No. 13-55943

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARLEEN CABRAL, individually and on behalf of all others similarly situated
***Appellee/Plaintiff*,**

vs.

SUPPLE, LLC,
***Appellant/Defendant*.**

On Appeal by Permission from an Order Granting Class Certification
of the United States District Court
Central District of California, No. 5:12-cv-00085 MWF (OPx)
The Honorable Michael W. Fitzgerald

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Supple, LLC states that it has no parent company and that no publicly held company owns 10 percent or more of its stock.

Dated: October 9, 2013 MANATT, PHELPS & PHILLIPS, LLP

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STATUTES AND RULES

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I. INTRODUCTION

The district court abused its discretion in certifying a class of 61,000 California consumers who purchased Supple®, a dietary supplement whose primary active ingredients are glucosamine and chondroitin (G/C). Rather than conducting the required rigorous Rule 23 analysis, the court ignored uncontradicted evidence that a substantial portion of the putative class was perfectly satisfied with the product and uncritically accepted Appellee Arlene Cabral's proffered "net impression" of the meaning of Appellant Supple, LLC's advertising.

Cabral's class certification theory was that every consumer who bought Supple® believed that Supple® was "clinically proven" to treat arthritis pain, and that this was the only reason anyone would have purchased Supple®. This theory has at least two glaring problems that preclude class certification.

First, the uncontradicted evidence shows that many – if not most – Supple® purchasers liked the product. Specifically, nearly half of the putative class placed multiple orders for Supple®, which cost approximately $100 per order. These purchases accounted for 79 percent of the total revenues generated from Supple®'s California sales. In other words, 79 percent of the money Cabral seeks to recover as restitution comes from sales to satisfied repeat customers

who received the benefit of the bargain.

Appellant also provided extensive other evidence of satisfied customers, including testimonials from many consumers and evidence that 19 percent of the class members had stopped purchasing Supple® at some point but later re-ordered due to outbound marketing efforts and their own positive experiences with Supple®.

The district court acknowledged – as it must, because there was no contrary evidence – that this evidence created an inference that these customers were satisfied. But the court simply ignored that inference, and refused to follow case law precluding class certification where the evidence shows that putative class members received the benefit of the bargain. This was an abuse of discretion.

Second, the evidence did not support the finding that the uniform "net impression" of the ads was that Supple® was "clinically proven" to treat arthritis pain. Even though that statement never appeared in *any* advertisement during the putative class period, Cabral's theory was that *every* consumer interpreted disparate ads in the same particular and peculiar way. But she provided no evidence to support her interpretation. In contrast, Appellant submitted evidence showing a variety of representations, unrelated to joint pain, contained in the various ads, as well as evidence of numerous other reasons why consumers would choose to purchase Supple® (or any other G/C supplement).

The district court abused its discretion in interpreting the advertisements in precisely the way Cabral suggested and ignoring the numerous other messages and reasons why a consumer might choose to buy Supple®. This Court has specifically held that the interpretation of advertising is a question of fact, not proper for a court to decide at any stage as a matter of law. *Williams v. Gerber Products Co.*, 552 F.3d 934 (9th Cir. 2008).

Moreover, the only evidence the court cited to support its erroneous and improper finding of a uniform advertising message was two argumentative "summary" exhibits prepared by Cabral's counsel. In fact, several of the excerpted statements on which the court relied to find a uniform message were taken from a development website that was accessible only before the class period and before Appellant began marketing Supple®. This development website received almost no traffic and generated no sales to putative class members or anyone. The court also quoted a statement that appeared only in a test version of an infomercial that was not rolled out and was tested for only a limited period of time. Three of the five "representations" quoted in the court's order come from materials the class never even saw.

The *actual* evidence of the ads themselves – all contained in the class certification record but not discussed by the court – showed a range of other material messages intended to encourage consumers to buy Supple® – including widely known information on the benefits

and safety of G/C for joint health, superior quality ingredients, a good-tasting liquid form rather than a pill, shellfish-free glucosamine, avoidance of products sourced from China, promotion of weight loss, importance of vitamins and minerals, customer testimonials, and benefits for bone, back, and muscle discomfort, inflammation, cartilage protection, Vitamin D deficiency, overall weakness, and fatigue problems.

Under Rule 23, "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (citation omitted); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 974, 980-82 (9th Cir. 2011) (remanding where district court failed to conduct a "rigorous analysis" of the evidence). The court's analysis here was not rigorous. It ignored evidence of satisfied customers – even while acknowledging the unrebutted inference. It failed to distinguish the case law precluding certification where substantial satisfied customers exist, and it relied uncritically on an asserted uniform "net impression" that did not appear in the ads.

The court's tentative ruling acknowledged its concerns and open questions about the impact of satisfied customers and the lack of

a uniform message. (2-ER-4 at 68.[1]) The final order left these questions unanswered – a complete failure to conduct a rigorous Rule 23 analysis. This was an abuse of discretion, and the class certification order should be reversed.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). This Court has appellate jurisdiction pursuant to Federal Rule of Civil Procedure 23(f).

The district court issued its order granting class certification on February 14, 2013. (1-ER-1.) Appellant filed a timely petition for permission to appeal on February 28, 2013, which this Court granted on May 30, 2013. (2-ER-2 at 14.) Appellant perfected the appeal on May 31, 2013. (Dkt. No. 112.)

III. STATEMENT OF ISSUES

(1) Whether the district court abused its discretion in finding that common issues predominated and certifying a class under Rule 23(b)(3), where the unrebutted evidence established that almost 50 percent of class members were satisfied with Supple®, meaning that the alleged misstatements were, at a minimum, not false as to them, and they did not suffer the injury allegedly experienced by Cabral.

(2) Whether the district court abused its discretion in finding

[1] Citations to the Excerpts of Record are abbreviated in the format "[vol. #]-ER-[tab #] at [page #]."

that common issues predominated and certifying a class under Rule 23(b)(3), when the court concluded, without any evidentiary support, that class members uniformly interpreted the advertisements as implying that Supple® was clinically proven to treat arthritis pain, even though none of the ads actually said that and instead included numerous marketing messages and targeted multiple health conditions.

(3) Whether the district court abused its discretion by relying on evidence of representations made only in a development website that preceded the class period, was not seen by class members, and did not generate any sales to class members, and the transcript of a test infomercial not rolled out to the public, when drawing its conclusions about how all class members would have interpreted the ads.

IV. STATEMENT OF THE CASE

Cabral filed her putative class action complaint in San Bernardino Superior Court on December 2, 2011. The complaint alleged violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*; the False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.*; and the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.* Appellant timely removed the action to the Central District of California pursuant to CAFA on January 17, 2012. (Dkt. No. 1.)

On July 3, 2012, the court granted Appellant's motion to dismiss and allowed Cabral leave to amend. (Dkt. No. 28.) On July 13, 2012, she filed the operative first amended complaint. (10-ER-33.) On July 16, 2012, she moved to certify a class. (Dkt. No. 31.)

On November 12, 2012, Appellant filed opposition to the class certification motion, and Cabral replied on November 19. (Dkt. Nos. 56, 67.) The court issued a tentative ruling, held a hearing, and took the matter under submission on December 12, 2012. (2-ER-3, 4.) On February 14, 2013, the court issued its order certifying a class of "[a]ll persons residing in the State of California who purchased Supple for personal use and not for resale since December 2, 2007." (1-ER-1 at 2.)

V. STATEMENT OF FACTS

Appellant, Supple, LLC, is a small, cause-driven company. Its mission is to advance joint health education and research, and to market premium quality G/C comparable to that sold in Europe, where G/C is regulated as a drug. (5-ER-24 at 889 ¶ 5.)

Consumers are widely aware of the benefits of G/C. Consumers have long had many sources of information about G/C. According to the Centers for Disease Control, doctors recommended G/C to patients more than 6.1 million times in 2009. (7-ER-28 at 1450 ¶ 23; 11-ER-25 at 2304.) Others have tried G/C at the

recommendation of friends. (11-ER-25 at 2304; 5-ER-24 at 900 ¶ 38.)

The benefits of G/C have been broadly promoted. (9-ER-30 at 1834.) When Appellant launched Supple® in 2008, there was an extensive U.S. market for G/C supplements: sales in 2004 totaled approximately $730 million. (9-ER-30 at 1844.)

In 2007, Gallup conducted a study to determine the level of knowledge and use of joint supplements by American adults with joint problems. (11-ER-25 at 2304.) The study showed that over 70 percent of consumers with joint problems knew of the use of glucosamine to treat joint problems; about half had taken it for that purpose. (11-ER-25 at 2195, 2209.) Approximately 70 percent of these consumers were satisfied with the glucosamine product they used. (11-ER-25 at 2317.) By 2007, before Appellant began marketing Supple®, 93 percent of adults with joint problems who took supplements regularly agreed with the statement: "Glucosamine has been proven to prevent or relieve joint pain." (12-ER-26 at 2414.) According to the Glucosamine Chondroitin Arthritis Intervention Trial ("GAIT") by the National Institutes of Health, close to 80 percent of participants with severe to moderate pain obtained a positive result from the exact combination of G/C in Supple®. (7-ER-28 at 1453 ¶ 34.) Even participants in the general study group had a positive result rate of 66%. (*Id.*)

