-1124), testified that if all he had were Quincy's open-label, in vitro, and animal studies, he "would not have considered the challenged claims to be adequately substantiated" (J.A. Tr._1199-1201).

2. The district court erred in denying the State's motion for judgment as a matter of law as to six of the challenged statements.

The district court erred in denying the State's motion for judgment as a matter of law on the six statements for which the jury found no liability under GBL §§ 349 and 350—specifically, that Prevagen "improves memory," "improves memory within 90 days," "provides other cognitive benefits, including but not limited to healthy brain function, a sharper mind, and clearer thinking," and is "clinically shown" to do each of these things. The jury correctly found that these six statements, like the two statements on which it found GBL liability, are misleading because they are not supported by competent and reliable scientific evidence. However, the jury erred in concluding that Quincy is not liable for these six statements because there was not sufficient evidence that these six claims would be material to a reasonable consumer. (J.A. ECF_421_2, 4-

5.) The same presumption of materiality applies to these statements as to the statements for which the jury found liability, and Quincy failed to present any evidence at trial rebutting that presumption.

As discussed above, a misleading claim is material if it "pertains to an issue that may bear on a consumer's decision to participate in a particular transaction." *North State Autobahn*, 102 A.D.3d at 13. As the jury was properly instructed, "[a] challenged statement that is stated explicitly or that significantly involves health is presumed to be material." (J.A. Tr._1446-1447.) To overcome the presumption of materiality, the defendant must present evidence that the claims would not affect the decision-making of a reasonable consumer. See *supra* at 55.

The presumption plainly applies here because Quincy's marketing statements expressly assert that Prevagen had beneficial effects on consumers' health. And Quincy presented no evidence at trial to rebut the presumption of materiality. *See Image Plastic Surgery,* 210 A.D.3d at 445 (applying presumption where defendant failed to "meaningfully dispute" materiality of claims that procedure "could be used to effectively treat various medical conditions"). Quincy did not, for example, present documentary evidence or testimony indicating that reasonable consumers

would *not* have considered Quincy's advertising in determining whether to purchase Prevagen. To the contrary, as discussed above, Quincy's marketing director explained that the purpose of Quincy's advertising was to "create a quick impression to help a consumer move towards the product," by asking "[i]f they see what's on the package, if they see a commercial, would they make a move and go learn more?" (J.A. Tr._106.)

Courts have not hesitated to apply the presumption of materiality to misleading statements that are similar to defendants' statements here. In *National Urological Group*, for example, the court applied the presumption of materiality to the defendants' claims that their dietary supplements caused weight loss and improved sexual performance, explaining that it was "hard to imagine that any reasonable customer would find claims regarding how a product affects his or her health or safety immaterial." 645 F. Supp. 2d at 1190-91. *See also FTC v. Wellness Support Network, Inc.*, No. 10-cv-04879, 2014 WL 644749, at *3-4, *17 (N.D. Cal. Feb. 19, 2014); *Novartis Corp.*, 223 F.3d at 786; *FTC v. Roca Labs, Inc.*, 345 F. Supp. 3d 1375, 1386 (M.D. Fla. 2018). The same presumption of materiality applies to Quincy's misleading statements about Prevagen's purported health effects. Because Quincy presented no

evidence to rebut the presumption of materiality, the district court erred in denying the State's motion for judgment as a matter of law. *See Ginder*, 752 F.3d at 574.

POINT II

THE DISTRICT COURT ERRED IN DISMISSING THE STATE'S CLAIMS AGAINST UNDERWOOD FOR LACK OF PERSONAL JURISDICTION

For two independent reasons, the district court erred in concluding that it lacked personal jurisdiction over Underwood for purposes of the State's claims.[8] (*See* J.A. ECF_272_1-5.) First, the court had personal jurisdiction over Underwood under New York's long-arm statute. Second, the court had pendent jurisdiction in any event.

