BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

In re Prevagen Products Marketing and Sales Practices Litigation MDL-_____

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. § 1407

Defendants Quincy Bioscience Holding Company, Inc., Quincy Bioscience, LLC ("Quincy"), Prevagen, Inc. d/b/a Sugar River Supplements, Quincy Bioscience Manufacturing, LLC, Mark Underwood, and Michael Beaman (collectively "Defendants"), respectfully submit this brief in support of their Motion pursuant to 28 U.S.C. § 1407 for Transfer of Actions to the Southern District of New York for Coordinated or Consolidated Pretrial Proceedings (the "Motion").[1] Five actions described below and listed in the accompanying Schedule of Actions (the "Actions")—each a putative class action asserting the same or similar false advertising claims regarding Prevagen and seeking essentially the same relief on behalf of overlapping classes of consumers—are currently pending in three federal district courts. Each is in the initial stages of litigation, with motions to dismiss pending in four of the five actions (*Vanderwerff, Karathanos, Collins* and *Engert*).[2] Defendants have not filed an answer in any of the five Actions.

Two of the cases at issue—*Karathanos* and *Vanderwerff*—were part of a transfer motion that Defendants presented to the Judicial Panel on Multidistrict Litigation (the "Panel") in March 2017. At that time, Defendants sought to centralize those two cases with (1) a regulatory

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[1] By the Motion, Messrs. Underwood and Beaman (who are named as defendants in the *Vanderwerff* and *Karathanos* Actions) do not intend to waive, and specifically reserve, their jurisdictional defenses.

[2] The magistrate judge in *Engert* issued a report and recommendation recommending that the Court deny Quincy's motion to dismiss. Quincy timely filed objections to that report and recommendation, which are still pending. In the fifth action, *Spath*, the parties have refrained from briefing Defendants' anticipated motion to dismiss until the court has issued a ruling in the related *Vanderwerff* action.

enforcement action brought by the Federal Trade Commission ("FTC") and Attorney General of the State of New York ("NYAG"), *Federal Trade Commission et al. v. Quincy Bioscience Holding Co., Inc. et al.,* No. 1:17-cv-00124 (S.D.N.Y. filed Jan. 9, 2017); and (2) another class action, *Racies et al. v. Quincy Bioscience, LLC*, No. 15-cv-00292-HSG (N.D. Cal. filed Jan. 21, 2015). All four plaintiff groups opposed Defendants' prior motion and the Panel denied it in favor of a suggestion of informal coordination. (Case MDL No. 2783 Doc. 28.)

The instant Motion is different. The plaintiffs in *Karathanos*, initially filed in the Eastern District of New York, and *Vanderwerff* and *Spath*, initially filed in the District of New Jersey, voluntarily transferred their cases to the Southern District of New York, and those cases have been referred to the same jurist (Abrams, J.). The two recently-filed complaints in the Southern District of Florida (*Collins*) and the Western District of Texas (*Engert*) assert the same claims, in the same terms, as the trio of New York cases. Although the New York cases date back to 2017, they remain at the pleading stage. Moreover, the requested consolidation would not disturb the FTC/NYAG action, although having the five class actions pending in the same judicial district as the FTC/NYAG action, albeit before a different judge, will facilitate coordination of discovery. Nor does the present motion seek to consolidate the *Racies* action which this Panel previously noted was more procedurally advanced, and is currently set for trial on January 6, 2020.

Transfer and consolidation of the 5 class actions that are the subject of this motion would satisfy the requirements and purpose of Section 1407. Their transfer to one district court by the Panel would be more convenient for the parties, their counsel, and the witnesses likely to be called upon during discovery and at trial. Centralized pretrial proceedings would also conserve judicial resources and promote the just and efficient conduct of the litigations by avoiding duplicative discovery and conflicting rulings, especially about whether the plaintiffs have stated claims upon

which relief may be granted and whether the claims (asserted on behalf of overlapping classes) are appropriate for class certification under Federal Rule of Civil Procedure 23.[3] Thus, centralization is warranted to ensure an efficient and consistent resolution of the Actions.

