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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

13 PHILLIP RACIES, On Behalf of Himself
14 and All Others Similarly Situated,

15 Plaintiff,

16 vs.

17 QUINCY BIOSCIENCE, LLC, a
18 Wisconsin limited liability company,

19 Defendant.

Case No. 3:15-cv-00292 HSG

**DEFENDANT QUINCY BIOSCIENCE,
LLC’S NOTICE OF MOTION AND
MOTION TO STAY PROCEEDINGS**

*[Filed concurrently with Declaration of
William P. Cole]*

Date: April 20, 2017
Time: 2:00 p.m.
Place: Courtroom 10

Complaint Filed: January 21, 2015
Trial Date: None Set

23
24 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

25 **PLEASE TAKE NOTICE** that on April 20, 2017 at 2:00 p.m., or as soon
26 thereafter as the matter may be heard in Courtroom 10 of the United States District
27 Court for the Northern District of California, located on the 19th Floor at 450 Golden
28 Gate Avenue, San Francisco, California 94102, Defendant Quincy Bioscience, LLC

**CALL &
JENSEN**
EST. 1981

1 (“Quincy”) will and hereby does move for an order staying the proceedings in this
2 action, pending resolution of the civil enforcement action brought by the Federal Trade
3 Commission and the Attorney General of the State of New York in *Federal Trade*
4 *Commission, et al. v. Quincy Bioscience Holding Co., Inc., et al.*, Case No. 17-cv-00124
5 (Southern District of New York).

6 This motion is made pursuant to the Court’s inherent power to control the
7 disposition of the causes on it docket with economy of time and effort for itself, for
8 counsel, and for litigants, and on the grounds that a stay will promote judicial economy
9 and the orderly course of justice, will avoid duplicative litigation and discovery, and
10 will avoid the potential for inconsistent judgments.

11 This Motion is based on this Notice of Motion, the Memorandum of Points and
12 Authorities hereunder, the concurrently-filed Declaration of William P. Cole and the
13 documents and materials attached thereto, the pleadings and papers on file herein, and
14 such other matters as may be properly considered by the Court at or before the hearing
15 of this motion.

16 Dated: February 10, 2017

CALL & JENSEN
A Professional Corporation
Matthew R. Orr
William P. Cole
Joshua G. Simon

19
20 By: /s/ William P. Cole
William P. Cole

21 Attorneys for Defendant
22 Quincy Bioscience, LLC

23
24 CALL &
25 JENSEN
26 EST. 1981

1 **STATEMENT OF ISSUE TO BE DECIDED PER CIVIL L.R. 7-4(A)(3)**

2 Whether this action should be stayed pending resolution of the civil enforcement
3 action brought by the Federal Trade Commission (“FTC”) and the Attorney General of
4 the State of New York in *Federal Trade Commission, et al. v. Quincy Bioscience*
5 *Holding Co., Inc., et al.*, Case No. 17-cv-00124 (Southern District of New York).

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. INTRODUCTION**

8 Quincy requests that, in the interests of efficiency and judicial economy, the
9 Court stay this action pending resolution of the *parens patriae* action brought by the
10 FTC and the New York Attorney General in the Southern District of New York (the
11 “FTC action”). The FTC action targets all of the same Prevacen® products and the
12 same alleged misrepresentations as Racies’ Complaint in this case. Quincy is a
13 defendant in the FTC action.

14 Because the issues in the FTC action subsume the issues in this case, a stay of
15 this case is proper. A stay will avoid the inevitable duplication of discovery—as well as
16 the risk of inconsistent rulings—that would result from concurrent proceedings. The
17 FTC action also will inform, if not dispose of, Racies’ claims in this case, because his
18 claims are governed by the same “reasonable consumer” test as the FTC’s Section 5(a)
19 claim and the New York Attorney General’s consumer fraud claim. At a minimum,
20 resolution of the FTC action will inform this Court’s consideration of whether a class
21 action would be the “superior” method of adjudication. On the other hand, a stay will
22 not cause any prejudice to Racies, who the Court has already found does not face any
23 threat of future harm.

