17-3745(L)

17-3791(CON)

United States Court of Appeals for the Second Circuit

FEDERAL TRADE COMMISSION, PEOPLE OF THE STATE OF NEW YORK, by Barbara D. Underwood, Attorney General of the State of New York,

Plaintiffs-Appellants,

v.

QUINCY BIOSCIENCE HOLDING COMPANY, INC., a corporation,

Defendants-Appellees.

(*Caption continues on inside cover*)

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR STATE APPELLANT

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(*Continued from front cover*)

QUINCY BIOSCIENCE, LLC, a limited liability company, PREVAGEN, INC., a corporation, DBA SUGAR RIVER SUPPLEMENTS, QUINCY BIOSCIENCE MANUFACTURING, LLC, a limited liability company, MARK UNDERWOOD, Individually and as an officer of Quincy Bioscience Holding Company, Inc., Quincy Bioscience, LLC and Prevagen, Inc., MICHAEL BEAMAN, Individually and as an officer of Quincy Bioscience Holding Company, Inc., Quincy Bioscience, LLC, and Prevagen, Inc.,

Defendants-Appellees.

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PRELIMINARY STATEMENT

The federal and state-law claims at issue here allege a classic form of false and deceptive advertising: defendants represented the benefits of Prevagen in ways that their own studies contradicted. On appeal, defendants simply mischaracterize the complaint's allegations about both their advertising representations and the results of their studies. Properly understood, the complaint identifies precisely the type of mismatch between advertising and evidence that supports liability under both federal and state law. This Court should therefore reverse the district court's dismissal of plaintiffs' claims.

As the State's opening brief explained, defendants' advertisements about Prevagen were misleading for two reasons. First, defendants represented that a clinical study showed that Prevagen could improve memory for all users, when the study instead showed results for only a portion of the population. Defendants' assertion that the study showed positive results for "more than 76% of the study population" (Br. for Quincy Bioscience Holdings, Inc. et al. ("Quincy Br.") at 1) is simply incorrect—the result of a straightforward mathematical error. Even if there were some basis for this figure, there is no dispute that the study

found statistically significant effects only for cognitively healthy participants, and not for cognitively impaired individuals to whom defendants marketed Prevagen. And the complaint further alleges that defendants' study relied on post hoc subgroup analyses that were unreliable and thus inadequate to support defendants' claims about Prevagen's benefits.

Second, defendants represented that Prevagen could supplement proteins in the human brain, when their own studies showed no such physiological effect in humans. On appeal, defendants deny making such a representation, but that assertion is belied by their own advertisements, which described the active ingredient in Prevagen (apoaequorin) as "a protein our brains need for healthy function but is diminished in the aging process," and specifically represented that Prevagen "supplements" brain proteins that "we lose" "[a]s we age." (Corrected Joint Appendix (J.A.) 24, 57.)

The alternative grounds for affirmance that the two individual defendants press likewise fall short. The complaint plausibly alleges that both individual defendants directly participated in advertising Prevagen

and that the company those two defendants cofounded and run directed its marketing efforts to New York.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT'S CLAIMS UNDER THE FEDERAL TRADE COMMISSION ACT

A. The Complaint Plausibly Alleges That Defendant Quincy Bioscience Holding Company, Inc., Made Misleading Statements About Prevagen's Effect on Memory.

Defendant Quincy Bioscience Holding Company, Inc., asserts that Prevagen's effect on memory was in fact proved by the Madison Memory Study, but the complaint plausibly alleges otherwise. Quincy does not dispute that the Madison Memory Study failed to show statistically significant benefits for the study population as a whole and for the vast majority of subgroups that researchers later analyzed. (*See* J.A. 37 (¶¶ 28–29).) Nor does Quincy dispute that it failed to disclose these negative results when advertising Prevagen's supposed benefits. (*See* J.A. 38 (¶ 30).) Instead, Quincy argues that its advertising claims were supported by statistically significant results for members of only two of

the more than thirty subgroups that Quincy's researchers created and examined after their initial study failed. *See* Quincy Br. at 20–21. Quincy's argument is both factually and legally incorrect. Even if Quincy's subgroup methodology could substantiate Quincy's advertisements—which it cannot (see *infra* at 7–11)—Quincy's subgroup analyses still would not support its broad marketing claims to the general public that Prevagen improves memory.