I. BACKGROUND

Defendants are seeking to transfer five separate class actions to the Southern District of New York for consolidated proceedings pursuant to 28 U.S.C. § 1407. Plaintiffs in each of these five Actions allege that the marketing and sales practices of the dietary supplement Prevagen® violated federal and state laws, which Defendants deny. These five Actions (in order of filing) are:

a. *James Vanderwerff, et al. v. Quincy Bioscience Holding Co., Inc., et al*., No. 1:19-cv-07582-RA (D.N.J. filed Feb. 7, 2017; motion to dismiss fully briefed and *sub judice* as of Apr. 22, 2019; transferred to S.D.N.Y. Aug. 14, 2019) (the "*Vanderwerff* Action");

b. *John Karathanos, et al. v. Quincy Bioscience Holding Co., Inc. et al.*, No. 1:19-cv-08023-RA (E.D.N.Y. filed Feb. 27, 2017; motion to dismiss fully briefed and *sub judice* as of Jun. 10, 2019; transferred to S.D.N.Y. Aug. 13, 2019) (the "*Karathanos* Action");

c. *Elaine Spath v. Quincy Bioscience Holding Company, Inc., et al.*, 1:19-cv-03521-RA (D.N.J. filed Aug. 2, 2018; stayed by agreement of the parties pending motion to dismiss in *Vanderwerff*; transferred to S.D.N.Y. Apr. 22, 2019) (the "*Spath* Action");

d. *Max Engert, et al. v. Quincy Bioscience, LLC*, 1:19-cv-183-LY (W.D. Tex. filed Feb. 25, 2019; motion to dismiss report and recommendation submitted by Magistrate Judge on Oct. 8, 2019 and objections filed on Oct. 22, 2019) (the "*Engert* Action"); and

e. *Juan Collins et al. v. Quincy Bioscience, LLC*, 1:19-cv-22864-MGC (S.D. Fla. filed Jul. 11, 2019; motion to dismiss fully briefed and *sub judice* as of Oct. 16,

[3] Defendants do not believe that class certification will be appropriate in any of the Actions because individualized issues of fact and law will preclude any plaintiff from satisfying the requirements of Rule 23.

2019; motion for class certification fully briefed and *sub judice* as of Dec. 12, 2019) (the "*Collins* Action").[4]

Four of these five Actions seek to represent overlapping nationwide classes of Prevagen purchasers:

Action	Nationwide Class
Vanderwerff	All consumers who, within the applicable statute of limitations period, purchased Prevagen in the United States until the date notice is disseminated. (*Vanderwerff* Compl., ECF No. 1 ¶ 35).
Karathanos	All consumers who, within the applicable statute of limitations period, purchased Prevagen in the United States until the date notice is disseminated. (*Karathanos* Compl., ECF No. 1 ¶ 35).
Spath	All citizens of the United States who, within the relevant statute of limitations period, purchased Defendants' Products. (*Spath* Compl., ECF No. 1 ¶ 40).
Engert	All residents of the United States who, within the last four years prior to the filing of this Complaint, purchased Defendant's product Prevagen, in any amount. (*Engert* Compl., ECF No. 14 ¶ 88.)

In addition, each of the five Actions seeks to represent nearly identical sub-classes of Prevagen purchasers in the states where their respective named plaintiffs reside, all of which are subsumed by the overlapping nationwide classes being sought:

Action	The State Classes
Vanderwerff	New Jersey consumers who, within the applicable statute of limitations period, purchased Prevagen until the date notice is disseminated. (*Vanderwerff* Compl., ECF No. 1 ¶ 36.)
Karathanos	New York consumers who, within the applicable statute of limitations period, purchased Prevagen until the date notice is disseminated. (*Karathanos* Compl., ECF No. 1 ¶ 36.)
Spath	All citizens of New Jersey who, within six years prior to the filing of the initial complaint, purchased Defendant's Products. (*Spath* Compl., ECF No. 1 ¶ 40.)
Engert	All residents of Texas who, within the last four years prior to the filing of this Complaint, purchased Defendant's product Prevagen, in any amount. (*Engert* Compl., ECF No. 14 ¶ 88.)
Collins	All consumers from Florida who, within the applicable limitations period, purchased the Prevagen products. (*Collins* Compl., ECF No. 15 ¶ 23.)

[4] In addition to the five federal cases at issue on this Motion, the FTC/NYAG action, and *Racies*, a seventh class action, *Miloro v. Quincy Bioscience, LLC*, No. 16PH-cv01341 (Mo. Cir. Ct. filed Sept. 12, 2016), is pending in Missouri state court.

