

No. 17-3745

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

FEDERAL TRADE COMMISSION and THE PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,
Plaintiffs-Appellants,

v.

QUINCY BIOSCIENCE HOLDING COMPANY, INC., QUINCY BIOSCIENCE, LLC, a limited liability company, PREVAGEN, INC., a corporation, DBA 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., MICHAEL BEAMAN, Individually and as an officer of Quincy Bioscience Holding Company, Inc., Quincy Bioscience, LLC, and Prevagen, Inc.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Motion of Truth in Advertising, Inc., AARP, AARP Foundation, Advertising Law Academics, and National Consumers League for Leave to File Brief as Amici Curiae in Favor of Appellants and in Support of Reversal

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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

FEDERAL TRADE COMMISSION and THE)
PEOPLE OF THE STATE OF NEW YORK, by)
ERIC T. SCHNEIDERMAN, Attorney General of)
the State of New York,)

Plaintiffs-Appellants,)

v.) Docket No.: 17-3745

QUINCY BIOSCIENCE HOLDING COMPANY,)
INC., QUINCY BIOSCIENCE, LLC, a limited)
liability company, PREVAGEN, INC., a)
corporation, DBA 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., MICHAEL BEAMAN, Individually)
and as an officer of Quincy Bioscience Holding)
Company, Inc., Quincy Bioscience, LLC, and)
Prevagen, Inc.,)

Defendants-Appellees.) MARCH 6, 2018

**MOTION OF TRUTH IN ADVERTISING, INC., AARP, AARP
FOUNDATION, ADVERTISING LAW ACADEMICS, AND NATIONAL
CONSUMERS LEAGUE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE
IN FAVOR OF APPELLANTS AND IN SUPPORT OF REVERSAL**

In accordance with Federal Rule of Appellate Procedure 29 and Second Circuit
Rule 29.1, Truth in Advertising, Inc. (TINA.org), AARP, AARP Foundation,
Advertising Law Academics, and National Consumers League (“Amici”) respectfully

request leave to file the attached Brief of Amici Curiae Truth in Advertising, Inc., AARP, AARP Foundation, Advertising Law Academics, and National Consumers League in Favor of Appellants and in Support of Reversal of the District Court's decision to dismiss the case ("Brief").

Amici sought the consent of all parties to participate in this case. Appellants have consented, and Appellees have stated that they take no position on Amici's request to file the Brief.

The Brief is attached hereto as Exhibit 1.

Truth in Advertising, Inc.

Truth in Advertising, Inc. (TINA.org) is a nonprofit, nonpartisan consumer advocacy organization whose mission is to combat the systemic and individual harms caused by deceptive marketing. At the center of TINA.org's efforts is its website, www.tina.org, which provides consumers information about common deceptive advertising techniques and applicable consumer protection laws, and broadcasts alerts about specific marketing campaigns.

TINA.org participates as amicus curiae in numerous court cases that pertain to false and deceptive marketing, both at the district court level (typically at the settlement approval stage to alert courts to proposed settlements that are not "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2)), as well as the appellate level. *See, e.g., Quinn v. Walgreen Co.* No. 12-cv-8187 (S.D.N.Y.) (responding to

TINA.org's concerns and objection of class member represented by AARP Foundation, parties renegotiated their settlement agreement to make injunctive relief broader and perpetual, rather than limited to 24 months); *Lerma v. Schiff Nutrition Int'l*, No. 3:11-CV-01056 (S.D. Cal.), Dkt. 120, 141 (prompted by TINA.org's and AARP's amici curiae brief, plaintiffs sought to withdraw (and ultimately renegotiated) settlement); *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629 (5th Cir. 2016) (en banc) (after granting Truth in Advertising's Motion for Leave to file amicus curiae briefs, both in support of appellees' petition for rehearing en banc and in support of affirmance, the Fifth Circuit affirmed certification of class action challenging multilevel marketing scheme as an illegal pyramid scheme pursuant to RICO) (*cert. denied S.G.E. Mgmt., L.L.C. v. Torres*, 138 S. Ct. 76 (Oct. 2, 2017)); *Frank v. Poertner*, No. 15-765 (S. Ct.), Brief Amicus Curiae for Truth in Advertising, Inc. Supporting Petitioner, (Jan. 14, 2016) (*cert. denied* 136 S. Ct. 1453 (2016)).