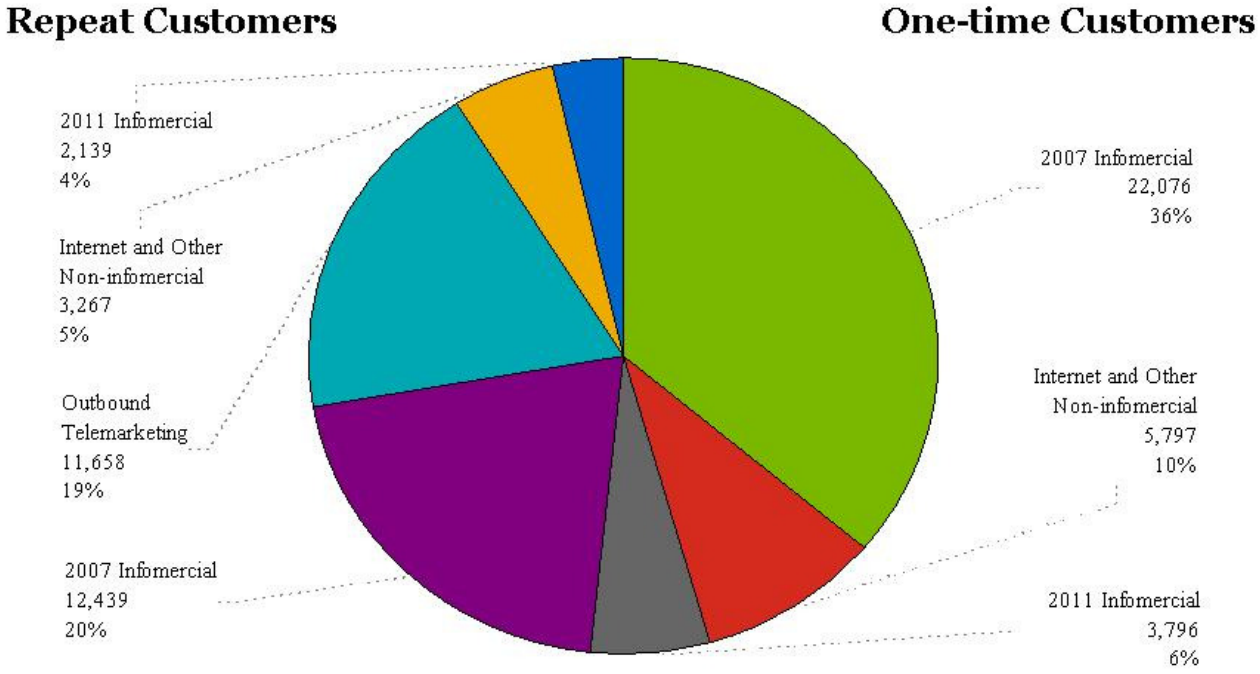
Supple® purchasers learn about Supple® from various sources. Appellant began actively marketing Supple® in February 2008, after brief periods of test marketing in 2007. (5-ER-24 at 891-92 ¶ 12.) Supple® was sold through various direct marketing channels, including (1) pay-per-click internet advertising; (2) Appellant's websites and affiliate websites; (3) two different half-hour infomercials (one made in 2007, which ran from February 2008 through late 2011, and another that ran from October 28, 2011 to the present, 5-ER-24 at 897-99 ¶¶ 28, 30); (4) outbound telemarketing to former customers; and (5) an associates referral program. (5-ER-24 at 891-92 ¶ 12.)

The 61,172 putative class members do not present a single uniform group:

- 22,076 made a single purchase after viewing the 2007 infomercial;
- 12,439 made repeat purchases after viewing the 2007 infomercial;
- 3,796 made a single purchase after viewing the 2011 infomercial;
- 2,139 made repeat purchases after viewing the 2011 infomercial;
- 5,797 made a single purchase after viewing one or more of the various internet pages or other sources;

- 3,267 made repeat purchases after viewing one or more of the various internet pages or other sources;
- 11,658 repeat purchasers bought Supple® in response to Appellant's outbound marketing efforts. (7-ER-29 at 1521.)

The following chart depicts the various sources from which Supple® purchasers learned of Supple®:



Supple®'s advertising was targeted toward various types of consumers. Appellant's marketing targeted various consumer groups, including persons interested in preserving joint health or preventing joint problems and persons who experience joint problems from a range of causes (not just arthritis), such as work-related repetitive motion or extended periods of standing, sports-related overexertion, falls, surgery, and joint problems associated with aging or activity. (5-ER-24 at 893-94 ¶ 14.) For instance, one web page begins:

> We're glad you're here and taking control of your joint health. Everyone has different goals: whether you're an all-star athlete looking to keep your joints in mint condition or a weekend warrior who wants protection and discomfort relief, you've come to the right place.

(6-ER-24 at 1134.[2])

The Gallup study confirmed that G/C is used by various consumer market segments, including "Sports Enthusiasts," "Joint Replacement Receptive," "Supplement Users," "Relief Seekers," and "Mild Sufferers." (7-ER-27 at 1438-39 ¶ 4; 12-ER-26 at 2408-2428.)[3]

Supple®'s advertising contained various messages. Appellant's advertising, which varied by channel and advertisement, has always contained a variety of messages, including:

- the use of Supple®'s ingredients as a first line of treatment for joint problems in Europe;
- the use of the ingredients in Supple® as part of an overall program to promote joint health;
- Supple®'s minimal side effects and the serious side effects from other medication alternatives;
- Supple® will "comfort, lubricate and rebuild your

[2] The copies of the website pages are most clearly displayed on the electronically filed version of the Excerpts of Record. In the printed hard copies, the content of the pages is compressed to fit on an 8-1/2 x 11 page and the text is not as clear.

[3] As will be seen, Cabral's theory of predominance of common issues requires collapsing all of these disparate categories into a single unit: arthritis sufferers.

joints" and promote "healthy joints";

- the quality of Supple®'s ingredients compared to other G/C supplements available on the United States market;
- that Supple® does not use active ingredients manufactured in China, which had notorious consistency and reliability problems;
- that Supple® is shellfish-free (for people with shellfish allergies, an important distinction between Supple® and glucosamine supplements that are derived from shellfish);
- the benefits, convenience and taste of Supple®'s liquid delivery system, which avoids the consistency problems that arise in the formulation of tablets, provides an alternative to pills, and provides a solution that is enjoyable to take every day;
- the inclusion of other vitamins and minerals in a single daily dose;
- testimonials from consumers who have taken Supple®;
- Supple®'s various pricing programs and special discounts;
- Supple®'s money-back guarantee;
- how regaining joint health through taking Supple® and increased physical activity can help people lose weight;
- the Vitamin D deficiency epidemic in the United

States and how Supple® can help with bone, muscle, weakness, and fatigue problems; and

- how Supple® can help with back problems and carpal tunnel syndrome.

(5-ER-24 at 890-91 ¶ 9; *id.* at 892-93 ¶ 13; *id.* at 898 ¶ 29; *id.* at 906-1004; 6-ER-24 at 1020-1188, 1196-1226.)

The wording and the messages conveyed in Supple®'s advertising varied by medium and over time. For instance, the 2007 infomercial included weight loss and back problem claims and touted the quality of Supple®'s ingredients compared to other products, in addition to discussing the benefits of G/C. (5-ER-24 at 897-98 ¶¶ 28-29; 6-ER-24 at 1196-1215.)

The 2011 infomercial differed materially from the 2007 infomercial. It did not promote weight loss, and instead presented testimonials from 20 customers with various health conditions. It also discussed the nutritional Vitamin D deficiency epidemic in the United States and how Supple® can help people with muscle, weakness, bone, back, and fatigue problems. (5-ER-24 at 898-99 ¶ 30; 6-ER-24 at 1216-26.)

Over 500 click-through banner ads, which drive traffic to Appellant's websites, contain a variety of messages targeted to specific audiences. (5-ER-24 at 895 ¶ 18; *id.* at 906-1019.) Many merely advertised discounts; others contained various brief messages

about Supple®'s benefits.

Traffic to Appellant's websites and landing pages has been extensive. During the putative class period, there have been almost 2.5 million visits to various (more than a dozen) Appellant-sponsored websites and landing pages. (5-ER-24 at 896 ¶ 24.)

Nineteen percent of the putative class (representing 31 percent of California sales) responded to outbound telemarketing targeted at former customers who had discontinued orders due to price or outdated billing information. (7-ER-29 at 1521.) These consumers bought in response to individual telemarketing appeals and necessarily made new purchasing decisions based on their personal experiences with Supple®. (5-ER-24 at 900 ¶ 36.)

The inbound (new sales) telemarketing scripts also highlight how customers do not receive a uniform message or the same information when they make their purchasing decision. (9-ER-30 at 2019 ("Does this cure arthritis? There is no known cure for arthritis. Supple provides your body with the building blocks of your joints and helps to restore your joints to a healthy, normal function.").)

Supple®'s ads did not represent that Supple® was clinically proven to treat arthritis. In contrast, one message that was not consistent – and in fact was *absent* from the ads – was a representation that Supple® was clinically proven to cure or treat arthritis. For instance, the selective excerpts from websites submitted

by Cabral (8-ER-30 at 1547 ¶¶ 26-31; *id.* at 1772-88; 9-ER-30 at 1789-93) only mention the word "arthritis" in connection with the title of a book – "Strong Women and Men Beat Arthritis" – that purchasers could buy with their order, or in the description of Supple, LLC's membership in the Bone and Joint Decade, a nonprofit organization involved in research of musculoskeletal disorders.[4]

The word "arthritis" appears a single time on Cabral's summary chart of the website representations (8-ER-30 at 1768), and a review of the referenced document (8-ER-30 at 1781-82; *id.* at 1548 ¶ 29) shows that the word does not appear in the actual ad referenced.[5] Every one of the cited web pages states: "This product is not intended to diagnose, treat, cure or prevent any disease." (8-ER-30 at 1547-48 ¶¶ 26-31; *id.* at 1772-88; 9-ER-30 at 1789-93.)

