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11 Attorneys for Defendant Quincy Bioscience, LLC

12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 PHILLIP RACIES, On Behalf of Himself
15 and All Others Similarly Situated,

16 Plaintiff,

17 vs.

18 QUINCY BIOSCIENCE, LLC, a
19 Wisconsin limited liability company,

20 Defendant.

Case No. 3:15-cv-00292 HSG

**DEFENDANT QUINCY BIOSCIENCE,
LLC’S ANSWER, AFFIRMATIVE
AND OTHER DEFENSES**

DEMAND FOR JURY TRIAL

Complaint Filed: January 21, 2015
Trial Date: None Set

21
22 Defendant Prevacen Inc., erroneously sued as Quincy Bioscience, LLC¹
23 (“Defendant”), hereby answers the allegations of the First Amended Class Action
24 Complaint (“Complaint”) filed by Plaintiff Phillip Racies (“Plaintiff”), as follows:

25 1. In response to Paragraph 1 of the Complaint, Defendant admits that it sells
26 Prevacen®. The Wikipedia cite referenced in Paragraph 1 speaks for itself. The

27
28 ¹ Quincy Bioscience, LLC does not sell, market, manufacture, or distribute Prevacen®. Rather, Prevacen® is sold, marketed, manufactured, and/or distributed by Prevacen, Inc.

1 Prevagen[®] labels speak for themselves. Except as expressly admitted, Defendant denies
2 the remaining allegations of Paragraph 1.

3 2. In response to Paragraph 2 of the Complaint, Defendant is without
4 knowledge or information sufficient to form a belief as to the allegations and on that
5 basis denies them.

6 3. In response to Paragraph 3 of the Complaint, Defendant is without
7 knowledge or information sufficient to form a belief as to the allegations regarding what
8 Plaintiff's purported expert did or concluded and, on that basis, denies the allegations.

9 4. In response to Paragraph 4 of the Complaint, the Prevacen[®] labels speak for
10 themselves. Defendant denies the remaining allegations of Paragraph 4.

11 5. In response to Paragraph 5 of the Complaint, Defendant denies the
12 allegations.

13 6. In response to Paragraph 6 of the Complaint, Defendant denies the
14 allegations.

15 7. In response to Paragraph 7 of the Complaint, Defendant denies the
16 allegations.

17 8. In response to Paragraph 8 of the Complaint, 21 U.S.C. Section 321 speaks
18 for itself. Defendant denies the remaining allegations of Paragraph 8.

19 9. In response to Paragraph 9 of the Complaint, 21 U.S.C. Section 321 and
20 403 of the Federal Food, Drug, and Cosmetic Act speak for themselves. Defendant
21 denies the remaining allegations of Paragraph 9.

22 10. In response to Paragraph 10 of the Complaint, Section 403 of the Federal
23 Food, Drug, and Cosmetic Act speaks for itself. Defendant denies the remaining
24 allegations of Paragraph 10.

25 11. In response to Paragraph 11 of the Complaint, Defendant is without
26 knowledge or information sufficient to form a belief as to the allegations regarding
27 Plaintiff's purported expert and on that basis denies them. Defendant denies the
28 remaining allegations of Paragraph 11.

1 12. In response to Paragraph 12 of the Complaint, Defendant denies the
2 allegations.

3 13. In response to Paragraph 13 of the Complaint, Defendant denies the
4 allegations.

5 14. In response to Paragraph 14 of the Complaint, Defendant denies the
6 allegations.

7 15. In response to Paragraph 15 of the Complaint, Defendant is without
8 knowledge or information sufficient to form a belief as to the allegations regarding
9 Plaintiff's conduct and on that basis denies them. Defendant denies the remaining
10 allegations of Paragraph 15.

11 16. In response to Paragraph 16 of the Complaint, Defendant is without
12 knowledge or information sufficient to form a belief as to the allegations regarding
13 Plaintiff's conduct and on that basis denies them. Defendant denies the remaining
14 allegations of Paragraph 16.

15 17. In response to Paragraph 17 of the Complaint, Defendant admits that this
16 Court has jurisdiction of the matter under CAFA.