The claims asserted in each of these Actions are similar. All five Actions assert claims under the unfair trade practices law of the state where the named plaintiffs reside: *Vanderwerff* and *Spath* are asserting claims under the New Jersey Consumer Fraud Act ("NJCFA"), N.J. Stat. Ann. § 56:8-1 et seq. (Count I in both cases); *Karathanos* is asserting a claim under the New York General Business Law §§ 349 and 350 ("NY GBL") (Count I); *Engert* is asserting a claim under the Texas Deceptive Trade Practices Act ("DTPA"), Tex. Bus. & Com. Code §§ 17.41 et. seq. (Count I); and *Collins* is asserting a claim under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Florida Statutes § 501.201 *et seq.* (Count I). The plaintiffs in each of the Actions seek similar recovery under these statutes, including compensation or restitution, injunctive relief, attorneys' fees and costs.

Certain plaintiffs also assert claims for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (*Vanderwerff* (Counts II and III) and *Karathanos* (Count II)), violation of the New Jersey Truth-In-Consumer Contract, Warranty and Notice Act. (*Spath* (Count II) and *Vanderwerff* (Count II)), and unjust enrichment (*Spath* (Count III) and *Collins* (Count II)).[5]

Although *Karathanos* and *Vanderwerff* have been pending since 2017, they remain at the pleading stage. There are various reasons for this, including that the Southern District of New York dismissed the FTC/NYAG case on Defendants' Rule 12(b)(6) motion and the *Karathanos* and *Vanderwerff* courts stayed or slowed those cases while the FTC/NYAG pursued an ultimately successful appeal from that dismissal. *See FTC v. Quincy Bioscience Holding Co.*, 753 Fed. App'x 87 (2d Cir. 2019). The Second Circuit's reasoning pertained only to the pleading standards the government had to meet in an enforcement action; however, the parties dispute the impact of the

[5] The *Engert* Action also alleges breach of express warranty, breach of implied warranty of merchantability, and violation of the Magnuson-Moss Warranty Act. (Counts II, III and IV.)

decision on Defendants' motions to dismiss the five private class Actions that are the subject of the instant Motion.

As summarized in the chart below, the parties and their counsel are located in various jurisdictions throughout the country.

Case(s)	Party	Location[6]	Location of Counsel[7]
Vanderwerff	Plaintiff James Vanderwerff	Jersey City, NJ	Cherry Hill, NJ Woodbridge, NJ; Ridgewood, NJ;
Karathanos	Plaintiff John Karathanos	Bayville, NY	Cherry Hill, NJ Woodbridge, NJ;
Spath	Plaintiff Elaine Spath	Morris County, NJ	New York, NY Morganville, NJ Healdsburg, CA San Marcos, CA
Engert	Plaintiff Max Engert	Travis County, TX	Houston, TX
Engert	Plaintiff Jack Purchase	Parker County, TX	Houston, TX
Engert	Plaintiff Ronald Atkinson	Walker County, TX	Houston, TX
Collins	Plaintiff Juan Collins	Leon County, FL	Coral Gables, FL West Palm Beach, FL Miami, FL
Collins	Plaintiff John Fowler	Palm Beach County, FL	Coral Gables, FL
All Cases	Defendant Quincy Bioscience, LLC	Madison, WI	New York, NY Parsippany, NJ Newport Beach, CA Chicago, IL Houston, TX
Spath *Vanderwerff* *Karathanos*	Defendant Quincy Bioscience Holding Company, Inc.	Madison, WI	New York, NY Parsippany, NJ Newport Beach, CA
Spath *Vanderwerff* *Karathanos*	Defendant Prevagen, Inc.	Madison, WI	New York, NY Parsippany, NJ Newport Beach, CA

[6] This is based on the residency and headquarters allegations in the pleadings. (*See Vanderwerff* Compl. ¶ 8; *Karathanos* Compl. ¶ 8; *Spath* Compl. ¶ 5; *Engert* Compl. ¶¶ 6-8; *Collins* Compl. ¶ 9.)

[7] This is based on individual attorney appearances in the actions and subsequent changes in address.

Case(s)	Party	Location[6]	Location of Counsel[7]
Spath *Vanderwerff* *Karathanos*	Defendant Quincy Bioscience Manufacturing, LLC	Madison, WI	New York, NY Parsippany, NJ Newport Beach, CA
Vanderwerff *Karathanos*	Defendant Mark Underwood	Verona, WI	New York, NY Parsippany, NJ Newport Beach, CA
Vanderwerff *Karathanos*	Defendant Michael Beaman	Heath, TX	New York, NY Parsippany, NJ Newport Beach, CA

There is no single location that has a nexus to all of the parties and their counsel. However, Plaintiffs and at least some of their counsel in three out of the five Actions (*Vanderwerff*, *Karathanos*, and *Spath*) are located in New York or New Jersey. Defendants' lead counsel in all five Actions is located in New York and New Jersey. Moreover, three of the five Actions are currently pending in the Southern District of New York.[8]