24 Accordingly, Quincy respectfully requests that the Court stay this case pending
25 the outcome of the FTC action.

1 **II. STATEMENT OF FACTS**

2 **A. This Putative Class Action**

3 On January 21, 2015, Racies sued Quincy Bioscience, LLC in this Court. His
4 First Amended Complaint (“FAC”) alleges violations of California’s Unfair
5 Competition Law (“UCL”) and the Consumers Legal Remedies Act (“CLRA”) arising
6 from Quincy’s marketing and distribution of Prevacen®. Doc. No. 21. Targeting
7 Prevacen® Regular Strength, Prevacen® Extra Strength, and Prevacen® Chewables,
8 Racies alleges that he and putative class members “have been damaged in their
9 purchases of these Products and have been deceived into purchasing Products that they
10 believed, based on Defendant’s representations, improved memory and supported brain
11 function, sharper mind and clearer thinking, when, in fact, they do not.” *Id.* ¶¶ 23, 35.

12 Initially, Racies attempted to predicate his UCL and CLRA claims not only on
13 the ground that Quincy’s marketing representations were allegedly false, but also on the
14 ground that they lacked substantiation. In May 2015, however, the Court dismissed the
15 lack of substantiation claims with prejudice. Doc. No. 34 at p.9. Accordingly, the sole
16 (and baseless) theory of Racies’ UCL and CLRA claims is that Prevacen® does not
17 provide any brain function or memory benefits. Doc. No. 21 at ¶ 57.

18 Racies seeks to represent “[a]ll consumers who, within the applicable statute of
19 limitations period, purchased Prevacen in California, Florida, Illinois, Massachusetts,
20 Michigan, Minnesota, Missouri, New Jersey, New York, and Washington until the date
21 notice is disseminated.” *Id.* ¶ 36. Alternatively, he seeks to represent a California-only
22 class. *Id.* ¶ 37. He seeks restitution and damages. *Id.* ¶¶ 63, 69, 71. Initially, he also
23 sought injunctive relief, but the Court dismissed that claim with prejudice. Doc. No. 34
24 at p.9.

25 Following the Court’s order on Quincy’s motion to dismiss, the parties limited
26 discovery to Racies’ brain chemistry allegations, in order to prepare summary judgment
27 motions focused solely on those allegations. In January 2016, the parties completed the
28 summary judgment briefing, and the Court heard the cross motions on February 4,

1 2016. On October 3, 2016, the Court denied the parties' respective motions. Doc. No.
2 89. Between the summary judgment hearing and the Court's order thereon, no court
3 proceedings or discovery took place.

4 Racies' motion for class certification is due on June 16, 2017. There is no trial
5 date.

6 **B. The FTC Action Subsumes the Issues in this Case**

7 On January 9, 2017, in the Southern District of New York, the FTC and New
8 York's Attorney General filed suit against the following parties: Quincy Bioscience,
9 LLC; Quincy Bioscience Holding Company, Inc.; Prevacen, Inc.; Quincy Bioscience
10 Manufacturing, LLC; Mark Underwood; and Michael Beaman. Declaration of William
11 P. Cole, Exh. 1. The FTC and the New York Attorney General allege that Quincy's
12 marketing of Prevacen® Regular Strength, Prevacen® Extra Strength, Prevacen®
13 Chewables, and Prevacen® Professional is false and misleading. *Id.* ¶¶ 19, 37, 41, 43,
14 45. The FTC action targets the same allegedly false and misleading representations as
15 Racies' putative class action—namely, that Prevacen® improves memory, reduces
16 memory problems associated with aging, and provides “other cognitive benefits,
17 including but not limited to, healthy brain function, a sharper mind, and clearer
18 thinking.” *Id.* ¶¶ 36, 42. The FTC and the New York Attorney General also bring lack
19 of substantiation claims.

20 The FTC alleges the defendants' conduct violates Sections 5(a) and 12 of the
21 FTC Act, 15 U.S.C. §§ 45(a) and 52. The New York Attorney General alleges
22 violations of New York General Business Law § 349 and New York Exec. Law §
23 63(12).

24 The FTC action subsumes Racies' proposed class. Whereas Racies seeks to
25 represent Prevacen® consumers in 10 states, the FTC action is, by nature, national in
26 scope. And whereas Racies will seek this Court's authorization to serve as a private
27 attorney general on behalf of New York consumers, New York's *public* attorney
28 general is already doing so.

1 Both the FTC and New York's Attorney General seek restitution and
 2 disgorgement of profits. *Id.* at p.30-31. They also seek injunctive relief (which Racies
 3 cannot seek on behalf of himself or any class). *Id.*

4 5 **III. ARGUMENT**

6 **A. The Court Has Inherent Authority to Stay This Action**

7 The district court's power to stay proceedings is "incidental to the power inherent
 8 in every court to control the disposition of the causes on its docket with economy of
 9 time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S.
 10 248, 254 (1936).