With respect to the use of unsubstantiated health claims in marketing, TINA.org has pursued more than 70 companies using deceptive health claims, has more than 65 databases on its website collectively cataloguing thousands of unsubstantiated health claims made about products, has sent dozens of warning letters to companies, and has filed numerous complaints with federal and state regulators. *See, e.g.*, TINA.org's Prevacen Action, <https://www.truthinadvertising>

.org/prevagen-summary-of-action/. As a result of TINA.org's efforts in this area, hundreds of unsubstantiated health claims have been removed from the internet, companies have revamped their product labeling and other marketing materials, state and federal agencies have fined companies millions of dollars, and industry trade associations are more closely monitoring member companies' marketing. TINA.org has also been invited to speak at numerous national conferences on the use of unsubstantiated health claims in marketing, including "The Evolving Phenomenon of Direct-to-Consumer Neuroscience" Conference in February 2018 hosted by The Banbury Center to help identify and address key regulatory and ethical issues related to the growth of brain health products sold directly to consumers.

AARP and AARP Foundation

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families, with a focus on health security, financial stability, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to ensure that low-income older adults have nutritious food, affordable housing, a steady income, and strong and sustaining bonds. AARP and AARP Foundation regularly file amici curiae briefs in federal and state appellate courts—

including those mentioned above—in support of efforts to eliminate deceptive advertising that targets the vulnerabilities of older people, particularly advertising that makes unsubstantiated health benefit claims to consumers.

AARP is also a member of the Global Council on Brain Health (GCBH), an independent collaborative of scientists, health professionals, scholars, and policy experts from around the world working in areas of brain health related to human cognition. The GCBH focuses on brain health relating to peoples' ability to think and reason as they age, including aspects of memory, perception and judgment.

Advertising Law Academics

Advertising Law Academics are academics with an interest in promoting truth in advertising, which protects consumers and promotes fair competition. Professor Rebecca Tushnet from Harvard Law School specializes in advertising law and has coauthored a leading casebook on the subject. *See* Rebecca Tushnet and Eric Goldman, *ADVERTISING & MARKETING LAW: CASES AND MATERIALS*, Volume 1 (3d ed. 2016). Professor Tushnet is joined here by Jessica Litman, University of Michigan School of Law; Ted Mermin, Executive Director, Berkeley Law Center for Consumer Law and Social Justice; Tamara R. Piety, University of Tulsa College of Law; Zahr Said, University of Washington School of Law; Dee Pridgen, University of Wyoming College of Law; Jeff Sovern, St. John's University School of Law; Brian Wolfman, Georgetown University Law Center.

National Consumers League

Founded in 1899, the National Consumers League (NCL) is America's pioneering non-profit consumer advocacy organization. For nearly 120 years, NCL has worked to promote fairness and economic justice for consumers and workers in the United States and abroad. To this end, NCL appears regularly before legislatures, administrative agencies, and courts across the country, advocating for the enactment and vigorous enforcement of laws that effectively provide truthful and accurate information to consumers about the products and services they purchase and use. To ensure that consumers possess the information necessary to make smart decisions about their health, NCL supports and devotes resources to ensure the full and accurate labeling and advertising of foods, drugs, and dietary supplements.

As explained in more detail in the Brief, TINA.org, AARP, AARP Foundation, Advertising Law Academics, and National Consumers League collectively have unique expertise that will assist this Court in better understanding the level of scientific substantiation required to support the type of health claims made in Appellees' marketing materials, as well as the serious and harmful consequences of allowing the District Court's decision stand, not just for the millions of aging American suffering from memory loss – the target population in this case – but for consumers as a whole.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Motion of Truth in Advertising, Inc., AARP, AARP Foundation, Advertising Law Academics, and National Consumers League for Leave to File Brief as Amici Curiae in Favor of Appellants and in Support of Reversal with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on March 6, 2018. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

By: /s/Sean M. Fisher
Sean M. Fisher