17 18. In response to Paragraph 18 of the Complaint, Defendant admits that this
18 Court has personal jurisdiction over Defendant. Except as admitted, Defendant denies
19 the remaining allegations of Paragraph 18.

20 19. In response to Paragraph 19 of the Complaint, Defendant admits that venue
21 is appropriate in this jurisdiction. Except as admitted, Defendant denies the remaining
22 allegations of Paragraph 19.

23 20. In response to Paragraph 20 of the Complaint, Defendant is without
24 knowledge or information sufficient to form a belief as to Plaintiff's alleged conduct
25 and on that basis denies those allegations. Defendant denies the remaining allegations of
26 Paragraph 20.

27 21. In response to Paragraph 21 of the Complaint, Defendant admits it is
28 corporation organized and existing under the laws of the state of Wisconsin and is

1 headquartered in Madison, Wisconsin. Defendant admits it manufactures, advertises,
2 markets, distributes, and/or sells Prevacen® to consumers in California and the United
3 States. Except as admitted, Defendant denies the allegations of Paragraph 21.

4 22. In response to Paragraph 22 of the Complaint, Defendant admits it
5 manufactured, marketed, and sold Prevacen®. Defendant denies the remaining
6 allegations of Paragraph 22.

7 23. In response to Paragraph 23 of the Complaint, Defendant admits Prevacen®
8 is sold online and is available in various flavors and strengths. Except as so admitted,
9 Defendant denies the remaining allegations of Paragraph 23.

10 24. In response to Paragraph 24 of the Complaint, Defendant's labeling speaks
11 for itself. Defendant denies the remaining allegations of Paragraph 24.

12 25. In response to Paragraph 25 of the Complaint, Defendant's labeling speaks
13 for itself. Defendant denies the remaining allegations of Paragraph 25.

14 26. In response to Paragraph 26 of the Complaint, Defendant's labeling speaks
15 for itself. Defendant denies the remaining allegations of Paragraph 26.

16 27. In response to Paragraph 27 of the Complaint, Defendant's labeling speaks
17 for itself.

18 28. In response to Paragraph 28 of the Complaint, the Dietary Supplement
19 Health and Education Act of 1994 ("SDHEA") speaks for itself. Defendant denies the
20 remaining allegations of Paragraph 28.

21 29. In response to Paragraph 29 of the Complaint, the SDHEA speaks for
22 itself. Defendant denies the remaining allegations of Paragraph 29.

23 30. In response to Paragraph 30 of the Complaint, California's Sherman Food,
24 Drug, and Cosmetic Law ("Sherman Act") speaks for itself. Defendant denies the
25 remaining allegations of Paragraph 30.

26 31. In response to Paragraph 31 of the Complaint, the FDA's policies,
27 procedures, and positions speak for themselves. Defendant denies the remaining
28 allegations of Paragraph 31.

1 32. In response to Paragraph 32 of the Complaint, the FDA's policies,
2 procedures, and positions speak for themselves. Defendant denies the remaining
3 allegations of Paragraph 32.

4 33. In response to Paragraph 33 of the Complaint, Defendant denies the
5 allegations.

6 34. In response to Paragraph 34 of the Complaint, Defendant denies the
7 allegations.

8 35. In response to Paragraph 35 of the Complaint, Defendant denies the
9 allegations.

10 36. In response to Paragraph 36 of the Complaint, Defendant is without
11 knowledge or information sufficient to form a belief as to the allegations regarding
12 Plaintiff's intent or actions and on that basis denies those allegations. Defendant denies
13 that Plaintiff's action can or should proceed as a class action.

14 37. In response to Paragraph 37 of the Complaint, Defendant is without
15 knowledge or information sufficient to form a belief as to the allegations regarding
16 Plaintiff's intent or actions and on that basis denies those allegations. Defendant denies
17 that Plaintiff's action can or should proceed as a class action.

