No. 13-55943

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ARLEEN CABRAL, *et al.*,
Plaintiffs-Appellees,

v.

SUPPLE, LLC, *et al.*,

Defendant-Appellant.

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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

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BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TREATISES AND PERIODICALS

INTRODUCTION

The alleged scheme to defraud California consumers in this case concerns statements made by Supple, LLC, through its marketing materials, that uniformly represent that their special juice product will "completely reverse[] and halt[] the disease process" for joint disease. 8 ER 1678. However, despite these rather specific health benefit claims, the plaintiff alleges that the product, at best, provides only a placebo effect. The placebo effect is a well-recognized phenomenon that occurs when a patient responds favorably to a drug or dietary supplement when exposed to a statement that the product is effective, even if the drug or supplement is only a sugar pill. The placebo effect should never be a basis for defeating class certification, as Supple urges in this appeal.

The class certification inquiry must take into account the underlying substantive law. The substantive statutes under which this case arises-California's Unfair Competition Law, Business & Professions Code §§ 17200, *et seq*. ("UCL"), False Advertising Law, Section 17500, *et seq*. ("FAL") and the Consumer Legal Remedies Act, Civil Code § 1750, *et seq*. ("CLRA")-each serve an important role in the enforcement of consumers' rights. Here, the underlying marketing scheme is based entirely upon a

uniform false message that Supple's special juice product is effective when, as alleged by the plaintiff, the truth is that it is not. Thus, the allegation that Supple's uniform marketing is "likely to deceive" a reasonable consumer falls squarely within the types of consumer fraud that the UCL, FAL and CLRA were designed to address.

Here, Supple's misrepresentations about the efficacy of its products are "likely to deceive" a reasonable consumer. *Lavie v. Proctor & Gamble Co.*, 105 Cal.App.4th 496, 508 (2003). The legal standard by which a court evaluates the defendant's conduct is objective, "judged by the effect it would have on a reasonable consumer," and does not depend on the state of mind of any particular class member. *Id.* at 506-07. Under California law, once a class representative has proven her actual reliance, as Ms. Cabral has done here, "no further individualized proof of injury or causation is required to impose restitution liability against the defendant in favor of absent class members." *In re Steroid Hormone Product Cases*, 181 Cal.App.4th 145, 154 (2010); *In re Tobacco II Cases*, 46 Cal.4th 298, 308 (2009).

Accordingly, the district court was correct when it found that the truth or falsity of Supple's statements will be determined by common proof

(scientific evidence) "rather than on the question whether repeat customers were satisfied or received multiple shipments … because of automatic renewals." 1 ER 7. Indeed, the only assumption that can be logically inferred from a consumer's continued purchase through an automatic renewal program is that the underlying scheme to defraud was effective. In particular, where a product is misrepresented, as Plaintiff alleges here about Supple's product, each class member suffers a common injury as a result of purchasing the product. *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 328-30 (2011) (California's consumer protection statutes infer injury from the purchase of a mislabeled or misrepresented product).

STATEMENT OF INTEREST

CAOC, founded in 1962, is a voluntary non-profit membership organization of approximately 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business practices, including consumer fraud, personal injuries, wage and hour violations, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of injured citizens in both the courts and the Legislature. This has often occurred through class and other representative actions under this state's consumer protection laws, the UCL, FAL and CLRA. In recent years, CAOC has participated as amicus curiae in many cases, including: *Rose v. Bank of America*, N.A., 57 Cal.4th 390 (2013); *Aryeh v. Canon Business Solutions, Inc.*, 55 Cal.4th 1185 (2013); *Parks v. MBNA America Bank, N.A.*, 54 Cal.4th 376 (2012); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012); *Kwikset v. Superior Court*, 51 Cal.4th 310 (2011); and *In re Tobacco II Cases*, 46 Cal.4th 298 (2009). CAOC has also participated as amici in numerous cases pending at the intermediate appellate level.

CAOC has a substantive and abiding interest in ensuring that California's consumer protection statutes are preserved, consistent with the California Supreme Court's precedents and with the strong public policies underlying the UCL, FAL and CLRA, which that Court has consistently affirmed.

CAOC is filing this brief to emphasize: (1) the importance of state consumer protection statutes in areas where federal oversight is lax, (2)

that the standard for finding consumer fraud under California's consumer protection statutes is that the misrepresentations are "likely to deceive" a reasonable consumer, and (3) that deception is determined by an objective standard without regard to subjective perceptions of satisfaction.

DISCUSSION

I. Private Enforcement of Consumer Fraud Statutes Is Vital, Particularly in the Largely Unregulated Area of Supplements.

A. Recently, the California Supreme Court affirmed the UCL "provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices." *Yanting Zhang v. Superior Court*, 57 Cal.4th 364, 371 (2013). It has also stated that "UCL actions serve important roles in the enforcement of consumers' rights [and] has repeatedly recognized the importance of these private enforcement efforts." *In re Tobacco II Cases*, 46 Cal.4th 298, 313 (2009) (quoting *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 126 (2000)).

The UCL "prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent

business act or practice.' [Citation.] Its purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.' [Citations.]" *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 320 (2011). Although the UCL contains sweeping language as to what is considered a business practice, standing to sue under the statute, as defined by Business and Professions Code section 17204, is confined " 'to any "person who has suffered injury in fact and has lost money or property" as a result of unfair competition. [Citations.]' " *Kwikset Corp.*, 51 Cal. 4th at 320-321. In other words, to have standing to bring a UCL cause of action, the named plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and (2) show that the economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim." *Id.* at 322. As to the injury in fact, or economic injury, requirement, the injury must be " 'an invasion of a legally protected interest which is (a) concrete and particularized, [citations]; and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' [citations].' [Citation.]" *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal.App.4th 798, 814 (2007), disapproved on another ground in *Kwikset Corp.*, 51 Cal. 4th

at 337.