A. The District Court Had Personal Jurisdiction over Underwood Under New York's Long Arm Statute.

Federal courts in New York may exercise specific personal jurisdiction over a defendant who is not domiciled in the State where both the applicable long-arm statute and principles of due process are

[8] Because the court dismissed the State's claims on Underwood's motion for summary judgement, the State cites evidence from the summary judgment record in this section.

satisfied. *See Eades v. Kennedy, PC L. Offs.*, 799 F.3d 161, 168 (2d Cir. 2015). Here, the court had personal jurisdiction over Underwood under the agency prong of New York's long-arm statute, C.P.L.R. 302(a)(1), because Quincy acted as Underwood's agent in advertising and selling Prevagen in New York using false and misleading statements.

The long-arm statute's agency prong permits the court to exercise personal jurisdiction over a corporate officer where the company acts as the agent of the officer in transacting business in New York. *See Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988). The State need not prove a formal agency relationship. *Id.* Instead, the State need only show that the corporation "engaged in purposeful activities in this State in relation to" the State's claims, that these transactions were "for the benefit of and with the knowledge and consent of" the corporate officer, and that the officer "exercised some control over" the corporation's transactions in New York. *Id.* Jurisdiction exists where the defendant was "a primary actor" in the conduct of business in New York, rather than "some corporate employee . . . who played no part in it." *Id.* at 470; *see Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18, 21-22 (2d Cir. 1988); *EMI Christian*, 844 F.3d at 98.

Here, each of the elements of *Kreutter*'s test is plainly satisfied. It is undisputed that Quincy engaged in purposeful activities in New York that are related to the State's claims, i.e., using false and misleading statements in New York advertisements to sell Prevagen to New York consumers. (*See* J.A. ECF_240-9_16-17, 21.) Advertisements for Prevagen aired on at least eight local New York television stations and numerous national television and radio stations available in New York. (J.A. ECF_240-3_40-50, 56, 71.) These advertisements resulted in sales of nearly one million bottles of Prevagen in New York between 2011 and 2019, earning more than $25 million in revenue for Quincy. (J.A. ECF_240-4_12-13.)

Underwood not only knew about these advertisements but also personally played an active role in Quincy's marketing, including exercising substantial control over marketing activities. Underwood translated scientific data into marketing language and directed research programs and activities. (*See* J.A. ECF_240-2_64.) Underwood also testified that Quincy's director of sales and marketing reported to him and that he played a leadership role with the marketing team. (J.A. ECF_240-6_7-8.) *See EMI Christian*, 844 F.3d at 98 (jurisdiction over defendant "founder

and CEO" who "exercised extensive control over [the company's] day-to-day activities").

Indeed, one of the many Prevagen advertisements that aired in New York on local television was a thirty-minute infomercial featuring Underwood himself making misleading statements about Prevagen's effects on memory and cognition. (*See* J.A. ECF_240-9_17, 21, ECF_240-3_56.) *See Retail Software Servs.*, 854 F.2d at 20, 22 (personal jurisdiction over two corporate officers who personally made misleading statements). Underwood also acknowledged that he was personally involved in the company's discussions "related to any form of media that we're interested in marketing through, print, radio, TV, digital," and in "develop[ing] messaging that connects with our target consumer audience." (J.A. ECF_240-6_9; *see* J.A. ECF_240-6_18.) He personally approved the packaging for Prevagen, which contained the misleading claims challenged by the State. (J.A. ECF_240-6_12.) And Underwood, as Quincy's largest individual shareholder with more than thirty-three percent of the company's stock, financially benefited from Quincy's Prevagen advertisements and sales in New York. (J.A. ECF_240-15_4.)

Underwood was thus "a primary actor" in Quincy's misleading advertising and sales in New York, not merely "some corporate employee" who had no knowledge or involvement. *See Kreutter*, 71 N.Y.2d at 470; *EMI Christian*, 844 F.3d at 98. Tellingly, even though Underwood was not a defendant as to the State's claims at trial, the jury nonetheless listed him as liable on the jury verdict sheet—thereby recognizing his pervasive role in developing and disseminating Quincy's misleading marketing in New York.

