

25-12-CV

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, 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,

(For Continuation of Caption See Inside Cover)

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

**BRIEF FOR *AMICI CURIAE* TRUTH IN ADVERTISING, INC.
(TINA.ORG), REBECCA TUSHNET AND CENTER FOR
CONSUMER LAW & ECONOMIC JUSTICE IN SUPPORT OF
PLAINTIFF-APPELLEE**

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

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. For More Than A Decade, Quincy Has Deceptively Marketed Prevagen To Seniors Worried About Memory Loss	9
II. Quincy’s Deceptive Marketing Has Harmed Aging Consumers and Honest Businesses	16
III. Quincy’s Deceptive Marketing Must Be Stopped.....	19
A. A broad injunction is warranted in this case	20
B. The New York Attorney General should be permitted to pursue monetary relief.....	24
IV. Conclusion	27

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>AMG Capital Mgmt., LLC v. FTC</i> , 593 U.S. 67 (2020).....	1-2, 27
<i>Basic Books, Inc. v. FTC</i> , 276 F.2d 718 (7th Cir. 1960)	22
<i>Bell v. Publix Super Mkts., Inc.</i> , 982 F.3d 468 (7th Cir. 2020)	23
<i>Bristol-Meyers Co. v. FTC</i> , 738 F.2d 554 (2d Cir. 1984)	9, 23
<i>Collins v. Quincy Bioscience, LLC</i> , No. 19-CV-22864, 2020 U.S. Dist. LEXIS 48236 (S.D. Fla. Mar. 19, 2020).....	9, 12
<i>Donaldson v. Read Mag., Inc.</i> , 333 U.S. 178 (1948).....	22
<i>Erickson v. FTC</i> , 272 F.2d 318 (7th Cir. 1959)	22
<i>Fedders Corp. v. FTC</i> , 529 F.2d 1398 (2d Cir. 1976)	9
<i>FTC v. Algoma Co.</i> , 291 U.S. 67 (1934).....	24
<i>FTC v. Bronson Partners</i> , 654 F.3d 359 (2d Cir. 2011)	25
<i>FTC v. Colgate-Palmolive</i> , 380 U.S. 374 (1965).....	20
<i>FTC v. Five-Star Auto Club</i> , 97 F. Supp. 2d 502 (S.D.N.Y. 2000)	21
<i>FTC v. Freecom Commc'ns, Inc.</i> , 401 F.3d 1192 (10th Cir. 2005)	22
<i>FTC v. QT, Inc.</i> , 512 F.3d 858 (7th Cir. 2008)	17, 18

<i>FTC v. Quincy Bioscience Holding Co., Inc.</i> , 753 Fed. Appx. 87 (2d Cir. 2019).....	2, 13
<i>FTC v. Roomster Corp.</i> , 654 F. Supp. 3d 244 (S.D.N.Y. Feb. 1, 2023)	9, 25
<i>FTC v. Ruberoid</i> , 343 U.S. 470 (1952).....	9, 20, 23
<i>FTC v. Standard Education Society</i> , 302 U.S. 112 (1937).....	21, 22
<i>FTC v. Stefanchik</i> , 559 F.3d 924 (9th Cir. 2009)	22
<i>FTC v. Winsted Hosiery Co.</i> , 258 U.S. 483 (1922).....	16, 19
<i>Gimbel Bros. v. FTC</i> , 116 F. 2d 578 (2d Cir. 1941)	19
<i>Greenberg v. Spitzer</i> , No. 800004/2018, 2020 N.Y. Misc. LEXIS 8517 (N.Y. Sup. Ct. Nov. 12, 2020)	25
<i>In re Ford Fusion and C-Max Fuel Economy Litig.</i> , No. 13-MD-2450, 2015 U.S. Dist. LEXIS 155383 (S.D.N.Y. Nov. 12, 2015).....	9, 26
<i>In re Genesis Glob. Holdco, LLC</i> , 660 B.R. 439 (Bankr. S.D.N.Y. 2024)	25
<i>Indep. Directory v. FTC</i> , 188 F.2d 468 (2nd Cir. 1951)	22
<i>Indep. Living Aids, Inc. v. Maxi-Aids, Inc.</i> , 25 F. Supp. 2d 127 (E.D.N.Y. 1998).....	9
<i>Indiana Quartered Oak Co. v. FTC</i> , 26 F.2d 340 (2d Cir. 1928)	20
<i>New York v. Greenberg</i> , 27 N.Y.3d 490 (N.Y. 2016)	26
<i>Pearson v. NBTY, Inc.</i> , 772 F.3d 778 (7th Cir. 2014)	23

<i>Royal Baking Powder Co. v. FTC</i> , 281 F. 744 (2d Cir. 1922)	19
<i>SEC v. Tome</i> , 833 F.2d 1086 (2d Cir. 1987)	25
<i>Spiegel, Inc. v. FTC</i> , 494 F.2d 59 (7th Cir. 1974)	16, 20
<i>U.S. Dep’t of Justice v. Daniel Chapter One</i> , 650 Fed. App’x. 20 (D.C. Cir. 2016).....	20-21
<i>Va. Bd. of Pharmacy v. Va. Citizens Consumer Council</i> , 425 U.S. 748 (1976).....	3
Statutes & Other Authorities:	
U.S. Const., Amend. I	3
Fed. R. App. P. 29(4)(E)	1
Fed. R. App. P. 29(a)(2).....	1
NYEL § 63(12)	25
NYGBL § 349.....	25
NYGBL § 350.....	25
<i>2019 AARP Brain Health and Dietary Supplements Survey</i> , AARP Research (June 2019).....	8
<i>2025 Alzheimer’s Disease Facts and Figures</i> , Alzheimer’s Association (2025).....	7, 8
Alexandra J. Roberts, <i>False Influencing</i> , 109 Geo. L. J. 81 (2020)	6, 16
Andrea Bradford <i>et al.</i> , <i>Missed and Delayed Diagnosis of Dementia in Primary Care: Prevalence and Contributing Factors</i> , 23 Alzheimer Disease & Associated Disorders (Oct. 2009)	17
Assurance of Discontinuance, <i>In Re Investigation by Attorney General of New York of Fareportal Inc.</i> , No. 22-016 (Att’y Gen. of New York Bureau of Internet and Tech., Mar. 10, 2022)	26
Diane Hoffman & Jack Schwartz, <i>Stopping Deceptive Health Claims: The Need for a Private Right of Action Under Federal Law</i> , 42 Am. J. Law & Med. 53 (2016)	18