11 "A trial court may, with propriety, find it is efficient for its own docket and the
 12 fairest course for the parties to enter a stay of an action before it, pending resolution of
 13 independent proceedings which bear upon the case." *Leyva v. Certified Grocers of*
 14 *California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). "This rule applies whether the
 15 separate proceedings are judicial, administrative, or arbitral in character, and does not
 16 require that the issues in such proceedings are necessarily controlling of the action
 17 before the court." *Id.* at 863-64.

18 When deciding a motion to stay, a court should consider: (1) possible damage
 19 which may result from granting a stay; (2) the hardship or inequity a party may suffer in
 20 being required to go forward; and (3) the orderly course of justice measured in terms of
 21 the simplifying or complicating of issues, proof, and questions of law which could be
 22 expected to result from a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir.
 23 1962)(citing *Landis*, 299 U.S. at 254-55).

24 **B. All Three *Landis* Factors Weigh in Favor of Staying this Action**

25 Here, all three of the *Landis* factors counsel in favor of staying this case.

26 **1. Staying this Action Will Not Prejudice Racies**

27 Staying this case will not prejudice Racies. First, Racies does not face any
 28 ongoing harm. The Court has already determined that Racies does not face any "real

1 and immediate threat” of future injury and does not have standing to seek injunctive
 2 relief. Doc. No. 34 at p.9. In contrast, the FTC action seeks nationwide injunctive
 3 relief.

4 Second, although a stay will delay Racies’ claim for damages, “[p]otential
 5 monetary damages are not sufficient harm to warrant not staying this proceeding.”
 6 *FormFactor, Inc. v. Micronics Japan Co.*, No. CV-06-07159, 2008 WL 361128, at *2
 7 (N.D. Cal. Feb. 11, 2008); *see also CMAX*, 300 F.32d at 268-69 (holding that delay in
 8 obtaining monetary damages was not sufficient prejudice to avoid a stay); *Gustavson v.*
 9 *Mars, Inc.*, No. 13-cv-04537-LHK, 2014 WL 6986421, at *3 (N.D. Cal. Dec. 10,
 10 2014)(“As to the delay in recovering damages, Defendant is correct that mere delay in
 11 monetary recovery is an insufficient basis to deny a stay.”). That is particularly true
 12 here, where Racies spent only \$27.99 on PrevaGen®. Doc. No. 21 at ¶ 20.

13 Third, the possibility “that evidence will be obtained, or rulings made,” in the
 14 FTC action, which may adversely affect Racies’ claims here “is not the kind of
 15 prejudice which should move a court to deny a requested postponement.” *CMAX*, 300
 16 F.2d at 269; *accord FormFactor*, 2008 WL 361128, at *2.

17 For these reasons, Racies cannot demonstrate any meaningful harm he will suffer
 18 if this case is stayed pending resolution of the FTC action. Thus, this factor weighs in
 19 favor of a stay.

20 **2. Quincy Will Suffer Hardship if Required to Litigate the Same**
 21 **Issues in Two Forums at Once**

22 Without a stay, Quincy will suffer hardship, because it will be forced to litigate
 23 identical issues in two separate actions at the same time. Where the “facts material to
 24 each examination may in large part be the same[,]” the situation “is one which cries out
 25 for the elimination of wasteful duplication of effort.” *Chronicle Pub. Co. v. National*
 26 *Broadcasting Co.*, 294 F.2d 744, 747 (9th Cir. 1961). “The burden of such duplication
 27 of effort is not, of course, borne by the courts alone. It is borne as well by the litigants
 28 and their counsel.” *Id.* at 748.

1 Because the FTC action subsumes not only all the same Prevacen® products but
 2 also the same alleged misrepresentations, there is no question that allowing both cases
 3 to proceed simultaneously will result in duplicative fact discovery, duplicative expert
 4 discovery, and duplicative motion practice. Indeed, this Court and the Southern District
 5 of New York would be answering the same questions: whether Quincy’s representations
 6 concerning Prevacen® are likely to mislead reasonable consumers. *See Williams v.*
 7 *Gerber Products, Co.*, 523 F.3d 934, 938 (9th Cir. 2008)(reasonable consumer test
 8 applies to UCL and CLRA claims); *F.T.C. v. Gill*, 265 F.3d 944, 950 (9th Cir.
 9 2001)(reasonable consumer test applies to claims under Section 5(a) of the FTC Act);
 10 *Gaidon v. Guardian Life Ins. Co. of America*, 94 N.Y.2d 330, 344 (Ct. App.
 11 1999)(reasonable consumer test applies to claims under New York General Business
 12 Law § 349). And neither the FTC nor the New York Attorney General will be bound by
 13 the discovery that Racies takes in this case, much less foreclosed from propounding
 14 their own written discovery and taking their own depositions. The same is true for the
 15 other parties named alongside Quincy as defendants in the FTC action, but not named
 16 as parties here. Thus, “two rounds of discovery would ensue absent a stay.” *Flexsys*
 17 *Americas LP v. Kumho Tire, U.S.A., Inc.*, No. 5:05CV156, 2005 WL 1126750, at *3
 18 (N.D. Ohio Apr. 29, 2005). Such “additional discovery is more than a hardship of
 19 continuing litigation, but the creation of duplicative efforts” that would prejudice
 20 Quincy. *FormFactor*, 2008 WL 361128, at *3.