1. Quincy misleadingly advertised Prevagen's benefits for the overall population, when its clinical study showed results for only certain populations.

Quincy flatly asserts that the Madison Memory Study demonstrated statistically significant effects in "more than three-quarters of the study population." Quincy Br. at 28; *see also id.* at 21 (asserting that significant effects were identified in "over 76% of the Madison Memory Study's population" (emphasis omitted)). There are serious questions whether the Court should even consider at the pleading stage the evidence that Quincy cites for its claim that the two subgroups comprised three-quarters of study participants. *See* Br. of the FTC ("FTC Br.") at 44–49. And in any event, that claim is simply wrong. Quincy

arrives at its three-quarters figure by citing a table showing that one subgroup for which researchers observed statistically significant results contained 100 participants, while the other subgroup with statistically significant results contained 61 participants. (J.A. 239 (tbl.2).) The error in Quincy's calculation is that the first subgroup entirely encompasses the second subgroup—meaning that the relevant population is not 161 participants, but only 100.[1] Even worse, 40 of those participants received a placebo (J.A. 239 (tbl.2)), meaning that only 60 of the study's 218 participants showed positive results—less than a third of the study population (*see* J.A. 37 (¶ 28)). These limited results did not support Quincy's broad marketing claims about Prevagen's benefits. *See* Br. for State Appellant ("State Br.") at 23–24.

Quincy's advertising also deviated from the Madison Memory Study's limited results because Quincy marketed Prevagen to the public generally—including people with more serious memory problems—even though the only participants for whom researchers observed significant

[1] Specifically, the first subgroup comprises participants with an AD8 score (designed to measure cognitive impairment (*see* J.A. 236)) of zero to two; the second subgroup is limited to participants with an AD8 score of zero to one. (*See* J.A. 239 (tbl.2).)

effects at the subgroup level were those with limited or no cognitive decline. *See id.* Thus, the complaint plausibly alleges that Quincy's advertisements misleadingly suggested sweeping benefits for users all along the cognitive-impairment spectrum despite observing positive results only "for small subgroups of the study population" that did not experience such impairment. (J.A. 37–38 (¶¶ 29–30).)

Quincy mischaracterizes the State's position as arguing "that Appellees cannot make truthful marketing claims about Prevagen if they do not have data that Prevagen specifically benefits those with 'more serious memory problems.'" Quincy Br. at 28 (quoting State Br. at 24). Rather, the State contended that Quincy's marketing of Prevagen *to people with more serious memory problems* was misleading because Quincy lacked any data showing that such people would enjoy Prevagen's benefits—and in fact possessed data suggesting that such people would not benefit from Prevagen at all. *See* State Br. at 21–24. Moreover, contrary to Quincy's assertion, this description of the misleading nature of Quincy's advertising is far from new. As the complaint alleges, Quincy "touted the Madison Memory Study" when it "widely advertised" Prevagen, despite knowing that the study's findings showed no significant

benefits for the entire study population and that the only statistically significant findings were confined to "isolated tasks for small subgroups" comprising people with limited cognitive impairment. (J.A. 21 (¶ 22), 33, 37–38 (¶¶ 28–20); *see* J.A. 21 (¶¶ 23–26).) These allegations, which plaintiffs have pressed from the outset, state a claim under the FTC Act.

2. Quincy's flawed subgroup analyses provided insufficient substantiation for its claims about Prevagen's effects on memory.

Even if Quincy had disclosed that its significant findings were limited to cognitively healthy individuals, Quincy still would have engaged in deceptive practices and false advertising by representing Prevagen's benefits based on flawed subgroup analyses. By conducting numerous analyses after its initial study failed, Quincy "greatly increase[d] the probability that some statistically significant differences would occur by chance alone." (J.A. 37 (¶ 29)); *see also* State Br. at 9 n.3; FTC Br. at 34; Br. of Amici Curiae Truth in Advertising, Inc. et al. ("TINA Br.") at 10–15.