18 38. In response to Paragraph 38 of the Complaint, Defendant is without
19 knowledge or information sufficient to form a belief as to the allegations regarding
20 Plaintiff's intent or actions and on that basis denies those allegations. Defendant denies
21 that Plaintiff's action can or should proceed as a class action.

22 39. In response to Paragraph 39 of the Complaint, Defendant denies the
23 allegations.

24 40. In response to Paragraph 40 of the Complaint, Defendant denies the
25 allegations.

26 41. In response to Paragraph 41 of the Complaint, Defendant is without
27 knowledge or information sufficient to form a belief as to the allegations regarding
28 Plaintiff's intent or actions or the intent and competency of his counsel and on that basis

1 denies those allegations. Defendant denies that Plaintiff's action can or should proceed
2 as a class action.

3 42. In response to Paragraph 42 of the Complaint, Defendant denies the
4 allegations.

5 43. In response to Paragraph 43 of the Complaint, Defendant is without
6 knowledge or information sufficient to form a belief as to the allegations regarding
7 Plaintiff's intent or his actions or as to his counsel's intent and competency and on that
8 basis denies those allegations. Defendant denies that Plaintiff's action can or should
9 proceed as a class action.

10 44. In response to Paragraph 44 of the Complaint, Defendant denies the
11 allegations.

12 45. In response to Paragraph 45 of the Complaint, Defendant denies the
13 allegations.

14 46. In response to Paragraph 46 of the Complaint, Defendant reasserts and
15 incorporates its responses to Paragraphs 1-45.

16 47. In response to Paragraph 47 of the Complaint, Defendant is without
17 knowledge or information sufficient to form a belief as to the allegations regarding
18 Plaintiff's intent or his actions and on that basis denies the allegations.

19 48. In response to Paragraph 48 of the Complaint, California's Business &
20 Professions Code, Section 17200, et seq. ("UCL") speaks for itself. Defendant denies
21 the remaining allegations of Paragraph 48.

22 49. In response to Paragraph 49 of the Complaint, Defendant denies the
23 allegations.

24 50. In response to Paragraph 50 of the Complaint, Defendant denies the
25 allegations.

26 51. In response to Paragraph 51 of the Complaint, the FDA and Sherman Act
27 speak for themselves. Defendant denies the remaining allegations of Paragraph 51.
28

1 52. In response to Paragraph 52 of the Complaint, the UCL speaks for itself.
2 Defendant denies the remaining allegations of Paragraph 52.

3 53. In response to Paragraph 53 of the Complaint, Defendant is without
4 knowledge or information sufficient to form a belief as to the allegations regarding
5 Plaintiff's intent or actions and on that basis denies those allegations. Defendant denies
6 the remaining allegations of Paragraph 53.

7 54. In response to Paragraph 54 of the Complaint, Defendant is without
8 knowledge or information sufficient to form a belief as to the allegations regarding
9 Plaintiff's intent or actions and on that basis denies those allegations. Defendant denies
10 the remaining allegations of Paragraph 54.

11 55. In response to Paragraph 55 of the Complaint, Defendant reasserts and
12 incorporates its responses to Paragraphs 46-54.

13 56. In response to Paragraph 56 of the Complaint, Defendant is without
14 knowledge or information sufficient to form a belief as to the allegations regarding
15 Plaintiff's intent or his actions and on that basis denies the allegations.

16 57. In response to Paragraph 57 of the Complaint, Defendant denies the
17 allegations.

18 58. In response to Paragraph 58 of the Complaint, the UCL speaks for itself.
19 Defendant denies the remaining allegations of Paragraph 58.

20 59. In response to Paragraph 59 of the Complaint, Defendant denies the
21 allegations.

22 60. In response to Paragraph 60 of the Complaint, Defendant denies the
23 allegations.

24 61. In response to Paragraph 61 of the Complaint, Defendant denies the
25 allegations.

26 62. In response to Paragraph 62 of the Complaint, Defendant denies the
27 allegations.
28

1 63. In response to Paragraph 63 of the Complaint, Defendant is without
2 knowledge or information sufficient to form a belief as to the allegations regarding
3 Plaintiff's intent or his actions and on that basis denies the allegations.