The district court's rejection of personal jurisdiction under the long-arm statute was based on the flawed reasoning that Quincy marketed and sold Prevagen not only in New York but nationwide. (*See* J.A. ECF_272_3-5.) As this Court has made clear, the fact that a defendant "served a national market, as opposed to a New York-specific market, has little bearing" on the personal jurisdiction analysis because "attempts to serve a nationwide market constitute evidence of the defendant's attempt to serve the New York market, albeit indirectly." *EMI Christian*, 844 F.3d at 98 (quotation and alteration marks omitted); *see Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 243 (2d Cir. 1999); *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 171 (2d Cir. 2010). If

that were not the case, wrongdoers who made their goods and services available in every State would have *more* protection from suit than those who targeted only select States. *See Keeton v. Hustler Mag., Inc.,* 465 U.S. 770, 781 (1984) (recognizing jurisdiction over "a national publication aimed at a nationwide audience" based on distribution in the forum State). Moreover, regardless of the geographic scope of Quincy's marketing plan, Underwood—through Quincy—indisputably had substantial contacts with the New York market, including airing advertisements on local New York television channels and selling significant quantities of Prevagen to New York consumers.

For substantially the same reasons, the exercise of personal jurisdiction over Underwood is consistent with due process. Only in a "rare" case would due process prohibit what New York's long-arm statute permits. *See D&R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro,* 29 N.Y.3d 292, 299-300 (2017). Personal jurisdiction is constitutionally proper where a defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State" and the plaintiff's claims "arise out of or relate to the defendant's contacts with the forum." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S.

351, 352 (2021) (quotation marks omitted). Here, Quincy, whose contacts may be imputed to Underwood, *see EMI Christian*, 844 F.3d at 98 & n.12, deliberately targeted New York by airing misleading advertisements in New York and making sales to New York consumers, *see id.* at 98. And there is no dispute that New York's claims are directly related to those misleading advertisements. Accordingly, the Court should conclude that New York's long-arm statute provided personal jurisdiction over Underwood.

B. Pendent Personal Jurisdiction Provides an Independent Basis for Jurisdiction.

Even if this Court were to conclude that the long-arm statute did not provide personal jurisdiction, the Court should reverse the dismissal of the State's claims against Underwood on the alternative ground that the district court had pendent personal jurisdiction based on the FTC's federal claims against Underwood. (*See* J.A. ECF_272_1-2.)

"[U]nder the doctrine of pendent personal jurisdiction, where a federal statute authorizes nationwide service of process, and the federal and state claims derive from a common nucleus of operative fact, the district court may assert personal jurisdiction over the parties to the

related state law claims even if personal jurisdiction is not otherwise available." *IUE AFL-CIO Pension Fund*, 9 F.3d at 1056 (quotation marks and citation omitted); *see Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 88 (2d Cir. 2018). As the district court initially recognized before changing its conclusion (J.A. ECF_72_7-14), pendent personal jurisdiction exists here because the FTC Act authorizes nationwide service of process as to Underwood based on his contacts with the United States, *see* 15 U.S.C. § 53(b), and the State's and FTC's claims challenge the same eight misleading statements. (*See* J.A. ECF_1_26-29.)

Although the exercise of pendent personal jurisdiction is discretionary, *Charles Schwab Corp.*, 883 F.3d at 88, jurisdiction over Underwood is particularly appropriate here. Underwood was already defending against the federal claims in the same action, in the same forum. And Underwood's company was responding to the same state law claims. Judicial economy, convenience, and fairness to the litigants thus warrant addressing the State's claims against Underwood in the same action. *See IUE AFL-CIO Pension Fund,* 9 F.3d at 1059; *see also Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1181 (9th

Cir. 2004); *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 628-29 (4th Cir. 1997).

The district court erred in rejecting pendent personal jurisdiction on the ground that the federal claims were brought by the FTC, whereas the state law claims were brought by a separate plaintiff, the State. (J.A. ECF_272_1-2.) This Court has never announced such a limitation. Rather, this Court has explained that the application of pendent personal jurisdiction turns not on whether the *plaintiffs* are the same, but rather whether there is a sufficient connection between the state and federal *claims*. *See IUE AFL-CIO Pension Fund*, 9 F.3d at 1056; *see also ESAB Grp., Inc.*, 126 F.3d at 629; *Action Embroidery Corp.*, 368 F.3d at 1181. Consistent with that conclusion, district courts have exercised jurisdiction where state and federal claims are brought by separate plaintiffs. *See FTC v. Educare Ctr. Servs., Inc.*, 414 F. Supp. 3d 960, 975 n.4 (W.D. Tex. 2019); *American Med. Ass'n v. United Healthcare Corp.*, No. 00-cv-2800, 2001 WL 863561, at *3-4 (S.D.N.Y. July 31, 2001); *In re Packaged Seafood Prods. Antitrust Litig.*, 338 F. Supp. 3d 1118, 1173 (S.D. Cal. 2018).