Despite the complaint's straightforward allegations that post hoc subgroup analyses increased the risk of false positives and thus provided inadequate substantiation for Quincy's claims, Quincy insists (Quincy

Br. at 28) that plaintiffs must "plead actual facts as to why subgroup analysis supposedly yielded false positives in *this case*." That argument turns the relevant analysis on its head. The FTC Act required Quincy to base its claims about Prevagen's benefits on "the amount of substantiation experts in the field would consider reasonable." *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490–91 (D.C. Cir. 2015) (quotation marks omitted).[2] And for its claims that Prevagen was clinically proven to improve memory, Quincy similarly had to "possess evidence sufficient to satisfy the relevant scientific community of the claim's truth." *Id.* at 491 (quotation marks omitted); *accord Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1498 (1st Cir. 1989); *see also* State Br. at 25–26.

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[2] Quincy seeks to distinguish *POM Wonderful* (Quincy Br. at 28–29) on the ground that the product there was advertised to treat and prevent diseases, whereas Quincy "made no 'disease claims'" about Prevagen. But *POM Wonderful*'s holding that advertisers must possess and base their claims on evidence that would satisfy the relevant scientific community applies regardless of whether the product is advertised as preventing disease. *See, e.g.*, *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 & n.23 (9th Cir. 1994); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1498 (1st Cir. 1989). While the precise benefits an advertiser boasts may affect the nature and quantity of substantiation that the relevant scientific community would accept, *see POM Wonderful*, 777 F.3d at 495, that question should not be resolved before plaintiffs have a chance to offer expert testimony on the issue, *see id.*

To state a claim, then, the complaint had to allege only that subgroup analyses were not accepted by the relevant scientific community as a proper basis for Quincy's advertisements about Prevagen's benefits. The complaint made precisely this allegation, asserting that Quincy's subgroup "methodology greatly increases the probability that some statistically significant differences would occur by chance alone" (J.A. 37 (¶ 29)). Whether that allegation is true is a factual question to be resolved through expert testimony, *see POM Wonderful*, 777 F.3d at 495 (citing expert reports to support level of substantiation required); *Removatron*, 884 F.2d at 1498 (same), rather than at the pleading stage.

Citing statements by plaintiffs and their amici that the flaws in subgroup analyses occur when researchers "manipulat[e]" (FTC Br. at 21) or "slice[] and dice[]" (TINA Br. at 11) data, Quincy argues (Quincy Br. at 27–28) that the complaint never alleges manipulation or slicing and dicing.[3] Quincy is mistaken. The complaint alleges that Quincy's

[3] Although Quincy argues (Quincy Br. at 27–28) that plaintiffs raise new arguments on appeal by using new terminology to describe the same defects alleged in the complaint, "[a]rguments made on appeal need not be identical to those made below if they involve only questions of law and additional findings of fact are not required." *Ford v. Bernard Fineson Dev.*

subgroup analyses—performed by "br[eaking] down" the data into "variations of smaller subgroups"—"greatly increase[d] the probability that some statistically significant differences would occur by chance alone" and so "do not provide reliable evidence of a treatment effect." (J.A. 37 (¶ 29).) Far from "*ipse dixit*" (Quincy Br. at 24), that allegation identifies precisely the problems with post hoc subgroup analyses that plaintiffs and their amici describe in this appeal.

In addition, Quincy improperly faults plaintiffs (*id.* at 27) for omitting from their complaint citations to "'scientific literature' casting doubt on the validity of subgroup analysis." The complaint's allegations by themselves plausibly explain the problems with Quincy's subgroup analyses. The complaint did not need to further identify "specific evidence or extra facts beyond what is needed to make the claim plausible." *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120–21 (2d Cir. 2010). And Quincy's further charge (Quincy Br. at 27) that plaintiffs "cite no [scientific] 'literature' in their brief to this Court" is simply wrong.

Ctr., 81 F.3d 304, 307 (2d Cir. 1996) (quotation marks omitted); *accord Kaplan v. Old Mut. PLC*, 526 F. App'x 70, 72 (2d Cir. 2013) (summary order) (same).

Both plaintiffs' briefs cited books and articles detailing the perils of relying on subgroup analyses. *See* State Br. at 9 n.3; FTC Br. at 32–35.

B. The Complaint Also Plausibly Alleges That Quincy Misrepresented Prevagen's Ability to Supplement Proteins in the Human Brain.