<i>Dietary Supplements: An Advertising Guide for the Industry</i> , FTC (2001).....	17
FDA Warning Letter from Michael Dutcher, Dir., Minn. Dist., FDA to Mark Underwood, President, Quincy Bioscience Mfg. (Oct. 16, 2012)	10, 11
FTC Consumer Sentinel Network, “Health Care Q1”	6, 16
Ian Skurnik, <i>et al.</i> , <i>How Warnings about False Claims Become Recommendations</i> , 31 J. Consumer Rsch. 713 (2005)	17
Jennifer Manly <i>et al.</i> , <i>Estimating the Prevalence of Dementia and Mild Cognitive Impairment in the US</i> , 2022 JAMA Neurology (Oct. 2022)	7
Jing Yu, <i>et al.</i> , <i>Effects of Age on Memory for Pragmatic Implications in Advertising: An Eye Movement Study</i> , 15 J. Pacific Rim Psych. (2021).....	5
Joshua C.P. Reams, <i>Twenty-First Century Advertising and the Plight of the Elderly Consumer</i> , 52 Willamette L. Rev. 325 (2016)	15
Lee Goldman, <i>The World’s Best Article on Competitor Suits for False Advertising</i> , 45 Fla. L. Rev. 487 (1993)	6
Letter from TINA.org to FTC and NY AG re: Ineffective Changes to Quincy Bioscience’s Deceptive Marketing for Prevagen (July 18, 2019)	14-15
Michael A. Carrier & Rebecca Tushnet, <i>An Antitrust Framework for False Advertising</i> , 106 Iowa L. Rev. 1841 (2021)	6, 16
<i>National Poll on Healthy Aging</i> , U. Mich. Inst. For Healthcare Pol’y & Innovation, (May/June 2019)	4, 7, 8
NC Ebner, <i>et al.</i> , <i>Financial Fraud and Deception in Aging</i> , 5 Adv. Geriatr. Med. Res. (2023)	8
Office of Inspector General, <i>Dietary Supplements: Structure/Function Claims Failed to Meet Federal Requirements</i> , Dep’t of Health and Human Servs. (Oct. 2012)	27
Prepared Statement of Federal Trade Commission on Deceptive Marketing of Dietary Supplements: FTC Enforcement Activities Before the Special Committee On Aging, 111th Cong. (May 26, 2010).....	18

Prepared Statement of the Fed. Trade Comm’n on “Health Fraud and the Elderly: A Continuing Health Epidemic,” Before the U.S. Senate Special Comm. on Aging, 107 th Cong. (Sept. 10, 2001).....	19
Prepared Statement of the FTC: Oversight of FTC Before the Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security (Nov. 2018).....	17
Prevagen Facebook About Page 2019	5
Prevagen TV Commercial 2019.....	5
Prevagen TV Spot, <i>Jellyfish Protein</i> , iSpot (published July 7, 2014)	12
Rahi Azizi, “ <i>Supplementing” the DSHEA: Congress Must Invest the FDA with Greater Regulatory Authority over Nutraceutical Manufacturers by Amending the Dietary Supplement Health and Education Act</i> , 98 Calif. L. Rev. 439 (2010).....	18
Robert Pitofsky, <i>Beyond Nader: Consumer Protection and the Regulation of Advertising</i> , 90 Harv. L. Rev. 661 (1977)	20
Staff Summary of Federal Trade Commission Activities Affecting Older Americans During 1995 and 1996, Fed. Trade Comm’n (Mar. 1998).....	5
Staff Summary of FTC Activities Affecting Older Americans Jan. 1999-Aug. 2001: A Commission Staff Report to the U.S. Senate Special Committee on Aging, Fed. Trade Comm’n (Oct. 2001)	8-9
The Insight Partners, <i>Brain Health Supplements Market Size to Reach a Valuation of US \$20.01 Billion by 2031, Driven by Increasing Mental Health Awareness</i> , PR Newswire (Feb. 25, 2025).....	8
TINA.org Complaint Letter to FTC in 2015 re: Deceptive Marketing for Prevagen (Sept. 17, 2015).....	14
West Health Institute, <i>Perceptions Of Aging During Each Decade Of Life After 30</i> , NORC at U. Chicago (2017)	4, 7
Ying-Chen Liu, <i>et al.</i> , <i>Are Older Adults More Deceived by False Advertising? Evidence from Intra- and Inter-brain Connectivity in the Prefrontal Cortex During Face-to-face Deceptive Sales</i> , 20 Social Cognitive & Affective Neuroscience (May 2025)	5

INTERESTS OF AMICI CURIAE

Amicus curiae Truth in Advertising, Inc. (“TINA.org”)¹ is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, self-regulatory bodies and government agencies to advance countermeasures that effectively prevent and stop deception in the economy.

Through its collaborative approach and attention to emerging issues and complexities, TINA.org has become a trusted source of expertise on matters relating to consumer fraud, and its representatives have testified before Congress on issues related to consumer protection, deceptive marketing and economic justice. TINA.org regularly draws on its expertise to advocate for consumer interests before the Federal Trade Commission (“FTC”) and other governmental bodies and appears as *amicus curiae* in cases raising important questions of consumer protection law. *See, e.g.*, Brief for Truth In Advertising, Inc. as Amicus Curiae Supporting Respondent, *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67

¹ The FTC and State of New York consent to amici filing this brief; counsel for defendants/appellants have withheld consent. Fed. R. App. P. 29(a)(2). Pursuant to Fed. R. App. P. 29(4)(E), amici affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to fund the preparation or submission of this brief.

(2020) (No. 19-508); Brief for Truth in Advertising, Inc. as Amicus Curiae Supporting Respondent, *Custom Comm. et al v. FTC*, (8th Cir. 2025) (No. 24-3137); Brief for Truth In Advertising, Inc. as Amicus Curiae Supporting Respondent, *Intuit, Inc. v. FTC* (5th Cir. June 21, 2024) (No. 24-60040); Brief for Truth In Advertising, Inc. et al. as Amici Curiae Supporting Appellants, *FTC v. Quincy Bioscience Holding Co., Inc.*, 753 Fed. Appx. 87 (2d Cir. 2019) (No. 17-3745). In addition, TINA.org has filed legal actions with regulatory agencies against hundreds of companies and entities, and since 2015, state and federal agencies have obtained more than \$250 million from wrongdoers based on TINA.org's legal actions and evidence, and returned millions in ill-gotten gains to consumers.

With respect to the use of unsubstantiated health claims in marketing, TINA.org has pursued more than 270 companies that were using deceptive health claims, catalogued thousands of unsubstantiated health claims made about products, sent dozens of warning letters to companies, and filed numerous complaints with federal and state regulators—including complaints regarding Quincy Bioscience. *See* TINA.org's Prevagen Action, <https://www.truthinadvertising.org/prevagen-summary-of-action/>. As a result of TINA.org's efforts, 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 participates in this action in its pursuit of protecting consumers from deceptive health claims.