As noted above, Defendants previously filed a motion to consolidate two of the actions at issue in this motion (*Vanderwerff* and *Karathanos*) with *Racies*—which at the time were the only three class actions pending in federal court—and the FTC/NYAG action. This Panel determined that the actions shared factual issues arising from the allegations that Defendants falsely and deceptively marketed Prevagen, and that centralization might eliminate duplicative discovery, avoid the possibility of conflicting pretrial rulings, and result in limited efficiencies. *See In re: Prevagen Products Mktg. and Sales Pracs. Litig.*, MDL No. 2783, Dkt. No. 28 (May 30, 2017) (the "Prior MDL Order"). However, the Panel denied the motion in part because: (1) *Racies* was at a much more procedurally advanced stage of litigation; and (2) the anticipated expert discovery did not seem sufficiently complex to warrant consolidation. (*Id.*) Both of these concerns have been addressed in the instant Motion. Moreover, the three new actions that have been filed since

[8] The related FTC/NYAG action is also pending in the Southern District of New York, albeit before a different judge than the *Vanderwerff*, *Karathanos* and *Spath* Actions.

the Prior MDL Order was decided (*Spath*, *Engert*, and *Collins*), and the exclusion from this motion of *Racies* and the FTC/NYAG action, substantially alter the posture of Defendants' motion, as discussed in more detail below.

II. ARGUMENT

The fundamental premise of each of the five Actions is that Defendants' marketing of Prevagen was false, deceptive or misleading. Under Section 1407:

> When civil actions involving one or more ***common questions of fact*** are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings ***will be for the convenience of parties and witnesses*** and ***will promote the just and efficient conduct of such actions***.

28 U.S.C. § 1407(a) (emphasis added). As the Panel has already held in connection with Defendants' prior motion, transfer to and coordination in the Southern District of New York will be convenient for the parties and will promote efficiency by avoiding duplicative discovery and conflicting pretrial rulings, particularly with respect to class certification. (Prior MDL Order at 1.)

A. The Actions Are Based on Common Factual Allegations.

All five Actions revolve around Defendants' marketing and sales practices for Prevagen. Plaintiffs all challenge precisely the same Prevagen labels and marketing statements, assert claims based on similar (indeed, apparently identical) legal theories, and seek essentially the same relief on behalf of identical or overlapping classes of consumers.

For example, each Action asserts claims for violation of the consumer fraud statute in the state where its named plaintiff resides. These claims will all require the court to consider whether Defendants engaged in false or deceptive business practices under the guise of the "reasonable consumer" standard. *See Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 69 (1985) (under the NJCFA,

the question is "whether the ad itself is misleading to the average consumer, not whether it can later be explained to the more knowledgeable, inquisitive consumer"); *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 344 (1999) (reasonable consumer test under the NY GBL questions whether the representation is "likely to mislead a reasonable consumer acting reasonably under the circumstances"); *Millennium Commc'ns & Fulfillment, Inc. v. Office of Attorney Gen., Dep't of Legal Affairs, State of Fla.*, 761 So. 2d 1256, 1263 (Fla. Dist. Ct. App. 2000) (holding that an act is deceptive under the FDUTPA "if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."); *Gill v. Boyd Distribution Ctr.*, 64 S.W.3d 601, 604 (Tex. App. 2001) (in order to prevail on a DTPA claim a plaintiff must prove that the defendant engaged in a false, misleading, or deceptive practice with regard to a consumer). Thus, each of these cases will involve similar factual questions, such as how reasonable consumers would interpret Quincy's advertisements, how widely those advertisements were disseminated, and whether those advertisements are false or misleading.

The Panel routinely centralizes false advertising and consumer fraud class actions like these, even when there are only a small number of cases. *See, e.g.*, *In re Coca-Cola Prods. Mktg. & Sales Practices Litig.*, 37 F. Supp. 3d 1386, 1387 (J.P.M.L. 2014) (six soda ingredient actions in three districts); *In re Natrol, Inc., Glucosamine/Chondroitin Mktg. & Sales Practices Litig.*, 26 F. Supp. 3d 1392, 1393 (J.P.M.L. 2014) (three dietary supplement active ingredient actions in three districts); *In re Nutramax Cosamin Mktg. & Sales Practices Litig.*, 988 F. Supp. 2d 1371, 1371 (J.P.M.L. 2013) (three dietary supplement active ingredient actions in three districts); *In re GNC Corp. Triflex Prods. Mktg. & Sales Practices Litig. (No. II)*, 988 F. Supp. 2d 1369, 1370-71 (J.P.M.L. 2013) (four dietary supplement active ingredient actions in four districts); *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, 753 F. Supp. 2d 1372, 1372 (J.P.M.L. 2010) (three

pomegranate juice healthfulness actions in three jurisdictions and five tag along actions). Defendants' motion, addressed to five cases pending in three districts, is well within this mainstream.