The complaint also plausibly alleges that Quincy misrepresented that Prevagen could supplement proteins in the human brain. According to the complaint, Quincy's own studies showed that apoaequorin, Prevagen's active ingredient, "is rapidly digested in the stomach and broken down into amino acids and small peptides," thus preventing it from crossing the human blood-brain barrier. (J.A. 38–39 (¶ 31).) Those allegations suffice to state a claim under the FTC Act. *See* State Br. at 27–29.

Quincy admits in response that it "ha[s] no studies showing that orally administered apoaequorin can cross the human blood-brain barrier," but it contends that it never advertised that Prevagen would have such a physiological effect. Quincy Br. at 22 (quotation marks omitted). Quincy's own advertisements belie that contention. Quincy described apoaequorin as "a protein our brains need for healthy function but is diminished in the aging process," and advertised that Prevagen

"supplements" brain proteins that "we lose" "[a]s we age." (J.A. 24, 57.) The reasonable inference from those advertisements is that apoaequorin enters the human brain to supplement the apoaequorin that our brains lose as we age. At the very least, "a significant minority of reasonable consumers would likely interpret" Quincy's statements to mean Prevagen's active ingredient actually reaches the human brain—all that is needed to allow this case to proceed. *See, e.g.*, *POM Wonderful*, 777 F.3d at 490 (quotation marks omitted).

Quincy also repeatedly boasted that "[a]poaequorin is capable of crossing the blood brain barrier" (*e.g.*, J.A. 26), suggesting that apoaequorin could have that effect in humans, the population Quincy claimed would benefit from Prevagen (*see, e.g.*, J.A. 23). While Quincy supported that claim with references to canine studies (Quincy Br. at 22; *see* J.A. 26), the "net impression" of Quincy's blood-brain barrier claims, *POM Wonderful*, 777 F.3d at 493 (quotation marks omitted)—which immediately preceded Quincy's claim that "Prevagen® can help" improve memory in humans (J.A. 26)—is that the canine studies suggested a similar result in humans. But because Quincy knew that apoaequorin

cannot enter human brains (J.A. 38 (¶ 31)), that net impression was misleading.

Quincy mischaracterizes the State's position (Quincy Br. at 22) as saying that Quincy "cannot make any advertisement statements *at all* regarding Prevagen's effect on memory *unless* [Quincy has] evidence that apoaequorin can cross the 'human blood-brain barrier.'" This theory of liability rests specifically on "Quincy's marketing of Prevagen as able to supplement proteins in the human brain" (State Br. at 27; *accord id.* at 13), not on Quincy's more general marketing about the positive effects of Prevagen.

Contrary to Quincy's arguments (Quincy Br. at 23), moreover, dismissal here is not warranted based on the district court's conjecture that apoaequorin must be able to enter the *human* brain because it can cross the *canine* blood-brain barrier—conjecture that will be proved wrong at trial—and because the subgroup analyses revealed some statistically significant findings. As plaintiffs explained (State Br. at 28–29; FTC Br. at 40–42), such supposition is inappropriate on a motion to dismiss, on which the court must resolve all inferences in plaintiffs' favor. *See, e.g.*, *Elias v. Rolling Stone LLC*, 872 F.3d 97, 104 (2d Cir. 2017).

POINT II

SUPPLEMENTAL JURISDICTION OVER THE COMPLAINT'S STATE-LAW CLAIMS IS PROPER

The State's opening brief established that the district court abused its discretion in dismissing the State's claims based on its improper dismissal of the FTC Act claims. *See* State Br. at 30–33. As the State demonstrated, the state statutes defendants allegedly violated encompass the misconduct covered by FTC Act §§ 5 and 12—and indeed, were modeled after the FTC Act. Holding that the complaint states a claim under the FTC Act thus compels the conclusion that the complaint also adequately pleads its state-law claims.[4] *See id.* at 30–32.

Quincy's only response to this argument (Quincy Br. at 50–51) is to cite cases standing for the unexceptional proposition that a district court properly exercises its discretion when it dismisses state-law claims after correctly dismissing all federal claims. *See, e.g.*, *Salvani v.*

[4] It was in that context that the State noted (State Br. at 32–33) that state consumer-protection laws are important "in the market in which Quincy operates—products designed to fight memory loss"—given recent fears about cognitive decline. The State never argued, as Quincy claims (Quincy Br. at 28), that "patients with Alzheimer's disease may believe that Prevagen is a cure or treatment for that disease."