In the cited infomercial transcripts (8-ER-30 at 1546-47 ¶¶ 16-23; *id.* at 1670-1766), the word "arthritis" is mentioned in three contexts: (1) at the outset of the program, in describing who might be interested in the infomercial (*e.g.*, "If you suffer from joint pain,

[4] Cabral's Exhibit 23 (8-ER-30 at 1547 ¶ 25; *id.* at 1769-70) mentions arthritis, but it is a development website that was not used during the class period. (5-ER-24 at 897 ¶ 26.) *See infra* Part VIII.C.

[5] The Wade Declaration and the summary chart purport to quote from a document Bates-numbered SUP0004204 (8-ER-30 at 1548 ¶ 29; *id.* at 1768), but her declaration attaches a different document, SUP0004205, which does not mention arthritis. (8-ER-30 at 1781-82.) SUP0004204 in fact does mention arthritis, but Cabral did not provide that document – underscoring that the court relied on the chart and not the evidence.

arthritis, back pain, carpal tunnel, gout, fibromyalgia, or if you just want help losing weight, then this is a show you do not want to miss . . . ," 8-ER-30 at 1675); (2) in statements in some ads that Supple®'s ingredients are "disease-modifying for arthritis pain" in Europe (*see, e.g., id.* at 1678, 1691, 1713); and (3) in statements describing the personal experience of Peter Apatow, Supple, LLC's founder, who had suffered from arthritis. *See, e.g.*, *id.* at 1676, 1681, 1709, 1732, 1575.[6]

The record includes copies of every version of the official Supple® website that ran during the class period. (6-ER-24 at 1020-1188.) None contains the message that "Supple® is clinically proven to treat arthritis." In fact, the phrase "clinically proven" does not even appear at all in many versions of the website.

The focus of the websites is on joint discomfort and not on curing or treating arthritis or on clinical proof. *See, e.g.,* 6-ER-24 at 1135 ("Why do I have joint discomfort?"); *id.* at 1151 (discussion of "joint problems"); *id.* at 1154 (discussing "joint health at any age"). None of the "Top Ten Reasons" for taking Supple® identified on

[6] Cabral's Exhibits 15-17 are excerpts from a single infomercial, not three separate infomercials as Cabral implied (8-ER-1546 ¶¶ 17-19, *id.* at 1670-73; 5-ER-24 at 899 ¶ 34). Exhibit 20 was a test for a program that was aired only for a limited time. (5-ER-24 at 899 ¶ 32.) Exhibit 21, which mentions arthritis, was another limited-run test program. (5-ER-24 at 899 ¶ 33.) The full transcripts are at 6-ER-24 at 1196-1226.

various versions of the website includes that it was clinically proven to treat arthritis. (*Id.* at 1097, 1149.)

Even where the words "clinically proven" appear, it is not in the context of curing or treating arthritis. For instance, one website says "clinically proven effective ingredients," with no mention of arthritis or other statement about what the ingredients are clinically proven effective to do. (6-ER-24 at 1112.) Another references "ground-breaking strategies that are clinically proven to help you beat your joint problems," and links Supple® with weight loss and the teachings of a New York Times bestseller book in order to achieve that goal. (*Id.* at 1137.)

One website states "a large body of clinical evidence shows that the combination glucosamine and chondroitin works better at restoring joint health than either ingredient alone." (*Id.* at 1134; *see also id.* at 1157 (same); *id.* at 1148 (referencing "clinically proven results" of the combination of G/C).) Others reference "evidence" of effectiveness for joint pain, but not "clinical proof" for treating arthritis. (*Id.* at 1122 ("evidence-based solution for joint health"); *id.* at 1142 ("Pharmaceutical strength 1500 mg glucosamine and 1200 mg bovine chondroitin are the most extensively studied and proven effective joint health supplements available today.").)

VI. SUMMARY OF ARGUMENT

The district court's abuse of discretion manifested itself in three ways.

First, the court ignored the fact that substantial numbers of Supple® customers were satisfied with the product, even though it recognized that the evidence supported an inference that these customers were satisfied and did not identify any contrary inference. It acknowledged the copious case law holding that individual issues predominate when many customers got the benefit of the bargain, but failed to apply or distinguish that law.

Second, the court adopted Cabral's improper "net impression" theory of Supple®'s advertising. Based on a series of different messages appearing in different ads, the court purported to interpret a single, uniform impression that it believed every class member would form when viewing the ads. In doing so, it reached a conclusion that the ads uniformly meant something that the ads never actually said. There was no evidence, such as a valid consumer survey, that class members actually formed that net impression. The court had to adopt its own interpretation, contrary to this Court's holding in *Williams v. Gerber*, *supra*, 552 F.3d 934, which holds that the meaning of allegedly false ads is a question of fact that a court cannot decide on its own.

Third, the court relied extensively on statements set forth in

materials the class would not have seen, including a development website that was on-line only for a short time before Supple® was ever marketed and before the class period, and a transcript of a test infomercial never rolled out to the public. The court formed its "net impression" based in large part on those statements, which no one in the class would have seen, and which generated no sales.

All of these decisions were abuses of discretion.

VII. LEGAL STANDARD

An order granting class certification is reviewed for abuse of discretion. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233-34 (9th Cir. 1996). The court abuses its discretion when it commits legal error in its analysis. *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001). A class certification order premised on insufficient factual findings is not entitled to deference. *Narouz v. Charter Comm'ns, LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010); *Rodriguez v. Hayes*, 591 F.3d 1105, 1113 (9th Cir. 2010).

Class certification is appropriate only where the "common contention . . . [is] of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. [¶] 'What matters to class certification . . . is not the raising of common "questions" – even in droves – but, rather the

capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.'" *Wal-Mart*, 131 S.Ct. at 2551 (citation omitted). In other words, the class members must have suffered the *same injury* by the defendant's alleged conduct. *Id.*

The ground for Appellant's petition for permission to appeal under Rule 23(f) was that the district court had committed manifest error in deciding that common issues predominated, for the same reasons discussed herein. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). This standard requires a showing that the asserted manifest error resulted in a class certification decision that "inevitably will be overturned." *Id.*; *see also id.* at 962 ("When an error is alleged, we generally will permit an interlocutory appeal only when the certification decision is manifestly erroneous and virtually certain to be reversed on appeal from the final judgment."). A court that commits manifest error in its class certification decision clearly has abused its discretion as well. *Compare Teamsters Local 617 Pension & Welfare Funds v. Apollo Grp., Inc.*, 282 F.R.D. 216, 231 (D. Ariz. 2012) ("Manifest error is, effectively, clear error."), *with Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir.) (abuse of discretion exists where "the reviewed decision lies beyond the pale of reasonable justification under the circumstances"), *cert. denied*, 531 U.S. 1038

(2000).

Evidentiary rulings are reviewed for abuse of discretion. *Gribben v. United Parcel Serv., Inc.*, 528 F.3d 1166, 1171 (9th Cir. 2008).

VIII. ARGUMENT

A. The District Court Abused Its Discretion in Finding That Common Issues Predominate Despite Unrebutted Evidence of Satisfied Customers.

The law dictates that where the putative class would include a substantial number of satisfied customers, class certification must be denied. Cabral cannot establish on a class-wide basis that all class members suffered the same injury from allegedly false advertising if many class members were content with the product they purchased.

1. The Unrebutted Evidence Established That Substantial Numbers of Consumers Are Satisfied With Supple®.

In opposing class certification, Appellant presented at least three kinds of evidence establishing that many class members were satisfied with Supple®:

- Forty-eight percent of putative class members made multiple purchases, some as many as 50 orders. These repeat customers generated 79 percent of total California sales. (7-ER-29 at 1521, 1524.) A single order of Supple® typically consists of two cases containing 48 single-serving aluminum cans, weighs almost 30

pounds, and costs more than $90. (7-ER-29 at 1514 ¶ 17.) These customers would not have continued to pay for each shipment if they were not satisfied. It cannot be presumed that these customers continued to buy Supple® because they were misled by advertising that they may have seen months before their second, fifth, or tenth purchase. As the district court acknowledged, "[t]he fact that most customers purchased the Beverage multiple times arguably does give rise to an inference that at least some of these customers were satisfied and/or that the Beverage was in some sense 'effective.'" (1-ER-1 at 5.)

- More than 1,000 customers submitted testimonials praising Supple® and describing the positive results they had realized. (5-ER-24 at 901-03 ¶ 40.) These include:

> "I was recommended by my Orthopidic [sic] Doctor to start a Gluclosamine [sic] Chrondroitin supplement. . . I was a bit scepticle [sic] about ordering this off of TV but I knew I would be a great test if it was going to work. I started feeling less pain within 5 days of drinking supple [sic]. . . . It has now been 2 weeks and can't believe how many things I can do again without pain already."
>
> ". . . I just started using Supple about 5 days ago. I noticed a difference the 2nd day. My arms used to ache from my neck to my hands and my hips were so stiff I could barely walk. I have very little pain in my shoulders. No pain in my arms or my hips . . . "
>
> "I feel better then [sic] I have in 3 years . . . Thank You for giving my life back to me and please keep my Supple coming. . . . "

> "I've been using Supple for two weeks or so now, and I have to say, I think it's incredible stuff. . . What an amazing product, it really works!"

(5-ER-24 at 901-03 ¶ 40; 6-ER-1227-61.) These excerpts are only a small sample of the satisfied customer testimonials that the company received. There was no need for the court to infer customer satisfaction from this evidence. The customers' testimonials speak for themselves, and demonstrate that many purchasers of Supple® had an experience with Supple® very different from what Cabral claims. The district court completely ignored this evidence, utterly failing to conduct the required rigorous Rule 23 analysis.

- Nineteen percent of California customers made purchases in response to Appellant's outbound telemarketing campaign, which sought to induce former customers to purchase Supple® again, by updating payment information or offering discounts. These consumers had stopped ordering Supple® – often due to its cost or outdated payment information (5-ER-24 at 900 ¶ 36) – and then decided, in response to targeted outbound telemarketing, to make a new purchase. (7-ER-29 at 1521; *id.* at 1512 ¶ 6.) These lapsed customers would not have chosen to re-order a product that did not work for them, even at a discounted price. Once again, the district court completely ignored this dispositive evidence of a lack of commonality.