Amicus curiae Rebecca Tushnet is the Frank Stanton Professor of the First Amendment at Harvard Law School. She has written numerous articles on false advertising and the First Amendment and is the co-author of a casebook on advertising law.

Amicus curiae Center for Consumer Law & Economic Justice (the “Center”), housed at the University of California, Berkeley, School of Law, is the leading law school research and advocacy center dedicated to ensuring safe, equal, and fair access to the marketplace. Through regular participation as *amicus curiae* in appellate courts around the nation, including in cases involving deceptive advertising, the Center seeks to develop and enhance protections for consumers and to foster economic justice. The Center appears in this proceeding to emphasize the importance of ensuring that statements made in advertising—particularly advertising for health-related products—be free from deception, and that “the stream of commercial information flow cleanly as well as freely.” *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772 (1976).

INTRODUCTION AND SUMMARY OF ARGUMENT

Millions of older consumers are concerned about memory loss because, among other things, memory declines with age and loss of memory is among the first symptoms reported by patients suffering from Alzheimer's disease.² As such, it is unsurprising that nearly half of all adults aged 50 to 64 report taking some type of vitamin or supplement to help with their memory.³

Cognizant of the demand for products that prevent and/or treat memory loss, for more than a decade, Quincy Bioscience ("Quincy") has deceptively marketed its supplement Prevagen as clinically shown to improve memory and correspondingly, reduce memory problems associated with aging. By lying to everyday consumers about the effects of its product, Quincy has been able to gain

² West Health Institute, *Perceptions Of Aging During Each Decade Of Life After 30*, NORC at U. Chicago, at 2 (2017), https://www.norc.org/content/dam/norc-org/pdfs/Brief_WestHealth_A_2017-03_DTPv2.pdf (73 percent of those in their 60s and 67 percent of those over 70 years old identify memory loss as their number one worry about aging); *National Poll on Healthy Aging*, U. Mich. Inst. For Healthcare Pol'y & Innovation, (May/June 2019), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/149132/NPHA-Brain-Health-Report_050919_FINAL-doi.pdf.

³ U. Mich. Inst. For Healthcare Pol'y & Innovation, *supra* note 2, at 2.

an unfair marketplace advantage⁴ at the expense of honest competitors and a susceptible aging population,⁵ and in the process, pocket millions of dollars.

Prior to the jury finding that none of Quincy’s challenged marketing statements are supported by competent and reliable scientific evidence and the court’s injunctive order in this case, nothing had successfully stopped Quincy from continuing its deceptive marketing campaign, including, among other things, an FDA warning letter—no doubt because the monetary benefits of engaging in false advertising have far outweighed the risks.⁶

⁴ Prevagen has touted its status as the “number one pharmacist recommended memory support brand.” *See, e.g.*, Prevagen TV Commercial 2019, available at <https://truthinadvertising.org/wp-content/uploads/2019/07/Prevagen-TV-Commercial-2019-wm.mp4>; Prevagen Facebook About Page 2019, available at <https://truthinadvertising.org/wp-content/uploads/2019/07/Prevagen-Facebook-About-i-wm.png>.

⁵ *See, e.g.*, Jing Yu, et al, *Effects of Age on Memory for Pragmatic Implications in Advertising: An Eye Movement Study*, 15 J. Pacific Rim Psych. (2021), <https://journals.sagepub.com/doi/full/10.1177/18344909211000452> (in eye tracking study, older adults “were more vulnerable to fraud in advertisement of health-related products”); Ying-Chen Liu, et al, *Are Older Adults More Deceived by False Advertising? Evidence from Intra- and Inter-brain Connectivity in the Prefrontal Cortex During Face-to-face Deceptive Sales*, 20 Social Cognitive & Affective Neuroscience 9 (May 2025), <https://academic.oup.com/scan/article/20/1/nsaf044/8123736> (study found that “older adults were more likely to purchase products promoted by false advertising”); *see also Staff Summary of Federal Trade Commission Activities Affecting Older Americans During 1995 and 1996*, Fed. Trade Comm’n (Mar. 1998), <https://www.ftc.gov/reports/staff-summary-federal-trade-commission-activities-affecting-older-americans-during-1995-1996> (“Senior citizens, because of special dietary requirements or other health concerns, may be particularly vulnerable to misleading claims for [food and dietary supplement] products.”).

⁶ False advertising misdirects resources and generates immense financial harm. *See*

Given Quincy’s predilection for manipulating scientific data and fleecing American seniors, the District Court was correct in entering a broad injunction designed to finally put a stop to Quincy’s deceptive marketing campaign. The District Court’s denial of New York’s request to pursue statutory penalties, disgorgement, and statutory costs, however, was a mistake. Return-of-profit relief is an indispensable component of effective injunctive decrees. In this case, Quincy

Michael A. Carrier & Rebecca Tushnet, *An Antitrust Framework for False Advertising*, 106 Iowa L. Rev. 1841, 1864 (2021) (“When companies engaging in false advertising have monopoly power, they possess the ability to harm not only an individual competitor but also the market as a whole. The consequences can be significant, especially for nascent competitors not able to enter the market, as the deception of consumers deprives them of the opportunity to obtain lower prices, more options, or enhanced quality. ... a false advertiser can go from success to success in the absence of false advertising liability.”); Alexandra J. Roberts, *False Influencing*, 109 Geo. L. J. 81, 98-99 (2020) (“The harms of false advertising have been well-documented and extensively debated. ... False claims harm consumers by deceiving them, hampering their autonomy, eroding their trust, improperly influencing their purchasing decisions, and providing unreliable information about goods and services that they nonetheless rely on. False claims make advertising less useful. And in extreme cases, false claims jeopardize consumer health and safety. Deceptive advertising also harms companies, which lose business and suffer reputational injury when competitors make false claims. A failure to police false advertising creates a race to the bottom, incentivizing deception and undermining the trustworthiness of every platform that hosts ads.”); *see also* Lee Goldman, *The World’s Best Article on Competitor Suits for False Advertising*, 45 Fla. L. Rev. 487, 493 (1993) (false advertising can give a competitive advantage to the dishonest marketer); FTC Consumer Sentinel Network, subcategory select “Health Care Q1,” <https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/FraudFacts> (Americans reported \$18.1 million lost to health care-related scams in Q1 of 2025).

has violated bedrock principles of commercial honesty. Accordingly, it should be made to forfeit its ill-gotten gains.

