

**FILED**

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STEPHEN H. NASH  
CLERK OF THE SUPERIOR COURT  
COUNTY OF CONTRA COSTA, CA  
BY LOCAL RULE 5 THIS  
CASE IS ASSIGNED TO  
DEPT \_\_\_\_\_

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**SUPERIOR COURT OF CALIFORNIA**  
**COUNTY OF CONTRA COSTA**

**C 15 - 00582**

13 **RICK MUSGRAVE, on behalf of himself,**  
14 **all others similarly situated, and the**  
15 **general public,**  
16  
17 **Plaintiff,**  
18  
19 **v.**  
20 **QUINCY BIOSCIENCE, LLC, a**  
21 **Wisconsin limited liability company;**  
22 **QUINCY BIOSCIENCE HOLDING CO.,**  
23 **INC., a Wisconsin corporation; and DOES**  
24 **1-15, inclusive,**  
25  
26 **Defendants.**

Case No:  
CLASS ACTION  
  
**COMPLAINT FOR VIOLATIONS OF  
CALIFORNIA CONSUMER  
PROTECTION STATUTES**  
  
DEMAND FOR JURY TRIAL

1 Plaintiff RICK MUSGRAVE on behalf of himself, all others similarly situated, and the general public  
2 (“Plaintiff”) alleges against Defendants QUINCY BIOSCIENCE, LLC, a Wisconsin limited liability  
3 company; QUINCY BIOSCIENCE HOLDING CO., INC., a Wisconsin corporation; and DOES 1-15,  
4 inclusive (“Defendants”) the following upon his own personal knowledge, or where there is no personal  
5 knowledge, upon information and belief and the investigation of his counsel:

6 **JURISDICTION AND VENUE**

7 1. Personal jurisdiction is derived from the fact that Defendants conduct business within the  
8 State of California and within this judicial district. *See also* Cal. Civ. Proc. Code § 410.10; Civ. Code §  
9 1780(d).

10 2. The amount in controversy under this Complaint exceeds the minimal jurisdictional limit of  
11 this Court, and the claims asserted in this Complaint are within the subject-matter jurisdiction of this Court.

12 3. Venue is proper in this Court because Defendants (i) are authorized to conduct business in this  
13 forum and have intentionally availed themselves of the laws and markets within forum through the promotion,  
14 marketing, distribution and sale of its products in this venue; (ii) do substantial business in this district;  
15 (iii) advertise to consumers residing in this district; and, (iv) the events and injuries complained of in this  
16 Complaint occurred in the County of Contra Costa. *See also* Cal. Civ. Proc. Code § 410.10; Civ. Code §  
17 1780(d).

18 4. Defendants and other out-of-state participants can be brought before this Court pursuant to  
19 California’s “long-arm” jurisdictional statute, Code of Civil Procedure § 410.10, as a result of Defendants’  
20 substantial, continuous and systematic contacts with the State, and because Defendants have purposely availed  
21 themselves of the benefits and privileges of conducting business activities within the State.

22 **THE PARTIES**

23 5. At all times relevant to this matter, Plaintiff was a resident of Pacheco, California, in Contra  
24 Costa County, California.

25 6. On information and belief, at all times relevant to this matter, Defendants were Wisconsin  
26 entities that maintained their principal place of business and corporate headquarters at 301 S. Westfield Road,  
27 Suite 200, Madison, Wisconsin.

28 7. Defendants are the manufacturer and seller of dietary supplements.



1 14. Prevagen comes in four known formulas: the original Prevagen capsule, Prevagen Chewables,  
2 Professional, and Extra Strength (the "Products" or, collectively, "Prevagen").<sup>1</sup>

3 15. Defendants primarily advertise and promote the Products through labeling claims on the front  
4 of the Products' package. Label descriptions on the Products' packaging, taken as a whole, represent there  
5 are various benefits and characteristics to the Products. *See Ex. A (Product Packaging.)*

6 16. Defendants' Product advertising is also the subject of an extensive and comprehensive  
7 marketing campaign in various media, including the Internet.