In contrast to this overwhelming evidence of customer

satisfaction, Cabral submitted *no evidence* that any class member other than herself was dissatisfied. While some customers did return their product, the evidence shows that the primary reason for the return was cost, not that Supple® didn't work in the manner they expected. Appellant's customer refund log shows that only a tiny fraction (2.25 %) of purchasers seeking refunds claimed "no results." (4-ER-20 at 441 ¶ 3; *id.* at 443-734.)[7]

In the district court, Cabral argued that these repeat customers simply forgot to cancel the automatic shipment feature. There is no evidence that class members made multiple purchases simply because they forgot to cancel their orders, and such an inference would be highly implausible, given the size, weight and cost of a shipment. But the determination of which customers forgot to cancel the auto-ship feature, as opposed to taking advantage of the convenience of the auto-ship feature to ensure regular delivery of a product the consumer

[7] Appellant's liberal money-back guarantee exists specifically to address dissatisfaction with the product. (5-ER-24 at 904 ¶ 44.) Where a defendant offers refunds to dissatisfied customers, "a class action is not 'superior' within the meaning of Federal Rule of Civil Procedure 23(b)(3)" because it means the defendant already provides "the very relief that Plaintiffs seek." *Webb v. Carter's*, 272 F.R.D. 489, 504 (C.D. Cal. 2011). The district court here indicated that the money-back guarantee does not make dissatisfied customers whole because the refund does not include shipping and handling costs. (1-ER-1 at 10:19-25.) But a suit to recover shipping and handling costs would be a very different class action, as it would focus on Appellant's refund policies, not dissatisfaction with the product.

liked, would raise additional individual issues. Each individual class member who received and paid for multiple shipments would need to be questioned as to the reason that happened. *Williams v. Oberon Media, Inc.*, No. CV 09–8764–JFW (AGRx), 2010 WL 8453723, at *4, *9 (C.D. Cal. April 19, 2010) (individual issues raised when class members forgot to cancel membership in automatic payment program), *aff'd*, 468 Fed. Appx. 768 (9th Cir. 2012). Rather than undermining the argument that repeat purchases are an indication of satisfaction, Cabral identified another predominant individual issue.

2. Satisfied Customers Preclude Class Certification.

Class members have not suffered the "same injury" when a substantial number were satisfied with the product. A "consumer protection suit will not lie where a plaintiff actually receives the 'benefit of the bargain.'" *In re Actimmune Mktg. Litig.*, No. CD 08-02376 MHP, 2010 WL 3463491, at *9 n.2 (N.D. Cal. Sept. 1, 2010), *aff'd*, 464 Fed. Appx. 651 (9th Cir. 2011). If a defendant "promoted [the product] as an effective treatment for [a condition] and it was, in fact, an effective treatment for [the condition], plaintiffs would have received exactly what they sought." *Id.*

The court acknowledged this bedrock legal principle and cited *nine* cases standing for the proposition that "class certification has been denied because the evidence demonstrated that absent class

members benefitted from the product at issue or otherwise suffered no injury and lacked standing to sue." (1-ER-1 at 4:1-4, 4:12-5:20.) The court further noted that "[t]he fact that most customers purchased the Beverage multiple times *arguably does give rise to an inference* that at least some of these customers were satisfied and/or that the Beverage was in some sense 'effective.'" (1-ER-1 at 5:23-25 (emphasis added).) The court identified no other inference that could be drawn from this evidence, and Cabral offered no evidence to support a contrary inference or explain why consumers would continue to pay more than $90 for something that allegedly did not work.

Nonetheless, the court ignored this law and uncontradicted evidence, effectively deeming them relevant only to the "merits question." (1-ER-1 at 4:4.) But according to the Supreme Court, the "merits question" cannot be divorced from commonality analysis. Rule 23's requirements frequently "will entail some overlap with the merits of the plaintiff's underlying claim . . . [because] '[t]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Wal-Mart*, 131 S. Ct. at 2551-52; *see also Ellis*, 657 F.3d at 974, 980-82 (remanding where district court failed to conduct a "rigorous analysis" of the evidence; "Instead of judging the persuasiveness of the evidence presented, the district court seemed to

end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible."). The district court abused its discretion by failing to analyze and apply these concepts.

Here, because there are many different representations and many different reasons consumers would buy Supple®, there are many reasons why consumers would be satisfied with their purchase. As discussed, Appellant promoted a variety of qualities other than joint discomfort relief, such as:

- tasty liquid delivery system;
- superior quality and safety of ingredients, not sourced from China;
- weight loss;
- shellfish-free;
- higher levels of vitamins and minerals;
- preservation of joint health; and
- relief from bone, back, muscle, weakness, and fatigue problems.

All of these are unrelated to efficacy for treating joint discomfort, but may have been the reason that particular consumers purchased Supple® and continued to purchase it because they were satisfied with the results.

When advertising a dietary supplement whose primary ingredients were G/C, Appellant was not writing on a clean slate. By

the time Appellant began marketing Supple®, there was an extensive market (over $730 million in sales in 2004) for supplements with G/C. (9-ER-30 at 1844.) Thus, numerous consumers (putative class members) already were aware of the publicized benefits of G/C or may have been shopping for a G/C supplement on the recommendation of their doctor. (12-ER-26 at 2404-05 (28 percent of surveyed consumers take glucosamine on doctor's recommendation); *id.* at 2490 (various reasons for taking glucosamine for joint discomfort); 11-ER-25 at 2278 (16.7 percent of surveyed consumers who have discussed joint discomfort with a health care professional were recommended to take G/C); *id.* at 2304 (34.1 percent of surveyed consumers take or used to take glucosamine at the recommendation of a friend or relative and 28.2 percent at the recommendation of a doctor); *see also* 7-ER-28 at 1450 ¶ 23 (in 2009, doctors recommended G/C to patients more than 6.1 million times).) Such persons have suffered no injury at all, let alone the "same" injury as the class representative and all other class members. Class certification is precluded in such cases.

Another court in the Central District recently denied class certification in a case nearly indistinguishable from this one. In *Moheb v. Nutramax Laboratories Inc.*, No. CV 12-3633-JFW (JCx), 2012 WL 6951904 (C.D. Cal. Sept. 4, 2012), the putative class representative claimed that the defendant misled the class about the

benefits of another G/C supplement. The court ruled that common issues did not predominate where the class would "include members who derived benefit from Cosamin and are satisfied users of the product." *Id.* at *3, *7. In *Moheb*, unlike this case, every consumer necessarily received a uniform message because the allegedly false statements that the supplement was proven to reduce joint discomfort appeared on the label of a product sold at retail. *Even so*, the court found individual issues predominated.

The *Moheb* court rejected the plaintiff's contention that the falsity of the alleged claims was subject to common proof: "Scientific data suggests that Cosamin works for some, but may not work as well for others . . . . The proposed class also does not distinguish between those who experienced moderate-to-severe pain as opposed to mild pain. Moreover, the proposed class does not distinguish between persons with different joint pain locations . . . , different pain causes . . . , different consumption . . . . , or different underlying health conditions that could affect Cosamin's efficacy . . . . Medical studies control for such factors among participants precisely because they can effect [sic] results. Therefore, the 'proof by medical studies' that Plaintiff proposes to present on behalf of the entire class is, at best, only relevant to the truth of Defendant's representations as to some

class members . . . ." *Id.* at *4.[8] These very same individual issues exist here, where even those class members who took Supple® specifically for joint discomfort relief vary in the severity and nature of their discomfort, the amount of Supple® they consumed and the duration of the time they used it.

The *Moheb* court also noted that "the existence of economic injury is also not a common question, because many purchasers are satisfied. (. . . (*e.g.*, reviews say 'Worth every penny!' and '100% worth it').)" *Id.* This settled legal principle concerning satisfied customers – based on the same type of evidence presented to the district court in this case – should have dictated the same result here.[9]

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[8] Even Cabral's own expert witness concluded that "if one word were to describe the current state of the clinical evidence for the efficacy of glucosamine and chondroitin in the treatment of osteoarthritis, it would be 'conflicting.' " (5-ER-23 at 861 ¶ 42.) Thus, a trial of this case would be a parade of experts offering conflicting interpretations of various scientific studies, asking the jury to act as industry regulators and to second-guess the international regulatory experts that have granted G/C drug status in many European countries. Because Cabral could only prevail if she proves that the alleged statements are false or misleading, any study concluding that the product effectively treats arthritis or joint pain as to any users would mandate a directed verdict for Appellant. *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.*, 107 Cal.App.4th 1336, 1340 (2003).

[9] The district court declined to follow *Moheb*, but its reasons are not convincing. For instance, the court said that, in contrast to *Moheb*, "the record demonstrates that class members necessarily would have been exposed to Supple's advertising before purchasing the Beverage . . . ." (1-ER-1 at 12.) But the reality is the opposite: in *Moheb*, the same representation that the product was proven to reduce joint

Many cases, in a variety of advertising contexts, confirm that where many customers bought a product for purposes that were met by the product, individual issues predominate and preclude class certification.[10] For instance, in *In re Vioxx Class Cases*, 180 Cal.App.4th 116, 132-36 (2010), the plaintiff alleged that the defendant falsely claimed Vioxx was safer than other drugs. The court affirmed denial of class certification, holding that materiality of and reliance on the representations could not be determined on a class-wide basis. Those elements could vary among the class because (1) Vioxx did not present an increased risk of death for all patients; (2) patients chose to take the drug even knowing the risks because of its effectiveness in treating their discomfort, and some physicians would still choose to prescribe it, regardless of risks, if other factors made it a good option for the particular patient; (3) physicians

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discomfort appeared on the label of a product sold only in retail stores, so all consumers saw the uniform representation. Supple® purchasers were exposed to various messages on different topics, and, as discussed below, the uniform "net impression" allegedly formed simply did not exist. The district court also said that scientific data in *Moheb* supported the notion that the product worked for some people (1-ER-1 at 12-13); here, too, scientific studies support the conclusion that Supple® was effective for many people. (7-ER-28 at 1451-53 ¶¶ 29, 34.)