ARGUMENT

Memory loss is a significant concern for U.S. consumers.⁷ Among adults over 45, 83 percent express some worry about developing Alzheimer’s disease, including 12 percent who express a lot of worry.⁸ More than two in five adults age 50 to 64 report concern about developing dementia and about half believe they are likely to develop dementia in their lifetime.⁹ This trend holds true for younger populations as well – 72 percent of those over age 30 worry about losing memory as they age.¹⁰

These concerns are legitimate. About 11 percent of Americans age 65 and older—or more than 7 million Americans—suffer from Alzheimer’s dementia (the sixth-leading cause of death among those age 65 and older).¹¹ Further, an additional 22 percent of seniors have mild cognitive impairments.¹² Given this

⁷ See Westhealth Institute & NORC at U. Chicago, *supra* note 2, at 2.

⁸ *2025 Alzheimer’s Disease Facts and Figures*, Alzheimer’s Association, at 104 (2025), <https://www.alz.org/getmedia/ef8f48f9-ad36-48ea-87f9-b74034635c1e/alzheimers-facts-and-figures.pdf>.

⁹ U. Mich. Inst. For Healthcare Pol’y & Innovation, *supra* note 2, at 2.

¹⁰ Westhealth Institute & NORC at U. Chicago, *supra* note 2, at 2.

¹¹ Alzheimer’s Association, *supra* note 8, at 28-29, 42.

¹² Jennifer Manly et al, *Estimating the Prevalence of Dementia and Mild Cognitive Impairment in the US*, 2022 JAMA Neurology 1242-49 (Oct. 2022), <https://jamanetwork.com/journals/jamaneurology/fullarticle/2797274>.

backdrop, it is unsurprising that the global brain health supplement market was valued at \$8.24 billion in 2023, and is expected to reach \$20 billion by 2031.¹³ Not only do nearly half of adults 50 to 64 report taking some kind of vitamin or supplement to help their memory,¹⁴ but 36 percent of adults 74 and older take a supplement specifically targeting memory.¹⁵

The intended audience for memory supplement advertising is a particularly susceptible and vulnerable group of older Americans concerned about cognitive decline.¹⁶ And it is this particular group that Quincy has targeted for more than a

Moreover, Black Americans, Hispanic Americans, and American women are all disproportionately impacted by Alzheimer's disease and the annual number of new dementia cases is projected to double by 2050. *See* Alzheimer's Association, *supra* note 8, at 31, 37.

¹³ The Insight Partners, *Brain Health Supplements Market Size to Reach a Valuation of US \$20.01 Billion by 2031, Driven by Increasing Mental Health Awareness*, PR Newswire (Feb. 25, 2025), <https://www.prnewswire.com/news-releases/brain-health-supplements-market-size-to-reach-a-valuation-of-us-20-01-billion-by-2031--driven-by-increasing-mental-health-awareness--the-insight-partners-302384634.html>.

¹⁴ U. Mich. Inst. For Healthcare Policy & Innovation, *supra* note 2, at 2.

¹⁵ 2019 AARP Brain Health and Dietary Supplements Survey, AARP Research, at 10 (June 2019), https://www.aarp.org/content/dam/aarp/research/surveys_statistics/health/2019/brain-health-and-dietary-supplements-report.doi.10.26419-2Fres.00318.001.pdf.

¹⁶ *See* NC Ebner, et al, *Financial Fraud and Deception in Aging*, 5 Adv. Geriatr. Med. Res. (2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10662792/> (“Susceptibility to deception in older adults is heightened by age-related changes in cognition, such as declines in processing speed and working memory, as well as socioemotional factors, including positive affect and social isolation.”); *see also* Staff Summary of FTC Activities Affecting Older Americans Jan. 1999-Aug. 2001: A Commission Staff Report to the U.S. Senate Special Committee on Aging, Fed. Trade Comm’n (Oct. 2001), <https://www.ftc.gov/reports/staff-summary-federal->

decade—profiting from its deceptive sales pitch that Prevagen can reduce memory problems.¹⁷ See *Indep. Living Aids, Inc. v. Maxi-Aids, Inc.*, 25 F. Supp. 2d 127, 132 (E.D.N.Y. 1998) (recognizing that misleading advertisements of products directed at the elderly, among other vulnerable groups, “constitutes ‘public interest’ of the highest order”). As such, a broad injunction and monetary penalties are warranted in this case. See, e.g., *Bristol-Meyers Co. v. FTC*, 738 F.2d 554, 561 (2d Cir. 1984); *Fedders Corp. v. FTC*, 529 F.2d 1398, 1401-02 (2d Cir. 1976); *FTC v. Roomster Corp.*, 654 F. Supp. 3d 244, 266 (S.D.N.Y. Feb. 1, 2023); *In re Ford Fusion and C-Max Fuel Economy Litig.*, No. 13-MD-2450, 2015 U.S. Dist. LEXIS 155383, at *89 (S.D.N.Y. Nov. 12, 2015); see also *FTC v. Ruberoid*, 343 U.S. 470, 473 (1952).

I. For More Than A Decade, Quincy Has Deceptively Marketed Prevagen To Seniors Worried About Memory Loss.

Quincy represents to this Court that “Prevagen’s target market is, and always has been, healthy, community-dwelling adults who are cognitively normal or who

trade-commission-activities-affecting-older-americans-january-1999-august-2001 (“Older consumers may be particularly vulnerable to false or misleading claims about the safety and health benefits of ... dietary supplements ... because the marketing of such products and services often relates to conditions associated with aging.”).

¹⁷ See, e.g., *Collins v. Quincy Bioscience, LLC*, No. 19-CV-22864, 2020 U.S. Dist. LEXIS 48236, at *77 n.14 (S.D. Fla. Mar. 19, 2020) (“Quincy’s marketing director testified that Quincy always ‘target[ed] memory loss,’ and [] Quincy ‘want[ed] people to buy our product if they think they are suffering from memory loss.’”).

have mild cognitive impairment due to the normal aging process.” Br. for Defs.-Appellants Quincy Bioscience, at 6. This statement is patently untrue and provides yet another example of the lengths Quincy is willing to go in order to continue its deceptive and misleading marketing campaign.