8 17. The purported active ingredient in Prevagen is apoaequorin, which originally was derived from  
9 jellyfish, but which Defendants now allege to create synthetically. Original Prevagen and Prevagen  
10 Chewables claim to have 10 mg of apoaequorin; Extra Strength 20 mg apoaequorin; and Professional 40 mg  
11 apoaequorin.

12 18. In addition to the foregoing, Defendants represent that Prevagen "supplements these [proteins  
13 that support our brain] during the natural process of aging;" "Prevagen ... is clinically shown to help with  
14 mild memory problems associated with aging;" "Prevagen® contains apoaequorin, a protein which uniquely  
15 supports critical brain functions;" "In clinical studies Prevagen® improved memory within 90 days;" "In a  
16 computer assessed, double blinded, placebo controlled study, Prevagen® improved memory;" "a chart  
17 claiming "Prevagen Improves Memory" by "7.5%" within "8 days," "10%" within "30 days," and "20%"  
18 within "90 days." Defendants also claim: "Originally discovered in jellyfish, Prevagen® is now made in a  
19 controlled scientific process;" and that the product was "[d]eveloped by university researchers and scientists  
20 in Madison, Wisconsin." Defendants also reinforce their quick effectiveness of the Products through use of  
21 an image of a clock next to the word Prevagen on each package. *See Ex. A.*

22 19. Moreover, Defendants use a seal depicting a brain in white on a blue background, double  
23 surrounded by the words, "SUPPORTS HEALTHY BRAIN FUNCTION". *See id.*

24 20. Plaintiff was exposed to and reviewed the foregoing claims, taken as a whole, as listed *supra*  
25 in paragraphs 13, 15, 17-19 (*see also Ex. A*), and relied on them when deciding to purchase Prevagen Extra  
26 Strength at a Walgreens near his home in Pacheco, California in or around March 2014. He regularly

27 <sup>1</sup> Plaintiff reserves the right to add other products manufactured, marketed and sold by Defendants for  
28 purported brain or memory benefits, or other iterations of the Prevagen products, as discovery proceeds.

1 purchased and used the Product thereafter, buying it approximately 10-12 times from Walmart or Walgreens  
2 stores near his home; and stopped taking it in around December 2014 because he did not think it was working.  
3 Plaintiff paid approximately \$40-\$50 for each purchase of Prevacen.

4 21. Prevacen, however, is falsely and deceptively advertised because it does not work for the uses  
5 described on the label, i.e., it does not support memory or brain function at all, much less in the time described  
6 on the label. The Products are therefore worthless.

7 22. Indeed, the active ingredient in all Prevacen Products, apoequorin, cannot survive the  
8 digestive tract and therefore can have no effect on the body.

9 23. Further, the Products are not "Clinically Tested." Only one clinical trial was performed, as  
10 Defendants' own label admits (*see* Exhibit A, back of package referring to "a computer assessed, double-  
11 blinded, placebo controlled study" but also claiming on the side label that the Products are backed by "clinical  
12 studies," plural).

13 24. In addition, the researcher that performed that sole study that allegedly shows apoequorin  
14 survives the digestive tract (UW-Milwaukee psychologist, James Moyer, Jr.) has stated that more tests would  
15 be needed before any brain and memory function claims for apoequorin could be clinically supported.

16 25. Defendants' clinical trial(s) fell below the standards that would be applied by a reasonable  
17 manufacturer of diet supplements to support its own products. The Federal Trade Commission ("FTC")  
18 enforces OTC drug advertising and applies the same standards as any consumer product: a "reasonable  
19 consumer" standard. The FTC requires OTC drug advertising to be truthful, non-deceptive, fair, and for  
20 manufacturers to contain evidence that backs up their claims. Defendants here do not have such evidence,  
21 despite advertising the Products as "Clinically Tested," possessing proof of effectiveness from "clinical  
22 studies," and being "made in a controlled scientific process," "developed by university researchers and  
23 scientists." *See* Ex. A.