[10] Cabral's assertions that the case is susceptible of class-wide proof because the issues are "binary: the advertising is either misleading or not, and Supple's joint relief claims are either true or false" (10-ER-32 at 2079:27-28, 2081:10-12) is a vast oversimplification of the multiple and variable issues in this case. If Cabral's argument were true, class certification would be automatic in every false advertising case.

prescribing Vioxx obtained information from numerous sources other than the defendant; and (4) a physician's decision to prescribe Vioxx depended on numerous factors that varied by patient, such as health history, allergies, condition, and potential adverse reaction with other medications. *Id.* at 133-34. "When all of these patient-specific factors are a part of the prescribing decision, the materiality of any statements made by Merck to any particular prescribing decision cannot be presumed." *Id.* at 134.

In *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006), *cert. denied*, 551 U.S. 1115 (2007), the Seventh Circuit affirmed denial of class certification of a false advertising claim, where the class necessarily included members who did not suffer the same injury because they bought the product for the very reason that the named plaintiff found it objectionable, or at least did not care one way or the other:

> Membership in Oshana's proposed class required only the purchase of a fountain Diet Coke from March 12, 1999, forward. Such a class could include millions who were not deceived and thus have no grievance under the ICFA. Some people may have bought fountain Diet Coke *because* it contained saccharin, and some people may have bought fountain Diet Coke *even though* it had saccharin. Countless members of Oshana's putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception.

Id. (emphasis in original). Similarly, in *Lipton v. Chattem, Inc.*, 289

F.R.D. 456 (N.D. Ill. 2013), individual issues precluded class certification of a state-law consumer fraud case where deception could not be proved on a class-wide basis:

> The proposed class includes individuals who: (1) were unaware of the presence of hexavalent chromium in Dexatrim and who would not have purchased the product had they been so aware; (2) were unaware of the presence of hexavalent chromium but may still have purchased the product had they been so aware; and (3) were aware of the presence of hexavalent chromium and purchased the product anyway. These differences among the proposed class require that the key liability issues – whether a given class member was deceived by Chattem's labeling of Dexatrim and whether she suffered damages as a result – can be resolved only on an individual basis.

Id. at 462.

Many other cases similarly conclude that individual reasons for buying a product mean individual issues predominate. *Konik v. Time Warner Cable*, No. CV 07-763 SVW (RZx), 2010 WL 8471923, at *9 (C.D. Cal. Nov. 24, 2010) (denying certification of UCL and CLRA claims when plaintiffs "failed to meet their burden of presenting sufficient evidence to support a conclusion that the challenged statements were actually false as applied to all (or even most) class members"; many putative class members did not experience the price increases of which the plaintiffs complained); *Campion v. Old Republic Home Protection Co., Inc.*, 272 F.R.D. 517, 531, 533 (S.D. Cal. 2011) (certification denied when some consumers obtained the

promised benefits); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 948 (6th Cir. 2011) (that many consumers remained enrolled in program and were apparently satisfied with it was relevant to predominance); *Faralli v. Hair Today Gone Tomorrow*, No. 1:06 CV 504, 2007 WL 120664, at *12 (N.D. Ohio Jan. 10, 2007) (denying certification in false advertising case regarding hair removal product, because determining whether any individual consumer had a claim would depend on the "customer's actual hair removal result as well as the customer's subjective view about the success of the treatment"); *Mahtani v. Wyeth*, No. 08-6255 (KSH), 2011 WL 2609857, at *8-*9 (D.N.J. June 30, 2011) (individual issues precluded class certification where studies indicated that product was effective for most consumers); *Green v. Green Mountain Coffee Roasters*, 279 F.R.D. 275, 284-85 (D.N.J. 2011) (striking class allegations where predominance could not be established because many consumers did not experience the product defect and received benefit of the bargain); *Whitson v. Bumbo*, No. C 07-05597 MHP, 2009 WL 1515597, at *6 n.5 (N.D. Cal. April 16, 2009) (plaintiff lacked standing under benefit of the bargain theory where she had not experienced product defect; however, if she did have standing, individual issues "might render her case inappropriate for class-action treatment"); *Cowitt v. Cellco Partnership*, 911 N.E.2d 300, 307-08 (Ohio Ct. App. 2009) (class certification denied when some class members were improperly

charged roaming fees, but some were properly assessed fees when they were actually roaming); *Hoang v. E*trade Group*, 784 N.E. 2d 151, 156-57 (Ohio Ct. App. 2003) (class certification denied when not all customers were damaged by stock trading interruption; each class member would have to prove that a better stock price was available elsewhere, that he was trading at the time of the interruption, or that she did not benefit from the interruption).

In opposing Appellant's petition for permission to appeal, Cabral purported to distinguish only three of the cases Appellant cited (*Vioxx*, *Konick*, and *Campion*) as purportedly involving a "staggering" amount of evidence of individual issues. This is not a distinction because here, the *only* evidence regarding class members' reaction to Supple® is that substantial numbers were satisfied. Certainly, that evidence is "staggering" when compared to Cabral's utter absence of evidence on this point. Cabral, who had the evidentiary burden, produced *no evidence* of complaints about Supple®'s effectiveness, other than her own conclusory statements.

Cabral argued that Appellant had not submitted sworn declarations of satisfied customers. This misapprehends the burden of proof. It was Cabral's burden to submit evidence to show the merits could be proven by class-wide evidence. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Appellant had no evidentiary burden. *National Council*, 107 Cal.App.4th at 1342

("there is no basis in California law to shift the burden of proof to a defendant in a representative false advertising and unlawful competition action").

But when Appellant submitted evidence showing (as the district court acknowledged) that customer satisfaction with Supple® was a predominant individual issue, Cabral needed to respond with evidence to counter that, by showing how she could establish on a class-wide basis that everyone was dissatisfied and suffered the same injury. Instead, she submitted evidence only as to herself (her conclusory declaration), and argued various speculative theories about why Appellant's evidence proved nothing.

Maybe Supple® was not effective for Cabral or did not live up to her heightened expectations; she believed Supple® would cure her arthritis within seven days. But she only took Supple® for less than two of the recommended seven weeks, and also testified that she had known for years, including at the time of taking Supple®, that arthritis cannot be cured. (5-ER-23 at 821:22-822:8.) Cabral's unique understanding and experience say nothing about anyone else.[11]

[11] Cabral's unique facts also make her not typical or adequate. *See Moheb*, 2012 WL 6951904, at *5 (plaintiff's limited use of the product – one bottle – made her an inadequate representative of a class whose members used the product "for an extended period of time"). For instance, Cabral, unlike many G/C purchasers, had no prior exposure to G/C. (5-ER-23 at 827:9-830:16, 843:25-844:5.) She took Supple® for far less than the recommended time period before concluding it did not work. (*Id.* at 838:20-839:8 (she took

3. The District Court Failed to Consider the Relevant Law and Evidence.

The court's efforts to distance itself from on-point law and unassailable evidence fall far short of a rigorous Rule 23 analysis.

First, the court relied on a 1986 Colorado district court case (not cited by either party) to conclude that the presence of satisfied customers did not preclude class certification. (1-ER-1 at 5:25-6:5 (citing *Joseph v. General Motors Corp.*, 109 F.R.D. 635 (D. Colo. 1986)).) Apart from its questionable bearing on a case in this Circuit, the decision predates *Wal-Mart* by 25 years and thus does not follow its dictates for rigorous Rule 23 analysis. *Joseph* also never addressed whether common issues can predominate when many class members received the benefit of the bargain. *Joseph*'s discussion of "satisfied customers" was in the context of the numerosity and typicality elements of Rule 23(a). *Joseph*, 109 F.R.D. at 641-42. Moreover, auto owners who did not experience engine problems from a design defect, as in *Joseph*, are not "satisfied" in the same sense as consumers who decide to make multiple purchases of the same product or submit a testimonial extolling the benefits of the product.

The district court also cited *Galvan v. KDI Distribution Inc.*,

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Supple® for 2 weeks); *id.* at 842:7-11 (she took Supple® for 10 days).) She did not complain about Supple®'s effectiveness until more than two years later (when she heard of a potential lawsuit, *id.* at 845:7-846:4); her complaints when she canceled her order pertained only to price. (7-ER-29 at 1516 ¶ 24.)

No. SACV-08-0999-JVS (ANx), 2011 WL 5116585 (C.D. Cal. Oct. 25, 2011), as support for ignoring evidence of satisfied customers. (1-ER-1 at 6:6-12.) In *Galvan*, the court certified a class of consumers based on an allegation that the defendant deceptively misrepresented how it calculated calling card minutes.[12] The district court quoted *Galvan*'s discussion of ascertainability, which Appellant did not contest (because it has a list of all Supple® purchasers). *Galvan*'s discussion of commonality did not address how evidence that a substantial portion of the class received the bargained-for benefit might impact class-wide proof of deception or injury.