Specifically, not long after entering the memory-supplement market, Quincy advertised Prevagen as being able to prevent and treat dementia and Alzheimer’s disease. FDA Warning Letter from Michael Dutcher, Dir., Minn. Dist., FDA to Mark Underwood, President, Quincy Bioscience Mfg. (Oct. 16, 2012), <https://truthinadvertising.org/wp-content/uploads/2015/09/FDA-Warning-letter-10-16-12.pdf>. As a result, in 2012 the Food and Drug Administration (“FDA”) sent Quincy a warning letter stating that Prevagen was being inappropriately promoted for conditions that caused it to be an unapproved new drug. *Id.* Problematic examples highlighted by the FDA included:

- “Prevagen will restore for you the lost protein so that you can gain your dignity back.... Alzheimer’s disease is a heartache on any family. Dementia is tough to be around people that have dementia, let alone have it yourself. Prevagen gives you back your dignity and gives you back the proteins that are so precious that we use. No side effects whatsoever, doesn’t matter what drugs you’re on, this is a safe natural supplement.” (This claim was posted on the company’s Facebook page at www.facebook.com/prevagen.) *Id.*
- “My mother died of Alzheimer’s disease.... I thought it was happening to me being too forgetful and so on. When I heard the commercial and them talking about this [Prevagen], it’s the first product that I’ve ever ordered this way.... It proved to be very helpful....in a very short time.... This is the first product I guess I’ve probably ever used that I could absolutely say it’s miraculous for the short time I’ve been on it. I know my thinking and

everything is more clearer and so on, just like it says.” (This claim was posted on the company’s website at www.prevagenreviews.com.) *Id.*

- Prevagen is the “first and only dietary supplement that ... protects the brain cells from death.... If you do just take one supplement, this may be the one to consider to protect and preserve your brain.” (This claim was posted on the company’s website at www.prevagen.com/watch.) *Id.*

The FDA also found that Quincy was referencing a number of scientific articles about apoeaquorin (Prevagen’s active ingredient) that implied the supplement could treat or prevent dementia and Alzheimer’s, including:

- The Effects of the Calcium Binding Protein Apoeaquorin on Memory and Cognitive Functioning in Older Adults. Mark Underwood, Peggy Sivesind, Taylor Gabourie. *Alzheimer’s & Dementia: The Journal of the Alzheimer’s Association*, July 1, 2011, Vol. 7, Issue 4, Supplement, Page e65. *Id.*
- Aequorin Protects Adult and Aging Hippocampal CA1 Neurons From Ischemic Cell Death. Julia A. Detert, Melody L. Schmidt, Nicholas D. Kampa, Patrick K. Tao, & James R. Moyer Jr., Departments of Psychology and Biological Sciences, University of Wisconsin-Milwaukee. *Id.*
- Neuroprotection of hippocampal CA1 neurons from ischemic cell death using the calcium binding protein aequorin. J. A. Detert, J. D. Heisler, E. L. Hochstetter, T. M. Van Langendon, J. R. Moyer, Jr., Univ. of Wisconsin--Milwaukee. Presented at The Society For Neuroscience; 2009. *Id.*¹⁸

The FDA’s letter clearly demonstrates that Quincy had been marketing Prevagen as a prevention and treatment for dementia and Alzheimer’s – not, as Quincy

¹⁸ The agency also determined that “Quincy Bioscience has been sponsoring clinical trials to investigate the use of apoeaquorin to treat or prevent disease for which there is no investigational new drug application (IND) in effect.” *Id.*

asserts, just a supplement to improve memory in “healthy, community-dwelling older adults.”

Following the FDA’s 2012 warning letter, Quincy pivoted away from making direct references to dementia and Alzheimer’s but retained the fundamental and false unqualified claim that Prevagen improves memory and reduces memory problems.¹⁹ Indeed, Quincy boldly marketed Prevagen as “clinically shown to improve memory”²⁰ despite the fact that its own study, the Madison Memory Study (conducted from 2009 to 2011), found that Prevagen worked no better than a placebo. As the District Court stated more than eight years ago:

It is common ground that the Madison Memory Study followed normal well-accepted procedures, conducted a “gold standard” double blind, placebo controlled human clinical study using objective outcome measures of human cognitive function using 218 subjects, and that it failed to show a statistically significant improvement in the experimental group over the placebo group as a whole.

Sept. 28, 2017 Opinion and Order, ECF No. 45, at 10-11. This point was driven home during oral argument before this Court in 2019 when Quincy admitted, “We don’t dispute that if you look across the entire 211 people who completed the study there was no statistically significant difference,” to which this Court replied, “You

¹⁹ See *Collins*, *supra* note 17, at *31-32.

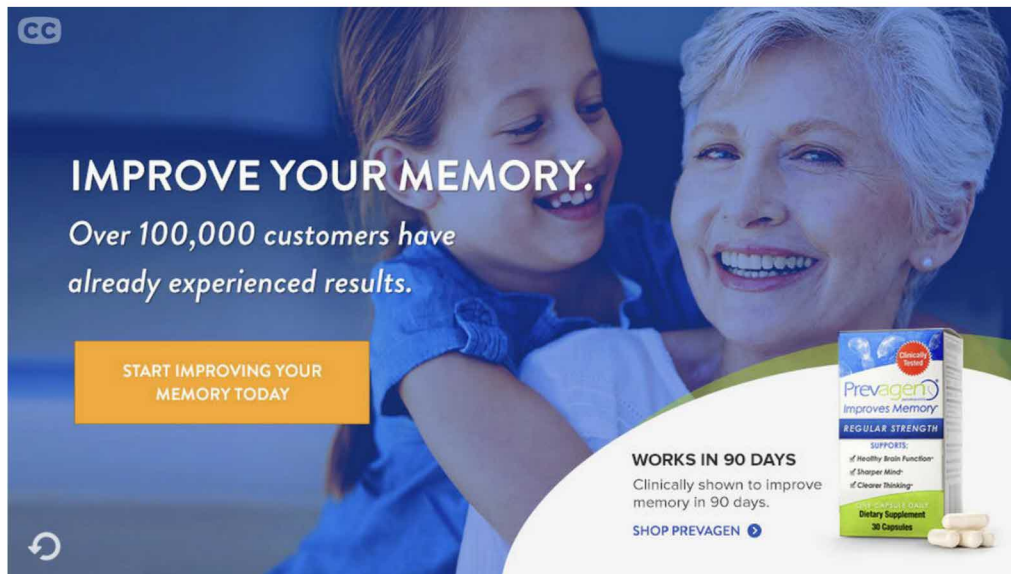
²⁰ See, e.g., Prevagen TV Spot, *Jellyfish Protein*, iSpot (published July 7, 2014), available at <https://www.ispot.tv/ad/71pj/prevagen-jellyfish-protein>.

couldn't dispute that." Oral Argument, 19:42 – 19:52, *FTC v. Quincy Bioscience Holding Co.*, 753 F. App'x 87 (2d Cir. 2019) (No. 17-3745).

Nevertheless, in the five years between the FDA's 2012 warning letter and the initiation of this case by the FTC and New York, Quincy continued its deceptive marketing campaign. During this time period, Quincy's marketing never informed consumers of the severe limitations of its clinical findings. Instead, Quincy's advertisements and marketing material conveyed unqualified efficacy and memory-enhancing establishment claims, unsupported by adequate substantiation.



