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NEWS RELEASE

For Immediate Release
January 25, 2019

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NPA Files Amicus Brief in CA Suit in Favor of Schwabe and Nature's Way *"Courts and juries cannot set different standards than the government," says NPA's Fabricant*

WASHINGTON, DC – The Natural Products Association (NPA) filed an amicus brief in a case being closely-watched by the supplement industry for its potential to set a dangerous precedent that could allow individual courts to use different standards to determine if a product's claims are supported by scientific evidence and are not false. The case is *Sonner v. Schwabe North America, Inc. and Nature's Way Products, L.L.C.* and is being heard in the U.S. Court of Appeals for the Ninth Circuit in California. Sonner is a private litigant suing the dietary supplement manufacturers for allegedly making false advertising claims relating to products containing *Ginkgo biloba*. In other words, Sonner alleged that the cognition claims for the products were unsupported by scientific evidence and were thus false. Sonner based her class action complaint on two California consumer statutes.

Schwabe and Nature's Way countered by filing a summary judgment supported by expert testimony and scientific evidence that supported its *Ginkgo* claims. Sonner hired her own expert, who criticized some, but not all, of the defendants' evidence. The case is significant because the lower court held that Sonner's summary judgment evidence was insufficient to prove false advertising. In essence, Sonner's legal team argued that despite a strong body of evidence that *Ginkgo biloba* could support making certain claims, other scientists disagreed that the ingredient could make such claims. This situation is known as "scientific disagreement," and the U.S. Food and Drug Administration (FDA) and the U.S. Federal Trade Commission (FTC) have established that scientific disagreement on its own is not sufficient to prohibit companies from making claims.

Sonner appealed the summary judgment decision to the Court of Appeals for the Ninth Circuit, which reversed. That Court held that, in a consumer fraud suit, "equivocal" evidence that a supplement is effective means there are factual disputes means that the dispute must be decided by a jury. This would result in much more expensive legal fees and costs.

If the ruling were to stand, it would mark a huge departure from the well-established standards that dietary supplement manufacturers and retailers have used since 1994 and allow individual courts and juries in private litigation to determine the standard for claims one case at a time. The supplement industry would be put in a position where it would have sufficient competent and reliable scientific evidence to substantiate a claim for FDA and FTC regulatory purposes, but it could be still liable for a private litigant's class action claims for false advertising.

Schwabe and Sonner have filed a petition for rehearing asking the case to be considered by all of the judges on that Court. NPA filed an amicus brief supporting rehearing. The brief emphasized the nature and scope of scientific evidence to support summary judgment for false advertising claims, the interplay



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with the Dietary Supplement Health and Education Act (DSHEA), and the First Amendment issues by a ban on commercial speech.

“Courts and juries cannot set different standards than the government. This is clearly legislating from the bench and would be a nightmare scenario for consumers and the dietary supplement industry. If courts can set different and inconsistent standards than the federal government requires, trial lawyers will win and consumers will lose because someone will have to pay the legal bill,” said Daniel Fabricant, PhD, President and CEO of NPA.

Read the NPA brief [here](#).

Additional Background:

- [Appeal from the United States District Court for the Central District of California](#)
- [Order Granting Defendants’ Motion for Summary Judgement and Denying Plaintiff’s Motion for Class Certification](#)

Natural Products Association

The **Natural Products Association (NPA)** is *the* trade association representing the entire natural products industry. We advocate for our members who supply, manufacture and sell natural ingredients or products for consumers. The Natural Products Association promotes good manufacturing practices as part of the growth and success of the industry. Founded in 1936, NPA represents approximately 1,000 members accounting for more than 10,000 locations of retailers, manufacturers, wholesalers and distributors of natural products, including foods, dietary supplements and health/beauty aids. Visit www.npanational.org.