4 64. In response to Paragraph 64 of the Complaint, Defendant reasserts and
5 incorporates its responses to Paragraphs 56-63.

6 65. In response to Paragraph 65 of the Complaint, Defendant is without
7 knowledge or information sufficient to form a belief as to the allegations regarding
8 Plaintiff's intent or his actions and on that basis denies the allegations.

9 66. In response to Paragraph 66 of the Complaint, California Civil Code,
10 Section 1750 ("CLRA") speaks for itself.

11 67. In response to Paragraph 65 of the Complaint, Defendant is without
12 knowledge or information sufficient to form a belief as to the allegations and on that
13 basis denies the allegations.

14 68. In response to Paragraph 68 of the Complaint, Defendant denies the
15 allegations.

16 69. In response to Paragraph 69 of the Complaint, Defendant is without
17 knowledge or information sufficient to form a belief as to the allegations and on that
18 basis denies the allegations.

19 70. In response to Paragraph 70 of the Complaint, Defendant admits it received
20 the letter attached to the Complaint as Exhibit C. Other than as so admitted, Defendant
21 denies the remaining allegations of Paragraph 70.

22 71. In response to Paragraph 71 of the Complaint, Defendant is without
23 knowledge or information sufficient to form a belief as to the allegations regarding
24 Plaintiff's intent or his actions and on that basis denies the allegations.

25 72. In response to Paragraph 72 of the Complaint, Defendant denies the
26 allegations.

27 73. In response to Paragraph 73 of the Complaint, Exhibit D speaks for itself.
28

AFFIRMATIVE AND OTHER DEFENSES

Without admitting any of the facts alleged in the Complaint, Defendant further alleges the following separate and independent affirmative defenses, without prejudice to Defendant’s right to argue that Plaintiff bears the burden of proof or persuasion as to any one or more of said defenses.

FIRST SEPARATE AND ADDITIONAL DEFENSE

(Failure to State a Claim)

Plaintiff fails to state a claim and/or sufficient facts upon which relief can be granted. Plaintiff’s Complaint fails to allege the time, place, manner and substance regarding his purported reliance on Quincy Bioscience, LLC’s alleged representations.

SECOND SEPARATE AND ADDITIONAL DEFENSE

(Statute of Limitations)

The Complaint filed herein, and each alleged claim therein, fails to state facts sufficient to constitute a claim for relief because they are barred by the applicable statutes of limitation.

THIRD SEPARATE AND ADDITIONAL DEFENSE

(Laches)

Plaintiff, by delaying prosecution of this action until the present time, is barred, in whole or in part, by the doctrine of laches from maintaining each and every purported claim for relief alleged in the Complaint or from recovering any damages thereunder from Defendant.

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FOURTH SEPARATE AND ADDITIONAL DEFENSE

(No Injury to Plaintiff)

The Complaint, and each cause of action contained therein, is barred because Plaintiff has not been injured at all as a result of the alleged conduct by Defendant.

FIFTH SEPARATE AND ADDITIONAL DEFENSE

(Acts or Omissions of Plaintiff)

The Complaint, and each cause of action contained therein, is barred to the extent that damages, if any, resulted from the acts and/or omissions of Plaintiff.

SIXTH SEPARATE AND ADDITIONAL DEFENSE

(Attorneys' Fees)

Defendant alleges that the Complaint and each cause of action set forth therein are barred because they are unreasonable and/or filed in bad faith and/or are frivolous in nature. For these reasons, an award of attorneys' fees and costs is justified against Plaintiff.

SEVENTH SEPARATE AND ADDITIONAL DEFENSE

(Estoppel, Ratification, and Waiver)

The Complaint, and each purported cause of action alleged therein, is barred, in whole or in part, by the doctrines of estoppel, ratification, and waiver.

EIGHTH SEPARATE AND ADDITIONAL DEFENSE

(Offset)

As a separate and additional defense to the Complaint and each purported cause of action contained therein, Defendant alleges that it is entitled to offset any damages suffered by Plaintiff against sums owed by Plaintiff to Defendant as a result of the torts and other wrongful conduct by Plaintiff.