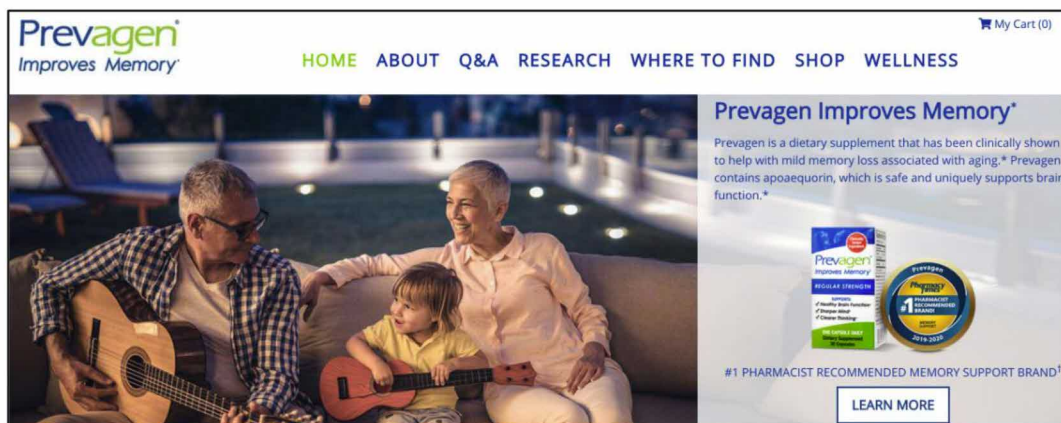
See Compl. ¶ 27A.



See TINA.org Complaint Letter to FTC in 2015 re: Deceptive Marketing for Prevacen, (Sept. 17, 2015), <https://truthinadvertising.org/wp-content/uploads/2015/09/Complaint-ltr-from-TINA-to-FTC-re-Prevagen.pdf>.

After this Court ordered that this litigation continue in 2019, Quincy made further modifications to its marketing. Still, it advertised Prevacen as “[c]linically shown to improve memory,” and stated that Prevacen “has been shown to improve aspects of cognitive function” despite the fact that it had no competent and reliable scientific evidence to support such claims. Letter from TINA.org to FTC and NY AG re: Ineffective Changes to Quincy Bioscience’s Deceptive Marketing for Prevacen (July 18, 2019), <https://truthinadvertising.org/>

wp-content/uploads/2019/07/7_18_19-ltr-to-FTC-and-NY-AG-re-Prevagen-changes_Redacted.pdf.



While Quincy has modified its advertising claims over the years as it has caught the attention of various regulatory authorities, the company has never honestly marketed Prevagen. See Joshua C.P. Reams, *Twenty-First Century Advertising and the Plight of the Elderly Consumer*, 52 Willamette L. Rev. 325, 340-341 (2016), <https://my.willamette.edu/site/law-journals/pdf/volume-52/52-3-reams.pdf> (“When information is repeated, people tend to believe it to be more valid and believable than when it is only presented once or a few times. ... Often the elderly have poor source-of-context memory; therefore, if advertisements are at all misleading or even fraudulent in their assertions, it is not as easy for the elderly to determine if the source is credible. ... The elderly use fewer processing strategies and at slower speeds, making it difficult for them to process the large amount of information provided.”). Quite to the contrary, it took a jury to deliver the unvarnished truth—which is that Quincy has no reliable scientific evidence to

support its marketing claims. *See* Verdict Form 1. And despite the jury verdict, up until the District Court’s injunctive order in this case, Quincy continued to push the misleading marketing message that Prevagen is a dietary supplement clinically shown to improve memory and reduce memory problems. *See* Order, at 3, Dec. 6, 2024 (discussing Quincy’s continued use of the challenged statements after trial).

II. Quincy’s Deceptive Marketing Has Harmed Aging Consumers and Honest Businesses.

Deceptive marketing and similar forms of commercial dishonesty are a scourge of the American economy, inflicting billions of dollars in losses to cheated consumers and distorting the efficient allocation of resources, rewarding those who hone ingenious fraudulent devices and punishing competitors focused on bringing superior products to market. As the Supreme Court noted more than 100 years ago, “when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods.” *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922)). *See also Spiegel, Inc. v. FTC*, 494 F.2d 59, 63 (7th Cir. 1974) (“If sellers in our society are free to compete for consumers’ patronage with others by unfair advertising, not only is the consumers’ right violated, but our commitment to fair competition becomes a pretense.”); *see also* Carrier & Tushnet, *supra* note 6; Roberts, *supra* note 6; FTC Consumer Sentinel Network, *supra* note 6. Of course, it is more expensive to develop health products that are demonstrably effective in improving well-being than to lie about

it. And it is demonstrably difficult to correct misinformation, especially among elderly consumers.²¹ Because of these incentives, the central determinant of whether dishonest practices can succeed—and inflict greater damage—is the efficacy of law enforcement.

Moreover, when useless products are marketed with false health claims, not only do consumers sustain monetary losses from purchasing worthless products but they may also forgo therapies that might be beneficial.²² *See FTC v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008) (“[I]f a condition responds to treatment, then selling a placebo as if it had therapeutic effect directly injures the consumer.”).²³

²¹ *See, e.g.*, Ian Skurnik, et al., *How Warnings about False Claims Become Recommendations*, 31 J. Consumer Rsch. 713 (2005), <https://bear.warrington.ufl.edu/brenner/mar7588/Papers/skurnik-jcr2005.pdf>.

²² With regard to memory-related impairments, “Missed and delayed dementia diagnosis leads to lost opportunities for treatment and increases patient and caregiver burden.” Andrea Bradford et al, *Missed and Delayed Diagnosis of Dementia in Primary Care: Prevalence and Contributing Factors*, 23 *Alzheimer Disease & Associated Disorders* 306-14 (Oct. 2009), <https://pmc.ncbi.nlm.nih.gov/articles/PMC2787842/>.