InvestorsHub.com, Inc., 628 F. App'x 784, 787 (2d Cir. 2015) (summary order). That argument simply begs the question presented in this appeal. See *supra* at 3–13. Because the district court erred in dismissing the federal claims, it necessarily abused its discretion in invoking § 1367(c)(3) to dismiss the state-law claims. *See IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1059 (2d Cir. 1993) (after reinstating dismissed federal claims, holding that "the district court should have exercised pendent jurisdiction over the state law claims," which "derive[d] from a common nucleus of operative fact").

POINT III

THE COURT SHOULD REJECT DEFENDANTS' ALTERNATIVE GROUNDS FOR AFFIRMANCE

Both Quincy and the individual defendants—Mark Underwood and Michael Beaman, Quincy's co-founders and principal officers—offer alternative grounds for this Court to affirm. In addition to the reasons the FTC offers to reject these arguments, the State notes the following two points.

First, the complaint adequately pleads that the individual defendants are liable for violating New York law. As the FTC correctly

explains (Reply Br. of the FTC ("FTC Reply") at 26–32), the individual defendants' arguments for dismissal lack merit. *See* Br. of Defs.' Mark Underwood & Michael Beaman ("Individual Defs.' Br.") at 30–39. Individual liability under state law mirrors that under the FTC Act: the complaint must allege that the individual personally participated in the illegal or fraudulent acts or had actual knowledge of them. *See People v. Apple Health & Sports Clubs*, 80 N.Y.2d 803, 807 (1992); *People v. Court Reporting Inst.*, 245 A.D.2d 564, 565 (2d Dep't 1997); *People ex rel. Koppell v. Empyre Inground Pools, Inc.*, 227 A.D.2d 731, 734 (3d Dep't 1996). Thus, the same the same allegations that suffice to establish individual liability under the FTC Act likewise establish such liability under New York General Business Law §§ 349 and 350 and Executive Law § 63(12).

Second, the Court has personal jurisdiction over Underwood and Beaman. The FTC correctly notes (FTC Reply at 27–29) that by allowing for nationwide service of process, the FTC Act gives the Court personal jurisdiction to adjudicate the complaint's federal claims against Underwood and Beaman. As a result, the Court also had personal jurisdiction to adjudicate the complaint's state-law claims against

Underwood and Beaman under the doctrine of pendent personal jurisdiction, which confers personal jurisdiction when, as here, "a federal statute authorizes nationwide service of process, and the federal and state-law claims derive from a common nucleus of operative fact." *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 88 (2d Cir. 2018) (quotation marks omitted); *accord Herrmann*, 9 F.3d at 1056. In *Herrmann*, this Court reversed the district court's dismissal of the complaint's federal claims and, after doing so, held that defendants were subject to pendent personal jurisdiction on the related state-law claims. 9 F.3d at 1056–57. The same result should follow here.

Even if the FTC Act did not provide nationwide service of process, New York's long-arm statute would allow the Court to adjudicate all the complaint's claims against Underwood and Beaman. That statute confers personal jurisdiction "over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the State," so long as the claim arises from those activities. N.Y. C.P.L.R. 302(a)(1). And as the New York Court of Appeals held in *Kreutter v. McFadden Oil Corp.*, an individual is subject to personal jurisdiction in New York under C.P.L.R. 302(a)(1)

if a corporation transacts business here on his behalf. 71 N.Y.2d 460, 467 (1988).

To establish personal jurisdiction under such a theory, a complaint must plead only that the corporation "engaged in purposeful activities in this State in relation to" the activities underlying the lawsuit "for the benefit of and with the knowledge and consent of the . . . defendants and that they exercised some control over [the corporation] in the matter." *Id.*; *accord People ex rel. Abrams v. Allied Mktg. Grp., Inc.*, 213 A.D.2d 256, 256 (1st Dep't 1995). For example, this Court, relying on *Kreutter*, has held that a plaintiff adequately alleged personal jurisdiction over nonresident defendants who made misrepresentations in California about a transaction that the corporation of which they were officers carried out in New York. *Retail Software Servs., Inc. v. Lashlee*, 854 F.2d 18, 20, 22 (2d Cir. 1988); *see also Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 169 (2d Cir. 2010) (relying on *Kreutter* to impute corporation's in-state activities to corporation's principal, who "shared in the decision-making and execution" of the transaction at issue).