The district court erred (J.A. ECF_272_1) in relying on the Sixth Circuit's decision in *Canaday v. Anthem Companies, Inc.*, which was primarily addressing the separate issue of whether out-of-state plaintiffs may opt in to a mass action brought under the federal Fair Labor Standards Act (FLSA) in a State in which they do not work. 9 F.4th 392, 394-95 (6th Cir. 2021). The Sixth Circuit affirmed the dismissal of the out-of-state plaintiffs, finding that their claims did not arise out of the employer's contacts with the forum. *Id.* at 394, 396-97. The court briefly rejected plaintiffs' alternative argument that pendent personal jurisdiction could provide a basis for jurisdiction because the Sixth Circuit had never recognized that doctrine and, in any event, the FLSA did *not* authorize nationwide service of process, as the doctrine requires. *Id.* at 401. Neither reason supports the district court's decision here. Unlike the Sixth Circuit, this Court has long recognized pendent personal jurisdiction. *See IUE AFL-CIO Pension Fund*, 9 F.3d at 1056. And it is undisputed that the FTC Act authorizes nationwide service of process.

POINT III

THE DISTRICT COURT'S INJUNCTION WAS PROPERLY ENTERED

Contrary to defendants' arguments (Quincy Br. 29-32; Br. for Def.-Appellant-Cross-Appellee (Underwood Br.) 33), the district court properly exercised its broad equitable discretion in enjoining defendants from using all eight challenged statements and any similar statements in their advertising.[9] (*See* J.A. ECF_513_2.) As an initial matter, defendants are mistaken in asserting that only two of the challenged statements were found to be unlawful. *Contra* Quincy Br. 22; Underwood Br. 33. The jury correctly found that *all eight statements* have a tendency to deceive and are thus unlawful under § 63(12)'s fraud prong. The injunction thus does not prohibit any lawful conduct.

Nor does the injunction's application to statements "similar" to the eight unlawful statements violate the specificity requirements of Federal Rule of Civil Procedure 65(d), as defendants erroneously argue (Quincy Br. 29-32; Underwood Br. 33). Rule 65(d) provides that every order

[9] Because the State sought and obtained an injunction applicable to New York, the State takes no position on the injunction's application to Quincy's marketing nationwide.

granting an injunction must "state the reasons why it issued," "state its terms specifically," and "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d). "[U]nder Rule 65(d), an injunction must be more specific than a simple command that the defendant obey the law." *Peregrine Myanmar Ltd. v. Segal,* 89 F.3d 41, 51 (2d Cir. 1996).

The injunction order meets each requirement here and is not the type of "obey-the-law order of the sort that this court has condemned in the past." *S.C. Johnson & Son,* 241 F.3d at 241. The order sets forth the reasons for its issuance. It summarizes the jury's conclusions that all eight challenged statements have a tendency to deceive and are not supported by competent and reliable scientific evidence, and that two statements (about Prevagen's ability to reduce memory problems associate with aging) are materially misleading. (J.A. ECF_513_2.) The order also expressly lists each of the eight challenged statements Quincy is prohibited from using, rather than incorporating them by reference to another document.

Moreover, when read in context, the injunction's prohibition against using statements similar to the eight listed statements plainly prohibits

defendants from using statements that are misleading in the same way that the jury found the eight challenged statements to be misleading. In other words, the injunction prohibits statements about Prevagen's effects on memory and cognition that have a tendency to deceive consumers and are unsupported by competent and reliable scientific evidence. The injunction is not required to list every hypothetical permutation of misleading claims about the effect of Prevagen on memory and cognition to satisfy Rule 65(d). *See S.C. Johnson & Son,* 241 F.3d at 241.