Consolidation is especially appropriate in cases involving "complex scientific issues concerning the effectiveness of [an] active ingredient[]," particularly when the actions will involve "extensive common expert discovery" over "many of the same clinical studies." *In re Natrol, Inc.*, 26 F. Supp. 3d at 1393; *see also In re Nutramax Cosamin*, 988 F. Supp. 2d at 1371; *In re GNC Corp. Triflex Prods.*, 988 F. Supp. 2d at 1369-70. Similarly, in *In re Horizon Organic Milk Plus DHA OMEGA-3 Marketing and Sales Practices Litigation*, 844 F. Supp. 2d 1380 (J.P.M.L. 2012), the Panel centralized five class actions pending in four states arising out of allegations that defendants' representations regarding milk products fortified with a fatty acid "were misleading insofar as they claimed that the milk supports 'brain health' in children and adults." *Id.* at 1380; *see also In re Enfamil Lipil Mktg. & Sales Practices Litig.*, 764 F. Supp. 2d 1356, 1357 (J.P.M.L. 2011) (centralizing six class actions "focus[e]d . . . on the presence and/or efficacy of two nutrients found in breast milk that are known to promote brain and eye development in infants"). In the above cited cases, the Panel found centralization appropriate in part because each of the consolidated cases would involve the same or similar complex issues regarding product efficacy. *Id.*

The same result is warranted here. Plaintiffs' allegations in all five Actions concern Defendants' marketing statements that the active ingredient in Prevagen, apoaequorin, protects against declinations in memory due to normal aging. Fact and expert discovery will be substantially similar in each of the five Actions, and will be focused on the substantiation for Defendants' advertising for Prevagen and apoaequorin's efficacy.

Thus, it cannot be disputed that these cases "involve[e] one or more common questions of fact" as required by Section 1407.

B. Centralization Will Promote the Just and Efficient Conduct of the Actions by Avoiding Duplication and Conflicting Rulings For Overlapping Classes

Centralization will also promote the just and efficient resolution of these five Actions, insofar as it will avoid duplication of litigation (both by the parties and the various courts where the Actions are currently pending) as well as conflicting rulings for overlapping classes.

1. The Actions Seek Certification of Overlapping and Duplicative Classes

The Panel has long held that "a potential for conflicting or overlapping class actions presents one of the strongest reasons for transferring such related actions to a single district for coordinated or consolidated pretrial proceedings which will include an early resolution of such potential conflicts." *In re Plumbing Fixtures*, 308 F. Supp. 242, 243-44 (J.P.M.L. 1970). *See also In re TD Bank, N.A., Debit Card Overdraft Fee Litig.*, 96 F. Supp. 3d 1378 (J.P.M.L. 2015); *In re Kentucky Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 659 F. Supp. 2d 1366, 1367 (J.P.M.L. 2009); *In re Tyson Foods, Inc. Chicken Raised Without Antibiotics Consumer Litig.*, 582 F. Supp. 2d 1378, 1379 (J.P.M.L. 2008); *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.*, 582 F. Supp. 2d 1373, 1375 (J.P.M.L. 2008).

As set forth above, four out of the five Actions propose essentially identical and overlapping nationwide classes of Prevagen purchasers. Moreover, all five Actions propose state-specific classes that are completely encompassed by and duplicative of the proposed nationwide classes. Requiring these Actions to proceed separately would cause unnecessary duplication of effort, both by the parties and the various courts where the Actions are pending. Centralization would minimize this duplication of effort and conserve judicial and party resources.

2. Centralization Will Avoid Inconsistent Pretrial Rulings

The need for consistent pretrial rulings is also an indispensable aspect of Section 1407's purpose, "particularly with respect to the issue of class certification." *In re McDonald's French Fries Litig.*, 444 F. Supp. 2d 1342, 1343 (J.P.M.L. 2006); *see also In re Simply Orange Juice Mktg. & Sales Practices Litig.*, 867 F. Supp. 2d 1344, 1345 (J.P.M.L. 2012); *In re Horizon Organic Milk Plus DHA OMEGA-3*, 844 F. Supp. 2d at 1380; *In re Wesson Oil Mktg. & Sales Practices Litig.*, 818 F. Supp. 2d 1383, 1383 (J.P.M.L. 2011).