21 Accordingly, this factor also weighs in favor of a stay.

22 **3. Staying this Action Will Promote the Orderly Course of Justice**
 23 **and Will Avoid the Risk of Inconsistent Rulings**

24 Because the same products are accused in this case and the FTC action, and
 25 because the similar standards apply under the UCL, CLRA, the FTC Act and New York
 26 General Business Law § 349, if both cases proceed simultaneously, there is an
 27 “inevitable risk of inconsistent rulings.” *Aliphcom v. Fitbit, Inc.*, 154 F. Supp. 3d 933,
 28 940 (N.D. Cal. 2015)(finding the risk of inconsistent rulings weighed strongly in favor

1 of a stay). For the same reasons, however, if the Court stays this case, the resolution of
2 the FTC action may result in the narrowing, withdrawal or dismissal of this action
3 altogether.

4 Staying this case until resolution of the FTC action also will shed considerable
5 light on whether any class should be certified. At the class certification stage, a key
6 factor is whether a class action is “superior to other available methods for fairly and
7 efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Thus, courts
8 considering class certification “should analyze carefully the full implications of a
9 pending or completed government enforcement action.” *To Certify or Not: A Modest*
10 *Proposal for Evaluating the “Superiority” of a Class Action in the Presence of*
11 *Government Enforcement*, 18 Geo. J. Legal Ethics 1383, 1383 (2005). Indeed, “[a]
12 *parens patriae* action is superior to a class action as a means for adjudication of
13 collective claims.” *Com. of Pa. v. Budget Fuel Co.*, 122 F.R.D. 184, 185 (E.D. Penn.
14 1988). “There is no need to have a second class representative where the class is
15 adequately represented by the Attorney General.” *Id.*; *see also Kamm v. California*
16 *Dev. Co.*, 509 F.2d 205, 212-13 (9th Cir. 1975)(affirming denial of class certification
17 where attorney general had resolved an enforcement action for false advertising);
18 *United States v. City of Chicago*, 411 F. Supp. 218, 243 (N.D. Ill. 1976)(“In view of the
19 Government’s willingness to prosecute the claims of all injured persons, it cannot be
20 said that either [proposed] class would be ‘superior to other available methods for the
21 fair and efficient adjudication of the controversy.’” (citation omitted)). As noted, the
22 FTC already brings its claims on behalf of consumers nationwide, and the New York
23 Attorney General also already represents the citizens of his state (which is one of the
24 states Racies seeks to include in his putative class). Thus, staying this case may
25 simplify—if not eliminate—the issues this Court must resolve.
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1 In short, “the anticipated simplification of the issues, the conservation of the
2 parties’ and the court’s resources, and the need to avoid the risk of inconsistent
3 judgments” all militate in favor of staying this action. *Aegean Marine Petroleum S.A. v.*
4 *Canpotex Shipping Services Ltd.*, No. 2:15-cv-00172-RAJ, 2016 WL 898571, at *3
5 (W.D. Wa. Mar. 9, 2016).

6
7 **IV. CONCLUSION**

8 All three of the *Landis* factors weigh in favor of staying this case pending
9 resolution of the FTC action. Accordingly, Quincy respectfully requests that the Court
10 grant its motion to stay.

11
12 Dated: February 10, 2017

CALL & JENSEN
A Professional Corporation
Matthew R. Orr
William P. Cole
Joshua G. Simon

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14
15
16 By: /s/ William P. Cole
William P. Cole

17 Attorneys for Defendant
18 Quincy Bioscience, LLC

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, I caused the electronic filing of the foregoing document described as **DEFENDANT QUINCY BIOSCIENCE, LLC'S NOTICE OF MOTION AND MOTION TO STAY PROCEEDINGS** with the Clerk of the Court using the CM/ECF System which will send notification of such filing via electronic mail to all counsel of record.