24 26. Moreover, the only independent scientific studies on apoequorin in PubMed are for uses other  
25 than brain function and memory. Therefore, there is no clinical testing and no clinical studies by which  
26 Defendants can claim expert endorsement or establishment claims for Prevacen Products.  
27  
28

1           27. At all times relevant herein, Defendants had a duty to disclose additional information to  
2 purchasing consumers, to correct all misunderstandings its omissions and misrepresentations created in the  
3 minds of those consumers.

4           28. The active ingredient in apoeaquorin is not vitamin, mineral, amino acid, herb, botanical, or  
5 other dietary substance to support the diet in human beings. Therefore, the Products are unlawfully labeled  
6 as dietary supplements. *See* Exhibit B attached hereto (FDA warning letter issued to Defendants).

7           29. Further, Defendants' Products are unlawful new drugs because they purport to mitigate or cure  
8 a disease -- memory loss. *See id.* But the Products are not supported by clinical trials and an approved new  
9 drug application.

10           30. Because Defendants' Products are unlawful new drugs, they are in violation of the California  
11 Sherman Law (Health & Safety Code §§ 109875, et seq.), which mirrors the federal Food, Drug and Cosmetic  
12 Act in all material respects (21 U.S.C. §§ 301, et seq.).

13           31. The Products are priced at \$50 and above. Hence, Defendants' unfair and deceptive practices  
14 have enriched them at the expense of Plaintiff and consumers.

15           32. Absent the misrepresentations and omissions described herein, which are material to an  
16 average consumer, Plaintiff would not have purchased Prevagen.

17           33. In purchasing a product that were falsely or deceptively advertised, Plaintiff suffered injury in  
18 fact in the form of the lost purchase price of the Product.

19           34. Plaintiff seeks justice by means of this action to enjoin the ongoing deceptive practices  
20 described herein.

21           35. Defendants' marketing and promotion of the Products was supported by false and misleading  
22 claims containing material omissions and misrepresentations.

23           36. When purchasing the Product, Plaintiff was seeking a remedy that would provide the benefits  
24 and had the endorsements, proof of efficacy, and characteristics that Defendants marketed, promised,  
25 represented and warranted.

26           37. Plaintiff purchased the Product believing it had the sought after qualities based on the Product's  
27 deceptive or false labeling, but the Product was actually unacceptable to him as it did not possess the benefits,  
28 endorsements, proof, and characteristics as advertised.



1 38. Moreover, like all reasonable consumers, Plaintiff considers a label's compliance with federal  
2 law a material factor in his purchasing decisions. Plaintiff is generally aware the federal government carefully  
3 regulates OTC products and therefore has come to trust that information conveyed on packaged OTC product  
4 labels is truthful, accurate, complete, and fully in accordance and compliance with federal law. As a result,  
5 Plaintiff trusts he can compare competing products on the basis of their labeling claims, to make a purchasing  
6 decision.

7 39. Like all reasonable consumers, Plaintiff would not purchase an OTC product he knew was  
8 misbranded under federal law, *see* 21 U.S.C. § 343, which the federal government prohibits selling, *id.* § 331,  
9 and which carries with its sale criminal penalties, *id.* § 333. Plaintiff could not trust that the label of a product  
10 misbranded under federal law is truthful, accurate and complete.

11 40. Similarly, like all reasonable consumers and members of the class, Plaintiff would not purchase  
12 an OTC product he knew was an illegally marketed new drug for which the FDA has not determined its safety  
13 and efficacy.

14 41. In light of the foregoing, reasonable consumers, including Plaintiff, were and are likely to be  
15 deceived by Defendants' advertising and marketing practices as detailed herein.

16 42. Further, Plaintiff purchased the Products instead of competing product(s) based on the false  
17 statements, misrepresentations and omissions described herein.