Here, all parties will benefit from a consolidated decision on Defendants' pending motions to dismiss, as each motion challenges the plaintiffs' failure to sufficiently allege the falsity of Defendants' marketing statements. Defendants have argued that each of the plaintiffs' complaints are premised on the unsupported assertion that Prevagen does not (or cannot) work as promised, but that the plaintiffs failed to allege any specific factual or scientific support for such a theory. At their core, the plaintiffs are relying on a "lack of substantiation" theory which is not permissible under any of the consumer fraud statutes identified in the complaints and can only be pursued by a governmental agency like the Federal Trade Commission. (*See Vanderwerff* Dkt. No. 28-1 at 13-15; *Karathanos* Dkt. No. 51 at 9-12; *Engert* Dkt. No. 22 at 13-14; *Collins* Dkt. No. 25 at 13-14.)

The parties will also benefit from a consolidated decision on class certification with respect to the overlapping and duplicative proposed class definitions. *See In re Natrol, Inc.*, 26 F. Supp. 3d at 1393 (consolidating cases under Section 1407 where a nationwide class in one action overlapped with the state classes in two other actions filed in different districts); *In re Nutramax Cosamin*, 988 F. Supp. 2d at 1371 (same). Absent centralization, one court could certify a putative nationwide class or grant summary judgment and another could deny a similar motion, resulting

in a contradictory situation where the same consumer's class claims could be rejected in one case and proceed to trial in another.

3. Centralization Will Prevent Duplicative Discovery

Centralizing these five Actions would also prevent duplicative discovery, which is sure to result in efficiencies both for the parties and for the court system. Plaintiffs will likely request the same documents and information from Defendants regarding the efficacy of apoaequorin and scientific substantiation for the challenged marketing statements. They will likely seek to depose many of the same Quincy employees who were involved in the creation of and substantiation for Prevagen's marketing material. Centralization will protect Defendants from responding to duplicative discovery, and will protect witnesses from having to appear at multiple depositions.

Coordination of ESI parameters and search terms among all five Actions will also likely result in fewer motions to compel and prevent Defendants from being held to conflicting discovery obligations in the various Actions.

Defendants also expect discovery to encompass third-parties involved in the research of apoaequorin and marketing of Prevagen. Centralization would minimize the burden on those third parties, allowing them to produce documents and provide deposition testimony in one coordinated proceeding as opposed to five separate ones. *See In re Collecto, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 999 F. Supp. 2d 1373, 1374 (J.P.M.L. 2014) (finding that the significant third party discovery in the cases would "benefit from common pretrial proceedings").

Avoiding duplication of effort is all the more appropriate here because each of the Actions will involve complex questions requiring extensive expert discovery. *See In re: Natrol, Inc. Glucosamine/Chondroitin Mktg. & Sales Practices Litig.*, 26 F. Supp. 3d 1392, 1393 (J.P.M.L. 2014); *In re Santa Fe Nat. Tobacco Co. Mktg. & Sales Practices Litig.*, 178 F. Supp. 3d 1377,

1378 (J.P.M.L. 2016) (consolidating five actions pending in four districts in part because they involved complex issues requiring expert discovery); *see also In re Smith & Nephew BHR & R3 Hip Implant Prod. Liab. Litig.*, 249 F. Supp. 3d 1348 (J.P.M.L. 2017) ("discovery is likely to be complex, expert-intensive, and will benefit from centralization").

In re: Natrol is particularly instructive. There the Panel consolidated just three actions related to a joint health supplement manufacturer's advertising claims largely because the actions presented common "complex scientific issues concerning the effectiveness of the active ingredient" in the products, necessitating "extensive common expert discovery and one or more *Daubert* hearings." 249 F. Supp. 3d at 1393.

Like in *Natrol*, these Actions present several different issues that will necessitate complex expert testimony and will likely result in *Daubert* motions and hearings. First, the plaintiffs will have to contend with the study on which Defendants' advertising claims related to Prevagen are based. This study—called the Madison Memory Study—is referenced in each of the complaints filed in the Actions. (*Vanderwerff* Compl. ¶ 27; *Karathanos* Compl. ¶ 27; *Spath* Compl. ¶¶ 32-39; *Engert* Compl. ¶ 23; *Collins* Compl. ¶ 6). It presents clinical evidence of Prevagen's efficacy and establishes the veracity of Defendants' advertising claims. To pursue their claims for false advertising, the plaintiffs will likely present expert testimony attacking the Madison Memory Study, and Defendants' expert will defend it.