The court attempted to distinguish the lengthy list of cases precluding class certification on evidence like that here, stating its view that "[c]lass-wide harm nevertheless can be established through common proof," although the court failed to say exactly how that could be done. (1-ER-1 at 6:16-17.) Those class members for whom the alleged representations were *not false* suffered *no harm*. So even if Cabral could prove that the alleged representations were false as to her and that she had been harmed, those same questions would still be wide open, and require individualized proof, for every other class

[12] *Galvan* is contrary to *Tucker v. Pacific Bell Mobile Services*, 208 Cal.App.4th 201, 221 (2012), which affirmed the striking of class allegations because of the lack of common issues in a case alleging that a telephone company misrepresented how it calculated airtime minutes.

member. That is not proving class-wide harm on common proof. *Cf.* 1-ER-1 at 6:17-20 (citing *Campion*, 272 F.R.D. at 532).

In addition, merely identifying some common question does not establish that the case is suitable for class certification. As the Supreme Court has noted, every putative class action involves *some* common issues. The question is whether the claims of all putative class members can be decided "in one stroke." *Wal-Mart*, 131 S.Ct. at 2551 (citation omitted). That simply cannot be done here.

Finally, *Johnson v. General Mills, Inc.*, 275 F.R.D. 282 (C.D. Cal. 2011), does not address whether the prevalence of satisfied customers defeats certification. In *Johnson*, the court certified a false advertising claim directed at retail marketing and labeling of yogurt that allegedly promoted digestive health. Nowhere does *Johnson* discuss whether there were satisfied customers who experienced better digestive health or whether they bought the product for other reasons. Because *Johnson* did not address the core issue presented here, it cannot be authority for "distinguishing" the on-point cases.

In addition, the allegedly false statements in *Johnson* appeared on the label of a product sold only at retail, so there was no question that all consumers were exposed to a uniform message that distinguished the defendant's yogurt from other yogurt.

Here, Cabral does not claim Appellant made false statements in order to distinguish Supple® from other G/C products, but rather that

it made false statements about the benefits of G/C itself. Such statements, as discussed below, would have been immaterial to consumers who were already aware of the benefits of G/C or were shopping for a G/C supplement based on a doctor's recommendation, and were merely deciding among competing products, not whether to take a G/C supplement in the first place.

The court abused its discretion by ignoring the unrebutted evidence of substantial numbers of satisfied customers showing that individual issues predominated.

B. The District Court Abused Its Discretion in Interpreting the Purported Meaning of Various Individual Statements and Crystallizing Them Into a "Uniform" Representation.

Cabral's core contention is that the sole and uniform message of Appellant's ads was that Supple® is "clinically proven" to treat arthritis, and that every purchaser of Supple® suffered from arthritis and bought Supple® only for that reason.[13] (10-ER-35 at 2145:5-6 ("In reality, the net impression that the product is [sic] given has never

[13] The "clinically proven" language is critical to Cabral's theory. Appellant moved to dismiss the complaint on the ground that Cabral pursued an impermissible "lack of substantiation" theory. (Dkt. No. 8 at 11-14.) In response, Cabral argued that "allegations that a defendant's claims lack scientific evidence are permissible where, as here, Defendant advertises its product as having 'clinically proven' health benefits." (Dkt. No. 15 at 15.) The district court rejected Appellant's lack of substantiation argument on precisely this ground. *See* 10-ER-34 at 2142 ("The Court views as significant the allegations that Supple's advertising includes clinical claims.").

changed. They have always used the claim that it's clinically-proven effective ingredients that will effectively treat arthritis."); 2-ER-3 at 18:19-19:4 ("COURT: How exactly would you define that message? . . . MS. WADE: The uniform message is that it's clinically proven as an arthritis treatment. . . ."); *id.* at 45:7-8 ("If this isn't about arthritis, what else could it possibly be about?")[14]; 10-ER-31 at 2076 ¶ 4 (averring that Cabral "relied upon the representations in the infomercial that Supple was proven to treat arthritis pain").)

The district court accepted Cabral's characterization. It found a uniform message that Supple® is "clinically proven effective in treating joint pain." (1-ER-1 at 7.) The court based this finding on its own (and Cabral's) interpretation of disparate ads, and the unsupported assumption that every purchaser bought Supple® because it was clinically proven to treat arthritis. Thus, the court concluded, all class members were exposed to the same uniform representation. (1-ER-1 at 8:10-11.)

But the question is not, as the court framed it, whether every consumer was exposed to Appellant's supposedly uniform advertising.[15] The question is whether every consumer was exposed

[14] *See also* 10-ER-32 at 2080:7-10 ("all of Defendant's advertising . . . expressly and impliedly makes the same claim: the fast-acting ingredients in Supple are 'clinically proven effective' to treat and/or prevent the joint pain caused by arthritis").

[15] Appellant never argued that purchasers might not have seen any ads. Rather, the point is what exactly were they exposed to, and what

to the identical message *as the court interpreted it*.

The message, as interpreted by the court, that Supple® is clinically proven to treat arthritis, not only is not uniform, it was not even made. Neither Cabral nor the court could point to a single advertisement that stated Supple® is "clinically proven to treat arthritis." Instead, the message upon which the court based its certification order was a composite "net impression" stitched together from various statements extracted from various ads, and three of the five statements the court quoted came from sources that the class members would never have seen.[16] Without proof of a uniform – *same* – representation to all members of the proposed class, the class should not have been certified. *Mazza v. American Honda Motor Co.,* 666 F.3d 581, 595 (9th Cir. 2012). The court abused its discretion in doing so.

1. This Circuit's Precedent Precluded the Court From Engaging in Its Own Interpretation of the Ads; Many Other Cases Are in Accord.

The court adopted Cabral's improper "net impression" theory and found a uniform "net impression" message that Supple® was

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was their "impression" of the ads they saw? As shown, there was no uniform message of the kind assumed by Cabral and the court.

[16] As noted, the court did not examine the actual advertisements, but rather relied only on Cabral's summary charts, which included statements from a development website and a transcript for a test infomercial. (1-ER-1 at 7:19-27; 5-ER-24 at 897 ¶ 26; *id.* at 899 ¶ 33; 8-ER-1546-47 ¶¶ 16, 23; *id.* at 1670, 1758, 1765.)

clinically proven to treat arthritis. In doing so, the court acted on behalf of absent class members, by concluding, without any evidence, that every class member interpreted the various ads to convey that identical message. This was an abuse of discretion.

In *Williams*, 552 F.3d 934, this Court specifically held that trial courts in false advertising cases cannot interpret the meaning of allegedly false advertisements as a matter of law:

> [T]he district court based its decision to grant the motion to dismiss *solely on its own review of an example of the packaging*. It is true that "the primary evidence in a false advertising case is the advertising itself." California courts, however, have recognized that *whether a business practice is deceptive will usually be a question of fact* not appropriate for decision on demurrer.

Id. at 938-39 (emphasis added; citations omitted).

Similarly, in *Yumul v. Smart Balance, Inc.*, 733 F. Supp. 2d 1117, 1129 (C.D. Cal. 2010), the court ruled that whether product representations were misleading could not be determined as a matter of law:

> It is not clear whether or not a statement that a product contains no cholesterol would cause a reasonable consumer to conclude that the product does not increase LDL blood cholesterol levels. . . . The [product] packaging does not make it "impossible for the plaintiff to prove that a reasonable customer was likely to be deceived." As a consequence, it is appropriate to permit plaintiffs to attempt to "demonstrate by extrinsic evidence, such as consumer survey evidence, that the challenged statements tend to mislead consumers."

Id. at 1129 (citations omitted); *see also Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 297-98 (2d Cir. 1992) ("It is not for the judge to determine, based solely upon his or her own intuitive reaction, whether the advertisement is deceptive. Rather, . . . '[t]he question in such cases is – *what does the person to whom the advertisement is addressed find to be the message?*' . . . Thus, the success of a plaintiff's implied falsity claim usually turns on the persuasiveness of a consumer survey.") (emphasis in original); *William H. Morris Co. v. Group W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995) (plaintiff must demonstrate with evidence that a significant portion of the audience understood the supposed message); *Heighley v. J.C. Penney Life Ins. Co.*, 257 F. Supp. 2d 1241, 1260-61 (C.D. Cal. 2003) ("To prevail [on a claim based on allegedly misleading representations], a plaintiff must demonstrate by extrinsic evidence, such as consumer survey evidence, that the challenged statements tend to mislead consumers."). A court may not make this determination on its own based on its interpretation of the ads. But that is exactly what the court did here.

Many cases confirm that a class cannot be certified where the allegedly misleading representations could have meant different things to different people.[17] In such cases, no uniform meaning can be

[17] This inquiry goes to the merits of the deceptive advertising claims, not to the standing of absent class members to sue under the UCL, and thus is properly considered in the analysis of common and individual

determined as a matter of law.

In *Astiana v. Kashi Co.*, __ F.R.D. __, 2013 WL 3943265, at *12-*13 (S.D. Cal. July 30, 2013), the court refused to certify a UCL deceptive advertising class based on the representation that the defendant's product was "All Natural." Consumers would have varying views as to what constituted a "natural" food product, particularly because food producers, consumers, and the FDA had no uniform definition of the term. "Defendant presents evidence that many consumers would still view a product as a 'natural food product' despite those amounts of allegedly artificial ingredients. . . . Class members' views of 'All Natural' may very well accommodate the presence of the challenged ingredients." *Id.* (citations omitted).

In addition, where, as here, putative class members would have a range of differing motivations to purchase or use a product, individual proof would be necessary to establish the "uniformity" of the representations and their import to class members. For instance, in *Poulos v. Caesar's World, Inc.*, 379 F.3d 654 (9th Cir. 2004), this Court affirmed denial of certification of a RICO class where

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issues on a class certification motion. *Cohen v. DIRECTV, Inc.*, 178 Cal.App.4th 966, 980-981 (2010) (noting that the opinion in *In re Tobacco II Cases*, 46 Cal.4th 298 (2009), that a UCL class representative need not show reliance by individual class members, was limited to standing; "We see no language in *Tobacco II* which suggests to us that the Supreme Court intended our state's trial courts to dispatch with an examination of commonality when addressing a motion for class certification.").

individual issues predominated because of various motives to gamble on defendants' machines:

> Gamblers do not share a common universe of knowledge and expectations – one motivation does not "fit all." Some players may be unconcerned with the odds of winning, instead engaging in casual gambling as entertainment or a social activity. Others may have played with absolutely no knowledge or information regarding the odds of winning such that the appearance and labeling of the machines is irrelevant and did nothing to influence their perceptions. Still others, in the spirit of taking a calculated risk, may have played fully aware of how the machines operate. Thus, to prove proximate causation *in this case*, an individualized showing of reliance is required.