18 43. Instead of receiving a product that had the benefits, advantages, endorsements, proof, and  
19 characteristics as advertised, Plaintiff received a product worth much less, or which was worthless, because  
20 the Product does not work; caused no effect or effects reversal of that advertised; and did not possess the  
21 characteristics, benefits, endorsements, and proof of efficacy, as advertised by Defendants.

#### 22 CLASS ACTION ALLEGATIONS

23 44. Plaintiff brings this class action for damages and other monetary relief on behalf of the  
24 following class:

25 All purchasers of Prevacen original capsules, Prevacen Chewables, Prevacen Extra Strength,  
26 Prevacen Professional, and all iterations/variations of the aforementioned products, for personal or  
27 household use and not for resale, in California from March 23, 2011 to the Opt-Out or Objection  
28 Date (the "Class Period"). Excluded from the consumer class are governmental entities, the  
Defendants, any entity in which the Defendants have a controlling interest, its employees, officers,

1 directors, legal representatives, heirs, successors and wholly or partly owned subsidiaries or  
2 affiliated companies, including parent corporations, class counsel and their employees; and the  
3 judicial officers and their immediate family members and associated court staff assigned to this case.

4 45. The proposed Class is so numerous that individual joinder of all its members is impracticable.  
5 Due to the nature of the trade and commerce involved, however, Plaintiff believes the total number of Class  
6 members is at least in the tens of thousands, if not hundreds of thousands of persons in the United States.  
7 While the exact number and identities of the Class members are unknown at this time, such information can  
8 be ascertained through appropriate investigation and discovery. The disposition of the claims of the Class  
9 members in a single class action will provide substantial benefits to all parties and to the Court.

10 46. There is a well-defined community of interest in the questions of law and fact involved  
11 affecting the Plaintiff and the Class and these common questions of fact and law include, but are not limited  
12 to, the following:

- 13 a. Whether the claims discussed above are true, misleading, or reasonably likely to  
14 deceive;
- 15 b. Whether Defendants' alleged conduct violates public policy;
- 16 c. Whether the alleged conduct constitutes violations of the laws asserted herein;
- 17 d. Whether Defendants engaged in false or misleading advertising;
- 18 e. Whether the Plaintiff and Class members are entitled to declaratory and injunctive  
19 relief.

20 47. Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff and all  
21 members of the Class have been similarly affected by the Defendants' common course of conduct since they  
22 all relied on Defendants' representations concerning its Products and purchased the Products based on those  
23 representations.

24 48. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has  
25 retained counsel with substantial experience in handling complex class action litigation in general and  
26 scientific claims, including for drug and diet supplements, in particular. Plaintiff and her counsel are  
27 committed to vigorously prosecuting this action on behalf of the Class and have the financial resources to do  
28 so.





1 • Representing [the Products] are of a particular standard, quality or grade... if they are of  
2 another. (Civ. Code, § 1770, subd. (a) (7).)

3 • Advertising [the Products] ...with intent not to sell them as advertised. (Civ. Code, § 1770,  
4 subd. (a) (9).)

5 • Representing [the Products] have been supplied in accordance with a previous representation  
6 when it has not. (Civ. Code, § 1770, subd. (a) (16).)

7 54. Defendants violated the Act by representing through advertising of the Products as described  
8 above, when they knew, or should have known, the representations and advertisements were false or  
9 misleading.

10 55. Plaintiff reasonably relied upon the Defendants' representations as to the quality and attributes  
11 of the Products.

12 56. Plaintiff was deceived by Defendants' representations about the quality and attributes of the  
13 Products, including but not limited to the purported benefits of the Products, taken as a whole, that their  
14 Products provide, *inter alia*, effective relief of various symptoms and ailments. Plaintiff would not have  
15 purchased the Product had he known Defendants' claims were untrue.