Plaintiffs in four of the Actions have also alleged that apoaequorin cannot improve cognition because it is broken down in the digestion process and incapable of passing the human blood-brain barrier. (*Vanderwerff* Compl. ¶ 34; *Karathanos* Compl. ¶ 34; *Engert* Compl. ¶¶ 27-28; *Collins* Compl. ¶¶ 2-4). If the Actions proceed into discovery, the plaintiffs will have to

support this theory with expert evidence regarding the biological channels through which Prevagen operates. Defendants, of course, will counter this theory with expert opinion(s) of their own.

Moreover, each of the complaints seek damages based on the allegedly inflated price that consumers paid for Prevagen. (*Vanderwerff* Compl. ¶ 64; *Karathanos* Compl. ¶ 61; *Spath* Compl. ¶ 68; *Engert* Compl. ¶ 59; *Collins* Compl. ¶ 49). Such a price premium damages theory can be advanced only through complex expert analysis and will fail in its absence. *See Zakaria v. Gerber Prods. Co.*, 755 F. App'x 623, 624 (9th Cir. 2018) (affirming dismissal of false advertising claims because the plaintiff failed to support her price premium damages theory with sufficient, reliable expert testimony).

In fact, in *Racies*, the parties submitted eight different expert reports and argued motions to exclude four of those experts. Defendants expect at least this volume of expert discovery in the five Actions at issue here, and suspect that there could be additional experts on each side to opine on the methodological and statistical sufficiency of the Madison Memory Study, which is not at issue in *Racies*. Requiring each of the Actions to separately proceed through expert discovery, which would potentially require duplicative expert reports, duplicative expert depositions, and duplicative *Daubert* motions, would be an inefficient use of party and judicial resources.

Therefore, because the claims asserted in each of the Actions raise several common, complex questions of science and damages requiring expert discovery, consolidation streamlining that discovery process stands to benefit all parties as well as the court system.

4. The Actions Are All At A Similar Procedural Stage of Litigation

Finally, consolidation will be efficient because each of the five Actions bears a substantially similar procedural posture to the others. Defendants have not filed an answer in any of the Actions, discovery has taken place in just one action (*Collins*) and motions to dismiss are

currently pending in four of the five Actions (*Vanderwerff, Karathanos, Engert* and *Collins*).[9] Therefore, the Actions are ripe for consolidation because they are ideally situated to move through pretrial procedure in lock-step.

When considering the convenience of all of parties and witnesses, the overlapping class definitions, the possibility of inconsistent rulings, and the necessary complex scientific expert discovery that will be required, centralization will result in the just and efficient conduct of the Actions and should be granted.

C. The Southern District of New York Is the Most Appropriate Forum for Centralization

Centralizing the Actions in the Southern District of New York would be appropriate because the majority of the Actions are currently pending in that district and all of the Actions have some connection with New York State.

Vanderwerff, Karathanos, and *Spath* are currently pending before Judge Ronnie Abrams in the Southern District of New York. Judge Abrams already has extensive experience with the relevant procedural history and facts and, therefore, is the most logical choice to preside over all of the Actions. *See In re Enter. Mortg. Acceptance Co., LLC Sec. Litig.*, 237 F. Supp. 2d 1384, 1385 (J.P.M.L. 2002) (holding that the Southern District of New York "stands out as an appropriate transferee forum" because the majority of the actions to be transferred were already pending before a single judge in that Court); *In re Multidistrict Litig. Involving Banking Agreements with Stirling Homex Corp.*, 388 F. Supp. 572, 573 (J.P.M.L. 1975) (holding that the Court's prior experience with related matters warranted transfer to the Southern District of New York). Judge Abrams and

[9] The *Collins* plaintiffs filed a "snap" motion for class certification before Quincy responded to the amended complaint in that action. Quincy has opposed that motion, which is currently pending before the court.

Judge Louis L. Stanton of the Southern District of New York, who presides over the FTC/NYAG action, both have expressed willingness to coordinate informally.

Moreover, according to the most recent MDL Statistics Report – Distribution of Pending MDL Dockets by District published on the Panel's website, Judge Abrams is not currently presiding over any MDL proceedings. *See* https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDLs_by_District-December-16-2019.pdf (last accessed December 16, 2019).