²³ *See* Prepared Statement of the FTC: Oversight of FTC Before the Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security, at 10 (Nov. 2018), https://www.ftc.gov/system/files/documents/public_statements/1423835/p180101_commission_testimony_re_oversight_senate_11272018_0.pdf (“When consumers with serious health concerns fall victim to unsupported health claims, they may put their health at risk by avoiding proven therapies and treatments.”); *Dietary Supplements: An Advertising Guide for the Industry*, FTC, at 21 (2001), <https://www.ftc.gov/system/files/documents/plain-language/bus09-dietary-supplements-advertising-guide-industry.pdf> (supplements making disease benefit claims “could lead consumers to forego other treatments that have been validated by scientific evidence, or to self-medicate for potentially serious conditions

Contrary to the District Court’s finding that “[t]here was no evidence that Prevagen, or the challenged statements, had actually caused harm or economic injury,” Mem. & J. 2, Nov. 18, 2024, the evidence revealed that consumers concerned about reducing memory problems were buying a supplement that did not work as advertised. Indeed, Quincy’s entire fortune derives from its misleading and unsubstantiated marketing campaign that convinced susceptible consumers to buy Prevagen –conduct in which “[d]isgorging profits is an appropriate remedy.” *FTC v. QT, Inc.*, 512 F.3d at 863 (“Deceit such as the tall tales that defendants told about the Q-Ray Ionized Bracelet will lead some consumers to avoid treatments that cost less and do more; the lies will lead others to pay too much for pain relief or otherwise interfere with the matching of remedies to medical conditions.”).²⁴

without medical supervision”); Diane Hoffman & Jack Schwartz, *Stopping Deceptive Health Claims: The Need for a Private Right of Action Under Federal Law*, 42 Am. J. Law & Med. 53, 56-57 (2016) (“Even more troubling is the potential for harm caused by giving consumers false hope that nutritional products are the best solution to their health problems. . . . Such claims might lead consumers to forgo medically recommended therapies.”); *see also* Rahi Azizi, “*Supplementing*” the DSHEA: Congress Must Invest the FDA with Greater Regulatory Authority over Nutraceutical Manufacturers by Amending the Dietary Supplement Health and Education Act, 98 Calif. L. Rev. 439, 447 (2010) (“out-of-work seniors are more likely than other groups to purchase dietary supplements, because these individuals often face cost limitations when considering treatment options and are generally more susceptible to illness.”).

²⁴ *See* Prepared Statement of Federal Trade Commission on Deceptive Marketing of Dietary Supplements: FTC Enforcement Activities Before the Special Committee On Aging, 111th Cong. (May 26, 2010) at 1, 10, https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-deceptive-marketing-dietary-

III. Quincy's Deceptive Marketing Must Be Stopped.

The central premises of modern consumer protection laws are that marketplace dishonesty is not simply deplorable in some abstract sense, but also injurious—causing real harms against which individual consumers and honest businesses alike cannot practically protect themselves; and that, if uncorrected, such behavior seriously impairs the efficient allocation of resources in the Nation's market economy. *See FTC v. Winsted Hosiery Co.*, 258 U.S. at 494 (deceptive marketing “lessen[s] the market for the honest product”); *Gimbel Bros. v. FTC*, 116 F. 2d 578, 579 (2d Cir. 1941) (an “advertisement [that] contains false representations” results in “the deception of purchasers and the diversion of trade from competitors”) (citations omitted); *Royal Baking Powder Co. v. FTC*, 281 F. 744, 753 (2d Cir. 1922) (deceptive advertising is “unfair alike to the public and to

supplements/100526dietarysupplementstatement.pdf (“[M]arketing scams that prey disproportionately on seniors [for] unproven cures or treatments for various health conditions is a prime example of fraud impacting older Americans.... Such marketing scams are particularly cruel by preying on consumers when they are most vulnerable and desperate, offering false hope and even luring them away from more effective treatments.”); Prepared Statement of the Fed. Trade Comm’n on “Health Fraud and the Elderly: A Continuing Health Epidemic,” Before the U.S. Senate Special Comm. on Aging, 107th Cong., at 5 (Sept. 10, 2001), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-dietary-supplement-fraud/healthfraud.pdf. (“Health fraud poses a direct and immediate threat of both economic and physical injury to persons already suffering from serious conditions and diseases. The elderly are particularly vulnerable because of the high incidence of health-related problems in this age group.”).

the competitors”); *Spiegel, Inc. v. FTC*, 494 F.2d at 63 (“A good society depends upon promises being kept. . . . The courts ‘must set their faces’ against those practices which are harmful to the public interest.”); *see also Indiana Quartered Oak Co. v. FTC*, 26 F.2d 340 (2d Cir. 1928); Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661 (1977).

A. A broad injunction is warranted in this case.

When Congress enacted section 5 of the FTC Act with its expansive prohibition of “unfair” or “deceptive” acts or practices, it gave broad discretion to interpret these terms as pragmatic concepts. As such, “the proscriptions . . . are flexible, ‘to be defined with particularity by the myriad of cases from the field of business.’” *FTC v. Colgate-Palmolive*, 380 U.S. 374, 385 (1965). In this case, the jury found that Quincy did not have the requisite evidence to support its marketing campaign and the District Court determined that the only way to stop the company from lying to American consumers and rein in Quincy’s continuing deception was with broad injunctive relief. *See FTC v. Ruberoid*, 343 U.S. at 473 (“If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.”); *U.S. Dep’t of Justice v. Daniel Chapter One*,

650 Fed. App'x. 20, 23-24 (D.C. Cir. 2016) (upholding broad injunction under the FTC Act finding that it was “not unreasonable for the district court to conclude that in the absence of a broad injunction, the defendants would continue to violate the FTC Act’s prohibition against deceptive and unfair acts and practices.”); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 536 (S.D.N.Y. 2000) (“broad injunctive provisions are often necessary to prevent transgressors from violating the law in a new guise.” (citations omitted)).

As the District Court noted, after its November 18, 2024 Memorandum and Judgment ordering Quincy to cease using the eight challenged statements and any other similarly deceptive statements,

Quincy continued to use the Challenged Statements after trial and the Court’s Order imposing FTC Act liability, which demonstrates a high likelihood – indeed a near assurance – of future violations that may deceive consumers nationwide.

Order, at 3, Dec. 6, 2024.

Without a doubt, lying to consumers can be a highly successful business strategy. Consumer welfare is lost when money set aside to purchase needed products instead flows to sellers who mislead consumers. As the Supreme Court explained in *FTC v. Standard Education Society*, “[l]aws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.” 302

U.S. 112, 116 (1937); *see also Donaldson v. Read Mag., Inc.*, 333 U.S. 178, 189 (1948) (“People have a right to assume that fraudulent advertising traps will not be laid to ensnare them.”).

Even if some consumers may not fall victim to misleading advertising, that does not change the character of the deception, which is why courts have continually held that “the existence of some satisfied customers does not constitute a defense to a § 5 action.” *FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1206 n.8 (10th Cir. 2005); *see also FTC v. Stefanchik*, 559 F.3d 924, 929 n.12 (9th Cir. 2009) (quoting same); *Indep. Directory v. FTC*, 188 F. 2d 468, 471 (2nd Cir. 1951) (“The fact that petitioners had satisfied customers was entire irrelevant. They cannot be excused for the deceptive practices shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them.”); *Basic Books, Inc. v. FTC*, 276 F.2d 718, 721 (7th Cir. 1960) (“The fact that petitioners had satisfied customers was entirely irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment petitioners accorded them.”); *Erickson v. FTC*, 272 F.2d 318, 322 (7th Cir. 1959) (“Further, it is sound to say that the fact that

petitioner had satisfied customers is not a defense to Commission action for deceptive practices.”).