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NINTH SEPARATE AND ADDITIONAL DEFENSE

(Unclean Hands)

Defendant asserts that Plaintiff has acted with “unclean hands,” and such actions are directly related to his claim for relief. Therefore, Plaintiff is barred from seeking relief by the doctrine of unclean hands.

TENTH SEPARATE AND ADDITIONAL DEFENSE

(Plaintiff May Not Maintain This Lawsuit as a Class Action)

Plaintiff may not maintain this lawsuit as a class action because he cannot establish the requirements of Federal Rule of Civil Procedure 23 or equivalent law, including but not limited to, typicality, superiority, predominance, manageability, ascertainability, and commonality.

ELEVENTH SEPARATE AND ADDITIONAL DEFENSE

(Business Justification)

As a separate and additional defense to the Complaint and to each cause of action against Defendant asserted herein, Defendant alleges that at all times mentioned in the Complaint, Defendant acted lawfully and within its legal rights, with a good-faith belief in the exercise of that right, and in the furtherance of a legitimate business purpose, business necessity, business justification and/or economic justification or judgment. Further, Defendant acted in good faith in the honest belief that the acts, conduct, and communications, if any, by Defendant was justified under the circumstances based on information reasonably available to Defendant.

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TWELFTH SEPARATE AND ADDITIONAL DEFENSE

(Bona Fide Error)

To the extent there was any violation at all, the violation was not intentional and resulted from a bona fide error made notwithstanding Defendant’s maintenance of procedures reasonably adopted to avoid such an error.

THIRTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Lack of Standing)

Defendant is informed and believes, and thereon alleges, that Plaintiff lacks standing to assert his cause of action in the Complaint.

FOURTEENTH SEPARATE AND ADDITIONAL DEFENSE

(No Causation)

As a separate and additional defense to the Complaint and each purported cause of action contained therein, Defendant alleges that Plaintiff is barred from any recovery or relief against Defendant because Defendant was not the actual or proximate cause of any of the damages, if any, alleged in the Complaint.

FIFTEENTH SEPARATE AND ADDITIONAL DEFENSE

(No Deceptive or Unfair Practice)

Plaintiff’s claims based on the existence of an alleged deceptive or unfair practice by Defendant are barred because Defendant did not engage in any deceptive or unfair practice.

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SIXTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Statutory Damages Violate Due Process)

The statutory damages Plaintiff seeks would be disproportionate to the harm alleged, and would violate Defendant’s rights under the due process clauses of California and the United States.

SEVENTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Vague Statute Violates Due Process)

The statute upon which Plaintiff bases his Complaint is unconstitutionally vague and ambiguous on its face and as applied to Defendant. The statute does not provide sufficient notice as to what constitutes a violation. Defendant was justified in relying on a reasonable interpretation of the statute. A finding of liability against Defendant based upon the application of the facts at bar would violate Defendant’s rights under the due process clauses of the California and United States Constitutions.

EIGHTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Unconstitutional)

Plaintiff’s punitive damages claims are unconstitutional and should be dismissed because they violate Defendant’s constitutional rights, including, but not limited to, Defendant’s due process rights under the United States Constitution under the Seventh, Eighth, and Fourteenth Amendments and corresponding applicable due process provisions of the California Constitution.

NINETEENTH SEPARATE AND ADDITIONAL DEFENSE

(Consent)

As a separate and additional defense to the Complaint and each purported cause of action contained therein, Defendant alleges that the Complaint and each cause of

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1 action set forth therein fail and recovery is barred or limited based on the doctrine of
2 consent.

3
4 **TWENTIETH SEPARATE AND ADDITIONAL DEFENSE**

5 **(No Damages)**

6 The Complaint, and each cause of action contained therein, is barred because
7 Plaintiff, and the proposed class, have not been damaged or injured by reason or on
8 account of the conduct complained of in the Complaint.