The majority of the parties and/or their counsel is also located in or near the Southern District of New York. The named Plaintiffs in *Vanderwerff*, *Karathanos*, and *Spath*, all live in New York or New Jersey and at least some of their counsel are also located there. Moreover, lead counsel for all Defendants in all five Actions are located in New York and New Jersey. Thus, while centralization will require some parties to travel in the event of in-person hearings, the Southern District of New York has the greatest number of contacts with the parties and their counsel. Any such travel will also be generally convenient, as the Southern District of New York sits in New York City, the nation's largest metropolitan area, with a plethora of daily transportation options, including direct flights from each of the areas where the parties are located. *See, e.g., In re WorldCom, Inc., Sec. & "Erisa" Litig.*, 226 F. Supp. 2d 1352, 1355 (J.P.M.L. 2002) (finding that centralization in the Southern District of New York was appropriate in part because of the "benefit from centralization in a major metropolitan center that is well served by major airlines, provides ample hotel and office accommodations, and offers a well-developed support system for legal services"). Therefore, the Southern District of New York is the most appropriate venue for consolidated pretrial proceedings.

D. The Panel's Denial of Defendants' Prior Motion to Transfer Does Not Foreclose Consolidation

The Panel previously denied a motion by Defendants to consolidate *Karathanos* and *Vanderwerff* with two other actions related to Defendants' marketing and sale of Prevagen (*Racies* and the FTC/NYAG action). Such denial "does not preclude [the Panel] from reaching a different result . . . where a significant change in circumstances has occurred." *In re Plavix Mktg., Sales Practices & Prod. Liab. Litig. (No. II)*, 923 F. Supp. 2d 1376, 1378 (J.P.M.L. 2013). Such a change in circumstances has occurred here with respect to each of the concerns identified in the Prior MDL Order. Therefore, transfer and consolidation is appropriate.

First, since the Prior MDL Order was issued, three new class actions have been filed making substantially identical allegations as the *Karathanos* and *Vanderwerff* Actions. Two of these actions—*Spath* and *Engert*—seek certification of a nationwide class that overlaps with the classes sought in *Karathanos* and *Vanderwerff*, as well as state-specific sub-classes of individuals who are already part of the proposed nationwide classes in *Karathanos* and *Vanderwerff*. The third new class action, *Collins*, seeks a state-specific class of individuals who are already part of the nationwide classes sought in the other four Actions.

Second, the Prior MDL Order was based, in part, on the fact that the Defendants sought to consolidate *Karathanos* and *Vanderwerff* with a separate class action that was much further advanced (*Racies*), and which that plaintiff argued was based on a different theory of liability than *Karathanos* and *Vanderwerff*, as well as with a governmental enforcement case. (*See* Prior MDL Order at 1-2.) The Panel found that those other actions were procedurally incompatible with *Karathanos* and *Vanderwerff* and that consolidation was therefore inappropriate. In contrast, all five of the Actions now at issue are private class actions on virtually identical procedural footing, with motions to dismiss pending in four of the five and class-related discovery having been

exchanged only in *Collins*. Because of these similarities, these Actions stand to fully realize the procedural efficiencies of consolidation.

Third, the Prior MDL Order held that the record at the time appeared to be insufficiently complex to fully benefit from the efficiencies of consolidation. (Prior MDL Order at 2.) However, as was detailed in Section II.B, *supra*, the Actions will require substantial and common expert discovery on several complex factual questions and scientific theories including, but not limited to, the efficacy of apoaequorin in improving cognitive function, the methodological and statistical sufficiency of the Madison Memory Study, which Quincy relied upon in making the marketing statements at issue, whether and to what extent apoaequorin is digested by the human body, the ability of apoaequorin to cross the human blood-brain barrier, and the plaintiffs' damages theory.

Finally, the Prior MDL Order found that, because the *Vanderwerff* and *Karathanos* plaintiffs were represented by common counsel, "cooperation and informal coordination by the involved courts and counsel should be feasible." (Prior MDL Order at 1.) Now, with the filing of *Spath*, *Engert*, and *Collins*, additional law firms have been brought in to the mix on the plaintiffs' side, decreasing the likelihood of informal cooperation. *See, e.g.*, *In re: GNC Corp.*, 988 F. Supp. 2d at 1369 (finding that coordination of discovery will be difficult when there is little overlap in plaintiffs' counsel); *In re: Santa Fe*, 178 F. Supp. 3d at 1379 (same).

III. CONCLUSION

For the foregoing reasons, the Actions should be transferred to and centralized in the Southern District of New York pursuant to 28 U.S.C. § 1407.

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