Courts routinely uphold injunctions like the one here by relying on the plain meaning and context of the order. In *S.C. Johnson & Son*, for instance, this Court upheld an injunction prohibiting the use of a specific challenged advertisement and all "other advertisements that similarly fail to accurately depict" the difference between two competitors' products. *Id.* The injunction was "sufficiently specific when read in the context" of prior orders because it made plain that the defendant could not disseminate advertisements that were misleading in the same way as the challenged advertisement. *Id.* Likewise, in *Eli Lilly & Co. v. Arla Foods, Inc.*, the Seventh Circuit upheld a preliminary injunction prohibiting the dissemination of a particular advertisement and all "substantially

similar" advertisements, reasoning that the prohibition on similar advertisements was sufficiently definite "when considered in the context of the rest of the order." 893 F.3d 375, 384-85 (7th Cir. 2018) (quotation marks omitted).[10] The Court should reach the same result here.

[10] Quincy misplaces its reliance on inapposite cases. *See* Quincy Br. 31. In *McCarthy v. Fuller*, the court vacated an injunction prohibiting the defendant from making many allegedly defamatory statements on the grounds that the jury had not found which of the challenged statements was defamatory. 810 F.3d 456, 461, 463 (7th Cir. 2015). Here, by contrast, the jury made factual findings that each challenged statement is deceptive and misleading. In *ALPO Petfoods, Inc. v. Ralston Purina Co.*, the court remanded for modification of an injunction that prohibited not only the dissemination of specific claims but also the publication, without preclearance by the court, of academic articles. 913 F.2d 958, 971-72 (D.C. Cir. 1990). The court limited the scope of that injunction to advertising, *id.* at 972-73, as the district court has already done here.

POINT IV

THE DISTRICT COURT ERRED IN SUMMARILY DENYING THE STATE'S REQUEST FOR MONETARY RELIEF

The district court erred in summarily denying the State's request for monetary relief, including disgorgement and statutory penalties (*see* J.A. ECF_513_2), without allowing the parties to gather and present evidence about monetary relief. The Court should reverse the district court's denial of monetary relief and remand for further proceedings on that issue.

There is no dispute that the State is authorized to seek monetary relief here. Specifically, Executive Law § 63(12) permits the State to seek disgorgement, an equitable remedy that requires wrongdoers to return their wrongfully obtained profits. *People v. Greenberg*, 27 N.Y.3d 490, 497-98 (2016). And, as noted, under GBL §§ 349 and 350, the State may seek statutory penalties of up to five thousand dollars for each violation. *See* GBL § 350-d(a). Courts have discretion to impose these statutory penalties "so long as [the court's] choice is explained and it is not disproportionate to the offense." *People v. Applied Card Sys., Inc.*, 41 A.D.3d 4, 10 (3d Dep't 2007) (quotation marks omitted), *aff'd*, 11 N.Y.3d 105 (2008).

After the jury issued its liability verdict, the State should have been allowed to present evidence to support its request for disgorgement and statutory penalties—and defendants should have been permitted to present evidence in response. Indeed, the district court repeatedly recognized that it would be necessary to conduct further evidentiary proceedings to address monetary relief if the jury found defendants liable. (*See* J.A. ECF_396_1 (request for discovery about Quincy's financials could be renewed at the remedies stage), ECF_457_3 (after trial, "[d]eterminations of the Attorney General's remedies . . . remain"), ECF_464_4-5, 9 (renewed discovery requests on monetary relief to be made after posttrial briefing on liability).) Defendants likewise argued that the presentation of evidence on monetary relief should occur, if at all, after liability had been determined. (*See* J.A. ECF_458_2-3, ECF_464_6-8.) Indeed, the award of monetary relief after a finding of liability is routine in cases like this one. *See, e.g.*, *Applied Card*, 11 N.Y.3d at 112-13, 125 (statutory penalties of $7.9 million); *People v. Orbital Pub. Group, Inc.*, No. 451187/2015, 2019 WL 6793640, at *1 (N.Y. Sup. Ct. Dec. 09, 2019) (statutory penalties of $7.4 million), *aff'd.*, 193 A.D.3d 661, 662 (1st Dep't

2021); *People v. Northern Leasing Sys., Inc.*, 234 A.D.3d 419, 420 (1st Dep't 2025) (disgorgement of $9 million).