16 57. Pursuant to California Civil Code § 1780(a), Plaintiff seeks an order of this Court enjoining  
17 Defendants from continuing to engage in unlawful, unfair, or deceptive business practices and any other act  
18 prohibited by law; and for actual damages, restitution, and punitive damages to Plaintiff and the Class.

19 **SECOND CAUSE OF ACTION**

20 **VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW**

21 ***California Business and Professions Code §§ 17200, et seq.***

22 58. Plaintiff repeats, realleges and incorporates by reference each and every allegation contained  
23 above as if fully set forth herein.

24 59. California's Unfair Competition Law, Business and Professions Code § 17200 (the "UCL")  
25 prohibits any "unfair, deceptive, untrue or misleading advertising." For the reasons discussed above,  
26 Defendants has engaged in unfair, deceptive, untrue and misleading advertising in violation of the UCL.

27 60. The UCL also prohibits any "unlawful... business act or practice." Defendants violated the  
28 UCL's prohibition against engaging in unlawful acts and practices by, *inter alia*, making the representations

1 and omissions of material facts, as set forth more fully herein, and by violating among others, California Civil  
2 Code §§ 1572, 1573, 1709, 1710, 1711, 1770, California Health and Safety Code §§ 109875, *et seq.*  
3 (“Sherman Law”), Cal. Bus. & Prof. Code §§ 12601, *et seq.* (“Fair Packaging and Labeling Act”), California  
4 Commercial Code § 2313(1), and the common law. Such conduct is ongoing and continues to this date. See  
5 Exs. 2-3.

6 61. Plaintiff reserves the right to allege other violations of law, which constitute other unlawful  
7 business acts or practices.

8 62. California Business and Professions Code § 17200 also prohibits any “unfair... business act or  
9 practice.”

10 63. Defendants’ acts, omissions, misrepresentations, practices and nondisclosures as alleged  
11 herein also constitute “unfair” business acts and practices within the meaning of the UCL in that its conduct  
12 is substantially injurious to consumers, offends public policy, and is immoral, unethical, oppressive, and  
13 unscrupulous as the gravity of the conduct outweighs any alleged benefits attributable to such conduct. Such  
14 conduct is ongoing and continues to this date.

15 64. Plaintiff alleges violations of consumer protection, unfair competition and truth in advertising  
16 laws in California resulting in harm to consumers. Plaintiff asserts violation of the public policy of engaging  
17 in false and misleading advertising, unfair competition and deceptive conduct towards consumers. This  
18 conduct constitutes violations of the unfair prong of the UCL. Such conduct is ongoing and continues to this  
19 date.

20 65. There were reasonable alternatives available to Defendants to further its legitimate business  
21 interests, other than the conduct described herein.

22 66. The UCL also prohibits any “fraudulent business act or practice.”

23 67. Defendants’ claims, nondisclosures (i.e., omissions), and misleading statements, as more fully  
24 set forth above, were false, misleading and/or likely to deceive the consuming public within the meaning of  
25 the UCL. Such conduct is ongoing and continues to this date.

26 68. Defendants’ conduct caused and continues to cause substantial injury to Plaintiff. Plaintiff has  
27 suffered injury in fact as a result of Defendants’ unfair conduct.



- 1 B. An order awarding declaratory and injunctive relief as permitted by law or equity,  
2 including enjoining Defendants from continuing the unlawful practices as set forth herein;  
3 C. An order compelling Defendants to engage in a corrective advertising campaign, including  
4 to notify all members of the class, to inform the public concerning the true nature of their  
5 Products;  
6 D. For her UCL claims, an order requiring Defendants to make restitution to the Class;  
7 E. An order awarding attorneys' fees and costs to Plaintiff and the Class; and  
8 F. An order providing for all other such equitable relief as may be just and proper.

9 **JURY DEMAND**

10 Plaintiff hereby demands a trial by jury on all issues so triable.

11 Dated: March 23, 2015



12 By: Ronald A. Marron

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