Under that corporate-agency theory of jurisdiction, the complaint sufficiently pleads that Underwood and Beaman are subject to personal

jurisdiction in New York. The complaint alleges that Quincy, which Underwood and Beaman controlled, engaged in a nationwide marketing campaign, including "short-form television advertisements [that] have aired nationally on broadcast and cable networks," and that Quincy transacted business in New York by selling Prevagen here. (J.A. 16–17 (¶¶ 9–12), 21 (¶ 24).) And it alleges that both Underwood and Beaman, in their official capacities, reviewed Quincy's advertisements, and that Underwood had the final say over the advertisements Quincy ran. (J.A. 18 (¶¶ 13–14).) Underwood also personally touted Prevagen's supposed benefits in a nationally distributed guide and a nationally broadcast infomercial. (J.A. 18 (¶ 14).)

The complaint's granular allegations about Underwood's and Beaman's roles in marketing Prevagen distinguish this case from those on which Underwood and Beaman rely (Individual Defs.' Br. at 12–16). *See, e.g.*, *Shostack v. Diller*, No. 15-cv-2255, 2016 WL 958687, at *3 (S.D.N.Y. Mar. 8, 2016) ("conclusory allegations" bereft of "any facts"); *Karabu Corp. v. Gitner*, 16 F. Supp. 2d 319, 325 (S.D.N.Y. 1998) (same). The complaint's allegations that Prevagen was marketed through a national print-and-broadcast campaign designed to boost sales on the

internet and in major retailers and to sell Prevagen through Quincy's interactive website (J.A. 20–21 (¶¶ 21–26), 57) also distinguish this case from those in which an individual defendant was the primary actor only in out-of-state transactions or maintained a merely passive website, *see Arma v. Buyseasons, Inc.*, 591 F. Supp. 2d 637, 647 (S.D.N.Y. 2008); *A.W.L.I. Grp., Inc. v. Amber Freight Shipping Lines*, 828 F. Supp. 2d 557, 569 (E.D.N.Y. 2011); *cf. Chloé*, 616 F.3d at 170 (personal jurisdiction proper because defendant corporation "operated a highly interactive website offering [products] for sale to New York consumers").

Underwood and Beaman likewise err in claiming that exercising personal jurisdiction over them would violate due process. They quote (Individual Defs.' Br. at 16) the Supreme Court's holding in *Walden v. Fiore* that a court may exercise specific personal jurisdiction over a defendant only if the defendant's relationship to the forum state "arise[s] out of contacts that the defendant *himself* creates with the forum State." 134 S. Ct. 1115, 1122 (2014) (quotation marks omitted). Exercising personal jurisdiction here accords with that principle. The complaint alleges that Quincy, the individual defendants' agent, created a relationship with New York by advertising and selling Prevagen here as

part of a national marketing strategy. (*See* J.A. 16–17 (¶¶ 9–12), 20–21 (¶¶ 20–26)); *see also Charles Schwab*, 883 F.3d at 85 (New York's agency theory of jurisdiction is "consonant with" due process). Those marketing efforts place this case in stark contrast to the cases Underwood and Beaman cite (Individual Defs.' Br. at 16–17), in which third parties, rather than defendants, created the relationship with the forum State. *See, e.g.*, *Walden*, 134 S. Ct. at 1119–20 (plaintiffs traveled to forum State after interacting with defendant in different State).[5]

[5] *See also Wilder v. News Corp.*, No. 11-cv-4947, 2015 WL 5853763, at *13 (S.D.N.Y. Oct. 7, 2015) (nonparty news outlets and investors in forum State accessed press release, drafted in the United Kingdom, on passive website); *Gordon v. Invisible Children, Inc.*, No. 14-cv-4122, 2015 WL 5671919, at *8 (S.D.N.Y. Sept. 24, 2015) (plaintiff, holder of a copyright on which out-of-state defendant's video allegedly infringed, resided in forum State).

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's dismissal of the complaint, and hold that the complaint states a claim under General Business Law §§ 349 and 350 and Executive Law § 63(12).

Dated: New York, NY
June 13, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Will Sager, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4,116 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Will Sager