Although the award of equitable monetary relief is ultimately a discretionary determination, the district court abused its discretion here in failing to provide the parties any opportunity to be heard on this issue. *Cf. SEC v. Smyth*, 420 F.3d 1225, 1232-33 (11th Cir. 2005); *Commodity Futures Trading Comm'n v. American Metals Exch. Corp.*, 991 F.2d 71, 77-78 (3d Cir. 1993). And the court further erred in failing to provide any reasoning for its decision. *See Applied Card*, 41 A.D.3d at 10 (decision as to monetary relief must be explained). As this Court has recognized, it "cannot uphold a discretionary decision" unless the district court provides "a sufficient explanation of how [it] reached the result it did." *United States v. Cavera*, 550 F.3d 180, 193 (2d Cir. 2008). There is no such explanation here.

As the State sought to explain below, the award of disgorgement and statutory penalties is appropriate because these remedies are intended to deter future violations, *see Ernst & Young*, 114 A.D.3d at 569-70; *People v. Applied Card Sys., Inc.*, No. 2073-03, 2006 N.Y. Misc. LEXIS 9527, at *23 (Sup. Ct. Albany County 2006), *aff'd in part and modified in*

part, 41 A.D.3d 4 (3d Dep't 2007), and there is evidence that Quincy is likely to engage in future violations absent such relief. For example, Quincy continued to disseminate its deceptive advertising in New York (and nationwide) for more than seven years after the State and the FTC filed this complaint. Quincy continued to use the same statements in its advertising after a jury verdict found that those statements were misleading and deceptive to consumers, until ordered to stop by the district court. (*See* J.A. ECF_512-2 (November 2024 photo of packaging), ECF_512-3 (same).) And Quincy now argues in this appeal (Quincy Br. 26-28) that it should be allowed to *continue* using six of the eight statements that the jury found fraudulent and misleading in its advertising outside New York.

On remand, the State is also prepared to put forth evidence supporting a calculation of disgorgement and statutory penalties.[11] For example, to "reasonably approximate[] the amount of the defendants' unjust gains," *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 364 (2d Cir.

[11] If permitted to present this evidence, the State intends to seek updated discovery on this issue, as the State attempted to do after trial. (*See* J.A. ECF_521-3_2-3, ECF_521-4_2-3.)

2011) (quotation and alteration marks omitted), the State may rely on data showing that, using misleading advertising, Quincy earned more than $25 million in revenue from sales to New York consumers between 2011 and 2019 (J.A. ECF_240-4_12-13). Civil penalties can similarly be assessed using data showing that Quincy sold nearly one million bottles of Prevagen to New York consumers between 2011 and 2019 (J.A. ECF_240-4_12-13). *See, e.g.*, *Applied Card,* 2006 N.Y. Misc. LEXIS 9527, at *23 (applying statutory penalties for "each improper consumer transaction").

Accordingly, this Court should reverse the denial of monetary relief and remand for further proceedings related to monetary relief.

CONCLUSION

This Court should (i) affirm the district court's orders finding liability on the Executive Law § 63(12) and GBL §§ 349 and 350 claims and entering an injunction prohibiting Quincy and Underwood from using the challenged statements in advertising; and (ii) remand for (a) entry of judgment as a matter of law as to the State's GBL §§ 349 & 350 claims for the statements on which the district court did not find liability; (b) adjudication of the State's claims as to Underwood, with instructions to exercise personal jurisdiction over him; and (c) an evidentiary hearing regarding the State's claims for monetary relief.

Dated: New York, New York
July 17, 2025

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for People of the State of New York

By: */s/ Sarah Coco*
SARAH COCO
Assistant Solicitor General

28 Liberty Street
New York, NY 10005
(212) 416-6312

BARBARA D. UNDERWOOD
Solicitor General
JUDITH N. VALE
Deputy Solicitor General
SARAH COCO
Assistant Solicitor General
of Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Ava Mortier, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 16,435 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ Ava Mortier