9
10 **TWENTY-FIRST SEPARATE AND ADDITIONAL DEFENSE**

11 **(Comparative Fault)**

12 As a separate and additional defense to the Complaint and each purported cause
13 of action contained therein, Defendant alleges that Plaintiff is barred from recovering
14 against Defendant on the Complaint and each cause of action therein because of the
15 contributory and/or comparative fault of Plaintiff. If Plaintiff has been damaged, his
16 damages were legally caused by and are the result of, in whole or in part, the acts of
17 Plaintiff, not Defendant. Accordingly, any recovery by Plaintiff is barred or
18 comparatively reduced by the percentage of fault of Plaintiff.

19
20 **TWENTY-SECOND SEPARATE AND ADDITIONAL DEFENSE**

21 **(Apportionment)**

22 As a separate and additional defense to the Complaint and each purported cause
23 of action contained therein, Defendant contends, without admitting that any damages
24 exist, that if damages were suffered by Plaintiff as alleged in the Complaint, those
25 damages were proximately caused by and contributed to by persons other than
26 Defendant. The liability, if any exists, of Defendant and/or any responsible parties
27 should be apportioned according to their relative degrees of fault, and the liability of
28 Defendant should be reduced accordingly.

1 **TWENTY-THIRD SEPARATE AND ADDITIONAL DEFENSE**

2 **(Supervening Cause)**

3 As a separate and additional defense to the Complaint and each purported cause
4 of action contained therein, Defendant alleges that the causes of action in the Complaint
5 are barred, in whole or in part, to the extent that any injury or loss sustained was caused
6 by intervening or supervening events over which Defendant had no control.

7
8 **TWENTY-FOURTH SEPARATE AND ADDITIONAL DEFENSE**

9 **(Inadequate Class Representative)**

10 Plaintiff is not a proper representative of the putative class asserted in
11 the Complaint.

12
13 **TWENTY-FIFTH SEPARATE AND ADDITIONAL DEFENSE**

14 **(Failure to Mitigate Damages)**

15 If Plaintiff has suffered damages by virtue of any conduct, act, or omission of
16 Defendant, which Defendant denies, Plaintiff has failed to mitigate such damage(s).

17
18 **TWENTY-SIXTH SEPARATE AND ADDITIONAL DEFENSE**

19 **(Res Judicata)**

20 As a separate and additional defense to the Complaint and each purported cause
21 of action contained therein, Defendant alleges that Plaintiff is barred from any recovery
22 or relief against Defendant because each and every cause of action is barred by the
23 doctrine of res judicata.

24
25 **TWENTY-SEVENTH SEPARATE AND ADDITIONAL DEFENSE**

26 **(Preemption)**

27 Plaintiff's claims are preempted by federal law.

1 **TWENTY-EIGHTH SEPARATE AND ADDITIONAL DEFENSE**

2 **(Primary Jurisdiction)**

3 Plaintiff's claims are barred by the doctrine of primary jurisdiction.

4

5 **TWENTY-NINTH SEPARATE AND ADDITIONAL DEFENSE**

6 **(Additional Defenses)**

7 Defendant reserves the right to allege additional defenses as they become known
8 during discovery and to amend its Answer accordingly.

9

10 Dated: June 16, 2015

CALL & JENSEN
A Professional Corporation
Matthew R. Orr
Joshua G. Simon

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14 By: /s/ Matthew R. Orr
 Matthew R. Orr

15 Attorneys for Defendant Quincy Bioscience,
16 LLC

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DEMAND FOR JURY TRIAL

Defendant demands trial by jury on all issues so triable.

Dated: June 16, 2015

CALL & JENSEN
A Professional Corporation
Matthew R. Orr
Joshua G. Simon

By: /s/ Matthew R. Orr
Matthew R. Orr

Attorneys for Defendant Quincy Bioscience,
LLC

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2015, I electronically filed the foregoing document described as **DEFENDANT QUINCY BIOSCIENCE, LLC’S ANSWER, AFFIRMATIVE AND OTHER DEFENSES; DEMAND FOR JURY TRIAL** with the Clerk of the Court using the CM/ECF System which will send notification of such filing via electronic mail to all counsel of record.

/s/ Matthew R. Orr
Matthew R. Orr

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