Id. at 665-66 (emphasis in original). In *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), *partially abrogated on other grounds by Bridge v. Phoenix Bond Indemn, Co.*, 553 U.S. 639 (2008), the court decertified a RICO class based on alleged misrepresentations about light cigarettes being healthier:

> Individualized proof is needed to overcome the possibility that a member of the purported class purchased Lights for some reason other than the belief that Lights were a healthier alternative – for example, if a Lights smoker was unaware of that representation, preferred the taste of Lights, or chose Lights as an expression of personal style.

Id. at 223.

In *Pfizer Inc. v. Superior Court*, 182 Cal.App.4th 622, 632 (2010), the court reversed the certification of a class in a false

advertising case, where the defendant ran various commercials at various times and injury could not be proven on a class-wide basis if not all consumers were exposed to the same ad and bought the product as a result: "[P]erhaps the majority of class members who purchased Listerine during the pertinent six-month period did so not because of any exposure to Pfizer's allegedly deceptive conduct, but rather, because they were brand-loyal customers or for other reasons." *Id.* *See also Korsmo v. American Honda Motor Co.*, No. 11 C 1176, 2012 WL 1655969, at *5 (N.D. Ill. May 10, 2012) ("individual inquiries would be necessary to determine each buyer's motivations for buying a Honda Certified Used Vehicle and which buyers, if any, were deceived . . . . It is highly likely that many proposed class members paid more for their cars, not because they believed they were getting a 'manufacturer certified' vehicle, but instead based on the actual benefits of the Program as advertised . . ."); *Akkerman v. Mecta Corp.*, 152 Cal.App.4th 1094 (2007) (false advertising class of persons who received shock treatment from defendant's devices not ascertainable as it included persons that relied on their doctor's advice or were advised of risks on consent forms, and thus not deceived by advertising); *Cohen,* 178 Cal.App.4th at 979 (UCL false advertising class lacked predominant common issues, where "the members of the class stand in a myriad of different positions insofar as the essential allegation in the complaint is concerned, namely, that DIRECTV

violated the CLRA and the UCL by inducing subscribers to purchase HD service with false advertising").

Thorogood v. Sears, Roebuck & Co., 547 F.3d 742 (7th Cir. 2008), *cert. denied*, 558 U.S. 819 (2009), articulates the problem with using a "net impression" theory to find a supposedly uniform representation in a false advertising case with no evidence anyone interpreted the ads in the particular way that is essential to proving liability. The plaintiff there alleged that the words "stainless steel" on dryers, and advertising stating the drum in which clothes were dried was stainless steel, falsely led consumers to believe that the entire drum was made of stainless steel and, as a result, the drum would not rust and clothes would not be stained. *Id.* at 734-44. The court explained the great difficulties associated with certifying a class based on the plaintiff's assertion that all purchasers interpreted the references to stainless steel in the same way that he did:

> The evaluation of the class members' claims will require individual hearings. Each class member who wants to pursue relief against Sears will have to testify to what he understands to be the meaning of a label or advertisement that identifies a clothes dryer as containing a stainless steel drum. Does he think it means that the drum is 100 percent stainless steel because otherwise his clothes might have rust stains, or does he choose such a dryer because he likes stainless steel for reasons unrelated to rust stains and is indifferent to whether a part of the drum not easily seen is made of a different material? Sears does not advertise its stainless steel drum as a protection against rust stains on clothes; it does not even say that the

> drum itself will not rust – only that it "resists rust." Advertisements for clothes dryers advertise a host of features that might matter to consumers, such as price, size, electrical usage, appearance, speed, and controls, but not, as far as anyone in this litigation has suggested except the plaintiff, avoidance of clothing stains due to rust.

Id. at 747.

As these cases show, ads may mean different things to different people and thus may impact their purchasing decisions differently. Unless the evidence shows that the putative class members actually received a single, uniform, articulated message from the advertising, such as when the same statement appears on a product's label, class certification must be denied. As discussed below, there was no such uniform message in this case – only the "net impression" cobbled together by Cabral and the court.

2. The Advertisements Did Not Make the Representations the Court Found to Be Uniform.

The district court here (and Cabral) concocted a net impression that is not found in or supported by the actual ads. No Supple® ad actually uses the words "clinically proven to treat arthritis or joint pain." *See supra* Part V pp. 14-17. The various advertisements, infomercials and other marketing demonstrate that Appellant never made such a representation. Certainly, the advertising made various disparate representations that use of Supple® may, among other

things, promote healthy joints and provide comfort and relief to those who experience joint discomfort. But Cabral's definition – "[t]he uniform message is that it's clinically proven as an arthritis treatment" (2-ER-3 at 19:3-4) – was not one of those representations anywhere in any of the ads.[18]

In adopting its own interpretation of the ads, the court did not even rely on the actual content of the advertisements, although all were in the record. Instead, the court relied on two summary charts prepared by Cabral's counsel, which excerpted certain portions of the ads. (8-ER-30 at 1670-73, 1768 [Exs. 14, 22].) These charts were the only source of "evidence" of representations the court cited in its order. (1-ER-1 at 7:19-27.) The charts included – and the court's order specifically quoted – statements from a development website that was accessible on-line only briefly, prior to the class period and prior to marketing Supple®, which was not seen by Cabral or any class member, and which did not actually generate a single order.[19] (5-ER-24 at 897 ¶ 26.) The court also specifically quoted a statement

[18] *See Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW (AGRx), 2012 WL 5504011, at *3-*4 (C.D. Cal. Oct. 25, 2012) (dismissing proposed UCL deceptive advertising subclasses as a matter of law because "the claim alleges that a consumer will read a true statement on a package and will then 'disregard well-known facts of life' and assume things about the products *other than* what the statement actually says") (emphasis in original).

[19] 5-ER-23 at 847:7-9 (Cabral never saw a Supple® website before ordering).

from Cabral's summary chart – "[i]f you have arthritis, joint pain, back pain, kne[e] pain, this is a product you absolutely have to try" (1-ER-1 at 7:19-21) – from a test infomercial that was not rolled out and was tested only for a limited time.[20] (8-ER-1546-47 ¶¶ 16, 23; *id.* at 1670, 1758, 1765; 5-ER-24 at 899 ¶ 33.)

In fact, the various ads include other language that generically discusses relief from joint discomfort and promotes Supple® as a product that will "comfort, lubricate and rebuild your joints" and will promote "healthy joints." (5-ER-24 at 906-1004; 6-ER-24 at 1020-1188.) Cabral never explained how a reasonable consumer would interpret such statements to mean that Supple® is clinically proven to treat arthritis.

This Court can see for itself from the evidence – and even from Cabral's summary charts – that no representations were made to the class that Supple® was clinically proven to treat arthritis or joint pain. Yet the court certified a class based on this phantom uniform message.

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[20] The statements the court quoted also did not support its interpretation of the supposed uniform message that Supple® was clinically proven to treat joint pain. For example, the statement above obviously conveys no message relating to clinical proof or what the product actually does. (1-ER-1 at 7:20-21.) Such statements are akin to inactionable puffery or introductory language. *In re Clorox Consumer Litig.,* 894 F. Supp. 2d 1224, 1233 (N.D. Cal. 2012). Only by stringing statements together and imposing its (and Cabral's) particular and peculiar interpretation could the court find the "uniform" message it presented in its order granting class certification.

This was an abuse of discretion.

3. Cabral Submitted No Evidence That Any Other Consumer Formed the "Net Impression" That She Did.

With regard to representations that Appellant actually *did* make about Supple®, relief from joint discomfort is only one of them. Numerous other representations about G/C in general, and Supple® in particular, were contained in the various ads. *See* Part V, *supra*.

Cabral claims *she* came away from *her* exposure to the 2007 infomercial – only one of numerous ads during the putative class period and the only one Cabral saw (5-ER-23 at 830:17-831:23)[21] – with the "net impression" that Supple® was clinically proven to cure her arthritis within seven days.[22] (*Id.* at 835:12-836:19.) Cabral

[21] The 2007 infomercial stated: "This product is not intended to diagnose, treat, cure or prevent any disease." (6-ER-24 at 1196, 1215.) In *Moheb*, where the plaintiff bought the product expecting it to cure her arthritis, despite this same disclaimer, the court found her atypical of the class. *Moheb*, 2012 WL 6951904, at *4.

[22] While the 2007 infomercial Cabral saw stated that "you *could* feel a significant difference in seven days" (6-ER-24 at 1210 (emphasis added)), the same infomercial, the websites, inbound telemarketing scripts, and other ads recommended that consumers take Supple® for longer periods to assure results (and even these speed of action representations varied among the channels). *See, e.g.,* 6-ER-24 at 1189 ("I strongly recommend that you try Supple® for a full 48 days before you make a final decision . . ."); 6-ER-24 at 1024 ("[s]ome people will notice an effect within a few days, while others may have to wait up to four to eight weeks"); 9-ER-30 at 1986 ("it is recommended to try Supple for at least 48-60 days to experience full benefits"); *id.* ("You can feel a difference with Supple in just a few weeks and benefits accumulate week after week. Peter Apatow . . .

presented no evidence that any other class member – even one who saw only the same ad – drew that same conclusion.[23]

Cabral submitted no evidence that any other consumer bought Supple® because he understood that it was clinically proven to treat arthritis or joint pain, or that any other member of the putative class even had arthritis or joint pain. Each class member necessarily formed her own impression of what Supple® could or would do, based not only on the ads she saw and the various representations contained therein, but also on the universe of other individual factors. Cabral's own impression cannot be the "uniform" message received by all class members.