/s/William P. Cole
William P. Cole

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8
9 Attorneys for Defendant Quincy Bioscience, LLC

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12

13 PHILLIP RACIES, On Behalf of Himself
14 and All Others Similarly Situated,

15 Plaintiff,

16 vs.

17 QUINCY BIOSCIENCE, LLC, a
18 Wisconsin limited liability company,

19 Defendant.
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21

Case No. 3:15-cv-00292 HSG

**DECLARATION OF WILLIAM P.
COLE IN SUPPORT OF DEFENDANT
QUINCY BIOSCIENCE, LLC'S
MOTION TO STAY PROCEEDINGS**

Date: April 20, 2017

Time: 2:00 p.m.

Place: Courtroom 10 – 19th Floor
450 Golden Gate Avenue
San Francisco CA 94102

22 Complaint Filed: January 21, 2015

23 Trial Date: None Set



1 I, William P. Cole, declare as follows:

2 1. I am an attorney duly licensed to practice law in the State of California and
3 before this Court and a shareholder in the law firm Call & Jensen, APC, the attorneys
4 for Defendant, Quincy Bioscience, LLC (“Defendant”). I have personal knowledge of
5 the following matters and, if called to testify concerning them, could do so competently.

6 2. Attached hereto as Exhibit 1 is a true and correct copy of the Complaint
7 filed January 9, 2017, in *Federal Trade Commission, et al. v. Quincy Bioscience*
8 *Holding Company, Inc., et al.*, No. 17-cv-00124 (Southern District of New York).

9 I declare under penalty of perjury under the laws of the United States of America
10 and the State of California that the foregoing is true and correct. This declaration was
11 executed on February 10, 2017, at San Diego, California.

12
13 By: /s/ William P. Cole
14 William P. Cole



CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, I caused the electronic filing of the foregoing document described as **DECLARATION OF WILLIAM P. COLE IN SUPPORT OF DEFENDANT QUINCY BIOSCIENCE, LLC’S MOTION TO STAY PROCEEDINGS** with the Clerk of the Court using the CM/ECF System which will send notification of such filing via electronic mail to all counsel of record.

/s/ William P. Cole
William P. Cole

CALL &
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EST. 1981

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12 Fax: (949) 717-3100

13 Attorneys for Defendant Quincy Bioscience, LLC

14
15 **UNITED STATES DISTRICT COURT**
16
17 **NORTHERN DISTRICT OF CALIFORNIA**
18

19 PHILLIP RACIES, On Behalf of Himself
20 and All Others Similarly Situated,

21 Plaintiff,

22 vs.

23 QUINCY BIOSCIENCE, LLC, a
24 Wisconsin limited liability company,

25 Defendant.

Case No. 3:15-cv-00292 HSG

**[PROPOSED] ORDER GRANTING
DEFENDANT QUINCY BIOSCIENCE,
LLC’S MOTION TO STAY
PROCEEDINGS**

Date: April 20, 2017

Time: 2:00 p.m.

Place: Courtroom 10

Complaint Filed: January 21, 2015

Trial Date: None Set

CALL &
JENSEN
EST. 1981

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Defendant Quincy Bioscience, LLC’s (“Defendant”) Motion to Stay Proceedings having duly come on for hearing before the Court, and the Court having considered all parties’ papers and arguments in connection therewith, and good cause appearing therefore,

IT IS HEREBY ORDERED that Defendant’s Motion to Stay Proceedings is GRANTED, and all proceedings in this action are stayed pending resolution of the civil action brought by the Federal Trade Commission and the Attorney General of the State of New York in *Federal Trade Commission, et al. v. Quincy Bioscience Holding Co., Inc., et al.*, Case No. 17-cv-00124 (Southern District of New York).

IT IS SO ORDERED.

DATE: _____

THE HON. HAYWOOD S. GILLIAM, JR.
UNITED STATES DISTRICT JUDGE



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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, I caused the electronic filing of the foregoing document described as **[PROPOSED] ORDER GRANTING DEFENDANT QUINCY BIOSCIENCE, LLC’S NOTICE OF MOTION AND MOTION TO STAY PROCEEDINGS** with the Clerk of the Court using the CM/ECF System which will send notification of such filing via electronic mail to all counsel of record.

/s/William P. Cole
William P. Cole

**CALL &
JENSEN**
EST. 1981