In this case, Quincy seeks to continue its deceptive marketing campaign of ten-plus years, arguing that it should be permitted to use not only specific phrases that the jury found were not supported by adequate scientific evidence but also any other phrase that conveys the same meaning. This is patently unreasonable. Without catch-all language in the injunction prohibiting Quincy from suggesting or implying that Prevagen improves memory or correspondingly reduces memory problems, the company will simply be able to employ other words or phrases to convey the same deceptive impression – that should not be allowed. *See FTC v. Ruberoid*, 343 U.S. at 473; *Bristol-Meyers Co. v. FTC*, 738 F.2d at 561; *see also Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 477 (7th Cir. 2020) (“Deceptive advertisements often intentionally use ambiguity to mislead consumers while maintaining some level of deniability about the intended meaning.”); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 785 (7th Cir. 2014) (reversing district court approval of a settlement because “[t]he injunction actually gives [defendant] protection by allowing it ... to preserve the substance of the claims by making ... purely cosmetic changes in wording.”). Instead, the District Court’s injunction should be affirmed to stay ahead of Quincy’s tendency to make subtle shifts in its marketing that in no way obviate the deception.

To be clear, if Quincy has its way, companies will have free rein to manipulate consumers with deceptive and misleading marketing messages and then be able to blame the consumer for not uncovering the truth—effectively undoing truth-in-advertising requirements altogether. But consumer protection laws are vital to ensure that our market-based economy works in the economic interest of both consumers and honest business, and thus benefits society as a whole. This is the essence of consumer protection, and Quincy’s efforts to drive the FTC off this enforcement field can only disserve the interest in fair, rational and coherent consumer-protection measures. As the Supreme Court stated over a century ago, “[t]he careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The [Federal Trade] Commission was not organized to drag the standards down.” *FTC v. Algoma Co.*, 291 U.S. 67, 79 (1934).

B. The New York Attorney General should be permitted to pursue monetary relief.

Return-of-profits enforcement is an indispensable component of effective injunctive decrees grounded in the universally acknowledged principle of justice that “no man should profit from his wrongdoing.” The actions taken by Quincy that have given rise to the necessity for injunctive relief—deceptively claiming, among other things, that Prevagen could reduce memory problems when there is no competent and reliable scientific evidence to support such a contention—carry

with them the adjunct necessity to divest the company of the illegally acquired profits that Quincy obtained before the law finally caught up with it.

Indeed, there is a just and symbiotic connection between disgorgement, monetary penalties and injunctions. Permitting defendants found to be engaged in unlawful activity to retain the fruits of the illegality not only is an affront to justice, but also ensures that the public interest in eradicating such misdeeds will be thwarted. *See FTC v. Bronson Partners*, 654 F.3d 359, 373 (2d Cir. 2011) (“the primary purpose of disgorgement orders is to deter violations of the [] laws by depriving violators of their ill-gotten gains”) (citation omitted); *SEC v. Tome*, 833 F.2d 1086, 1096 (2d Cir. 1987) (“The paramount purpose of ... ordering disgorgement is to make sure that wrongdoers will not profit from their wrongdoing.”); *In re Genesis Glob. Holdco, LLC*, 660 B.R. 439, 463 (Bankr. S.D.N.Y. 2024) (“NYAG may seek disgorgement under [Executive Law § 63(12)] even in ‘the absence of loss to individuals or independent claims for restitution.’”) (citation omitted); *FTC v. Roomster Corp.*, 654 F. Supp. 3d at 266 (“New York law authorizes broad relief for such claims brought pursuant to NYGBL §§ 349 and 350 and NYEL § 63(12), including injunctions, restitution, damages, and disgorgement.”); *Greenberg v. Spitzer*, No. 800004/2018, 2020 N.Y. Misc. LEXIS 8517, at *23 n.10 (N.Y. Sup. Ct. Nov. 12, 2020) (“Disgorgement is defined as the equitable remedy that deprives wrongdoers of their net profits from unlawful

activity, and reflects the foundational principle that ‘it would be inequitable that [a wrongdoer] should make a profit out of his own wrong.’”) (citations omitted); *New York v. Greenberg*, 27 N.Y.3d 490, 497 (N.Y. 2016) (“In our view, disgorgement ‘merely requires the return of wrongfully obtained profits [and] does not result in any actual economic penalty.’”) (citations omitted); *see also* Assurance of Discontinuance, *In Re Investigation by Attorney General of New York of Fareportal Inc.*, No. 22-016 (Att’y Gen. of New York Bureau of Internet and Tech., Mar. 10, 2022), https://ag.ny.gov/sites/default/files/2022.03.16_nyag-fareportal_aod_fully_executed.pdf. Disgorgement is consistent with New York consumer protection law’s expansive scope directed at protecting consumers against sharp dealers. *See, e.g., In re Ford Fusion and C-Max Fuel Economy Litig.*, 2015 U.S. Dist. LEXIS 155383, at *89 (S.D.N.Y. Nov. 12, 2015) (“[New York] consumer protection statutes are remedial in nature, and should be liberally construed in favor of protecting consumers.”) (citations omitted).

Moreover, the District Court’s ruling giving Quincy the right to retain the funds derived from its deceptive marketing campaign will no doubt make elderly consumers and the economy more vulnerable to harm in the future. Indeed, there can be no doubt that the brain health supplement market, valued at more than \$8

billion, is watching. The message to this industry should not be that deceiving America's elderly is a successful and profitable business model.²⁵

Ultimately, Quincy should not be permitted to retain the millions of dollars in sales revenue that it has obtained from its deceptive marketing of Prevagen. And New York should not be hamstrung from protecting consumers in accordance with its state laws – particularly in light of the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*, 593 U.S. 67 (2021), which largely prevents the FTC itself from securing nationwide monetary relief.

IV. Conclusion

For the foregoing reasons, this Court should affirm the District Court's judgment of liability and entry of injunction, and remand in part to allow New York to pursue monetary relief pursuant to its state laws.

²⁵ See, e.g., Office of Inspector General, *Dietary Supplements: Structure/Function Claims Failed to Meet Federal Requirements*, Dept of Health and Human Servs. (Oct. 2012), <https://oig.hhs.gov/documents/evaluation/2573/OEI-01-11-00210-Complete%20Report.pdf> (“20 percent [of a sampling of 127 supplements] included prohibited disease claims on their labels. These results raise questions about the extent to which structure/function claims are truthful and not misleading.”)

Dated: July 24, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 6,272 words and, thus, is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 24, 2025, an electronic copy of the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. The undersigned also certifies that the following participant in this case is a registered CM/ECF user and that service of the foregoing motion will be accomplished by the CM/ECF system.

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