Cabral's personal focus is on Appellant's supposed representation of Supple® as a cure for arthritis. But Supple®'s advertisements did not say Supple® cured arthritis; to the contrary, the ads repeatedly asserted that Supple® was *not* intended to cure any disease. (6-ER-1117 *et seq.*; *id.* at 1196, 1215; *see also* 6-ER-1155 ("Q: Does [Supple®] cure arthritis? [A:] There is no known cure for arthritis.").)

Nonetheless, there are many reasons that a consumer might be

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recommends that you try Supple for at least 7 weeks to really feel the full benefits.").

[23] *See Rexall Sundown, Inc. v. Perrigo Co.*, 651 F. Supp. 2d 9, 23-24 (E.D.N.Y. 2009) ("when bringing suit on a theory of implied falsity, a plaintiff must provide extrinsic evidence to support a finding that consumers do take away the misleading message alleged").

interested in taking G/C or trying Supple®. A consumer whose doctor recommended that she take G/C for joint discomfort (as doctors did 6.1 million times in 2009, 7-ER-28 at 1450 ¶ 23) – even for arthritis – would not have been misled by any alleged representations about G/C's effectiveness for these conditions (let alone clinical proof) and may not even have noticed such alleged representations when simply choosing among competing G/C products. The same is true for consumers who decided to take G/C at the recommendation of friends, coaches, or trainers, or after reading articles in sports and fitness publications or one of the many articles or studies available on the internet and elsewhere. *Moheb*, 2012 WL 6951904, at *4 (purchasers of the G/C product may have relied on sources other than the defendant's representations).

Consumers already taking a competitor's G/C product would not have been interested in representations about G/C's effectiveness in treating joint discomfort, but might instead have tried Supple® because it is a good-tasting drink rather than a pill, or because of a shellfish allergy, or because Supple® used a superior quality of G/C than used in other G/C supplements.

Others may have been interested in Supple®'s messages about joint discomfort relief, but not because they suffered from arthritis. Some may have wanted to be proactive about preventing joint problems. Others may experience joint problems from non-arthritis

causes. (5-ER-24 at 893-894 ¶ 14.)

Still other consumers may have been motivated or inspired by testimonials, from consumers of different ages, genders, lifestyles and health conditions, in the 2011 infomercial or on the Supple® websites or landing pages. Some consumers may have been interested in Supple® as a way to take more vitamins or help with bone, back, muscle, weakness, carpal tunnel, or fatigue problems. (5-ER-24 at 898 ¶ 29.)

This is not a typical false advertising case where the only information consumers receive about the product comes from the representations in the defendant's ads. *Cf. Johnson*, 275 F.R.D. at 288-89 (where representation about qualities of defendants' yogurt were contained on the retail packaging, all consumers necessarily got the same message). Appellant was not writing on a clean slate when it advertised a G/C supplement to consumers who already have pre-conceived notions about the benefits and efficacy of G/C. So this is not a case, as the court found, where the defendant seeks to avoid class certification by making minor changes in its ads.

The numerous varied messages in Appellant's ads changed over time and differed by medium. The court ignored this evidence and instead concluded that there was only one conceivable reason why people would buy Supple®. This was an abuse of discretion.

C. The District Court Abused Its Discretion in Relying Upon Representations Contained in Materials Never Seen by Any Member of the Class.

In adopting Cabral's "net impression" theory, the court quoted five statements that it believed appeared in Appellant's ads. For two of these – "Clinically Proven Effective and Safe" and "[C]ompletely relieve the symptoms of arthritis" – the court's cited source was the declaration of Cabral's attorney, Exhibit 22. (1-ER-1 at 7:24-28.) For another – "[i]f you have arthritis, joint pain, back pain, kne[e] pain, this is a product you absolutely have to try" – the court cited Cabral's Exhibit 14. (1-ER-1 at 7:19-21)

Exhibits 14 and 22 were not advertisements for Supple®. Rather, they were charts compiled by Cabral's attorneys to argue the numerous disparate representations that, read together, purportedly conveyed a uniform "net impression" promising a clinically proven arthritis cure. (8-ER-30 at 1670-73, 1768.) The above-quoted excerpts on Exhibit 22 actually come from a Supple® development website (8-ER-30 at 1770 [Ex. 23]) that was accessible only for a short time in 2007 – *before* Supple® marketing efforts began and *before* the class period. Cabral did not see that website, and no class member would have seen it. No orders were generated from this development site. (5-ER-24 at 897 ¶ 26; 5-ER-23 at 847:7-9.) Similarly, the statement quoted from Exhibit 14 comes from a test infomercial (Exhibit 20) that was not rolled out and was tested only

for a limited time. (8-ER-1546-47 ¶¶ 16, 23; *id.* at 1670, 1758, 1765; 5-ER-24 at 899 ¶ 33.)

Clearly, these materials and statements were irrelevant to this action. Fed. R. Evid. 401; *United States v. Vallejo*, 237 F.3d 1008, 1015 (9th Cir. 2001). "Evidence may not be admitted at trial unless it is relevant . . . . The particular facts of the case determine the relevancy of a piece of evidence." *Id.* The issue was whether Cabral could prove by class-wide evidence that the class members were deceived by Appellant's representations. Evidence showing representations that Appellant never made to the class is irrelevant.

> Appellant objected to Exhibit 23 for this very reason, stating:
>
> > Objection: Exhibit 23 is irrelevant. As discussed in the declaration of Peter Apatow, this website was live only for a brief period in 2007, *before* active marketing of the product began and *before* the putative class period commenced. There is no evidence that any putative class member ever saw this version of the website or that any sales resulted from it. Accordingly, Plaintiff's reliance on this information has nothing to do with whether a class here should be certified, and is therefore irrelevant. *See* Fed. R. Evid. 401, 402.

(5-ER-22 at 778:18-24 (emphasis in original).) Cabral's response to the relevance argument was largely a cut-and-paste from responses to Appellant's other objections to certain emails. Cabral did not address the points in Appellant's objection, instead stating that:

> The information contained in this email is relevant to class certification under FRE 401 and 402. Defendant's objections are not grounded in the FRE and are not

> proper bases upon which to sustain an evidentiary objection. These are not even grounds upon which to conclude the document is not relevant, as it was offered for the purpose of showing Defendant's false and misleading advertising was both intentional and uniformly conveyed. This, coupled with the fact it is an example of common evidence applicable to the entire class, goes directly to the "commonality" requirement for class certification.

(3-ER-14 at 342-43 no. 19; *compare id.* at 315-20 (nos. 7, 8, 9, 10) (virtually identical language responding to objections to emails).)

Cabral's response is plainly off the mark: the development website could not be offered for the purpose of "showing Defendant's false and misleading advertising was both intentional and uniformly conveyed" because it was never conveyed to the class. Cabral's response does not explain the relevance of the website or justify the court's reliance on it. *Vallejo*, 237 F.3d at 1015-16 (abuse of discretion to admit irrelevant evidence where the proponent "never articulated – either in its briefs or at oral argument – how the testimony was relevant to Vallejo's particular case"). This Court has noted, "Counsel's failure to articulate a rationale for allowing . . . evidence upon [the other party's] objection is in and of itself problematic. *Harris v. United States*, 371 F.2d 365, 366 (9th Cir. 1967) (an objection to a line of questioning may be sustained if counsel fails, in response to the objection, to articulate the question's relevance beyond simply stating that 'it is essential for the defense of

this client')." *Vallejo*, 237 F.3d at 1016 n.2.

Nor did the court articulate any basis for the evidence's relevance.[24] In holding that a district court abused its discretion in admitting irrelevant evidence, this Court has observed:

> Nor did the district court articulate a clear rationale for admitting the testimony. Although it stated that "the rationale is pretty clear for that kind of evidence," the court did not discuss – and we cannot glean from the record – what that rationale was in Vallejo's case. "Even the most comprehensive evidence may not be admitted unless its significance to the proposition at issue can be ascertained."

Id. at 1016 (quoting *Weinstein's Federal Evidence* § 401.04[2][d] (2d ed. 2000)). The court abused its discretion in overruling the objection and relying upon the irrelevant and inadmissible evidence.

[24] While the court asked for argument on the objections (2-ER-3 at 45:13-57:8), it initially directed the parties to argue as if all objections were overruled. (2-ER-3 at 17:19-18:4.) It never ruled on the objections, but as the order explicitly referenced and relied on Exhibit 22's quotes from Exhibit 23, it is apparent that the court overruled Appellant's objection to Exhibit 23. (1-ER-1 at 7:25-28.)

IX. CONCLUSION

The court abused its discretion in certifying the class. It ignored unrebutted evidence of customer satisfaction and interpreted Appellant's ads without any evidentiary basis. The order should be reversed.

Dated: October 9, 2013

MANATT, PHELPS & PHILLIPS, LLP

By: /s/ Brad W. Seiling
Brad W. Seiling
Attorneys for Appellant/Defendant
SUPPLE, LLC

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant states that it is not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULE 32-1

Pursuant to Circuit Rule 32-1, I certify that this Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 13,890 words, excluding the Corporate Disclosure Statement, table of contents, table of authorities, the caption page, Statement of Related Cases and this certification page.

Dated: October 9, 2013

MANATT, PHELPS & PHILLIPS, LLP

By: /s/ Brad W. Seiling
Brad W. Seiling
Attorneys for Appellant
SUPPLE, LLC

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that on October 9, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature	s/Brigette Scoggins

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