Similar to the UCL, the FAL makes it unlawful for a person, firm, corporation, association, or any employee thereof "with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto" by means of advertising, "which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading... ." Like the UCL, the FAL requires an individual suing under the statute to have " 'suffered injury in fact' " and to have " 'lost money or property as a result of such unfair competition.' " *Kwikset Corp. v. Superior Court*, 51 Cal.4th at 321-322 (standing limitations of UCL apply equally to the FAL.)

In addition, both the UCL and FAL share the "likely to deceive" standard when evaluating whether a marketing message is deceptive. *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 951 (2002) (" 'it is necessary only to show that "members of the public are likely to be deceived.' " [Citations.]"). This is determined by considering a "reasonable consumer" who is neither the most vigilant and suspicious of advertising claims nor the most unwary and unsophisticated, but instead is "the ordinary consumer within the

target population." *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496, 509-510 (2003). " 'Likely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Id.* at 508.

In contrast, the CLRA specifically declares unlawful a variety of "unfair methods of competition and unfair or deceptive acts or practices" used in the sale or lease of goods or services to a consumer. Civil Code § 1770, subd. (a). An individual seeking to recover damages under the CLRA based on a misrepresentation must prove, among other things, actual injury. "Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof." *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal.App.4th 746, 754 (2003). "Accordingly, 'plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm.' [Citations.]" *Buckland v. Threshold Enterprises, Ltd.*, supra, 155 Cal.App.4th at 809. A plaintiff bringing a CLRA cause of action must not

only be exposed to an unlawful practice but also have suffered "some kind of damage." *Meyer v. Sprint Spectrum L.P.*, 45 Cal.4th 634, 641 (2009); *see also id.* at 643 ("allegedly unlawful practice under the CLRA" must result "in some kind of tangible increased cost or burden to the consumer.").

Finally, in the consumer class action context, "standing is satisfied if at least one named plaintiff meets the requirements." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) (quoting *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007)); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011) ("[O]nly one named [p]laintiff must meet the standing requirements.").

B. Here, as a dietary supplement, Supple's claims about glucosamine hydrochloride are largely unregulated. To the extent there is any regulation at all, it falls under the Dietary Supplement Health and Education Act (DSHEA). Pub. L. No. 103-417, 108 Stat. 4325 (1994). The DSHEA, as enforced by the Food and Drug Administration, is a "reactive" regulatory scheme that "prevents the FDA from acting swiftly to protect consumers." Richard E. Nowak, *DSHEA's Failure: Why a Proactive Approach to Dietary Supplement Regulations Is Needed to Effectively Protect Consumers*, 2010 U. Ill. L. Rev. 1045, 1048 (2010). Others have

criticized the DSHEA's preference for "access over safety." Rahi Azizi, *"Supplementing" the DSHEA: Congress Must Invest the FDA with Greater Regulatory Authority Over Nutraceutical Manufacturers by Amending the Dietary Supplement Health and Education Act*, 98 Cal. L. Rev. 439, 441 (April, 2010). Further, unlike the "extensive testing" that manufactures must performed prior to offering a drug for sale in the U.S., the "DSHEA mandates a hands-off approach to dietary supplement regulation." Megan Dagerman, *Incentivizing Safety in the Dietary Supplement Industry*, 31 Rev. Litig. 173, 176-77 (Winter 2012). In addition, although the FDA may be concerned with "reducing fraud and other undesirable market practices, [these] are comparably weak priorities compared to the goal of protecting and promoting public health." Anton Tupa, *FDA's Definition of Disease: Foregone Opportunity or a Path Forward in Improving Regulation of Dietary Supplements?*, 15 U. Pa. J. Bus. L. 843, 854 (Spring 2013).

The ability of private individuals to enforce consumer rights through the UCL, FAL and CLRA is particularly important in areas, such as dietary supplements, where government enforcement is limited. This is especially true because such suits are nearly always expensive and time consuming. UCL, FAL and CLRA class actions "make it economically

feasible to sue when individual claims are too small to justify the expense of litigation, and thereby encourage attorneys to undertake private enforcement actions." *In re Tobacco II Cases*, 46 Cal.4th at 313 quoting Kraus, 23 Cal.4th at 126 (2000).

Therefore, CAOC respectfully urges this Court to uphold the district court's certification order. The Class certified by the district court below epitomizes the important public policies behind the UCL, FAL and CLRA and will fill in the gap where the passive federal regulatory scheme falls short.

II. The Danger of Finding Consumer Satisfaction from Non-Cancellation Should Be Avoided.

A. Auto-renew Does Not Mean the Consumer is Satisfied.

Supple's strategy of autoshipping its product to customers who do not take affirmative action to cancel is characterized as "negative option" marketing and exploits what is known as consumers' "status quo bias." The U.S. Federal Trade Commission (FTC) described this marketing strategy in its negative option rulemaking:

> Broadly speaking, a 'negative option' is any type of sales term or condition that imposes on consumers the obligation of rejecting goods or services that sellers offer for sale. A negative option allows a

> seller to interpret the failure of a consumer to reject goods or services as the acceptance of a sales offer, when, under traditional contract law, an affirmative response accepting the offer would be necessary. A consumer must agree to allow the seller to interpret his failure to reject goods or services as the acceptance of a sales offer.

Trade Regulation Rule Regarding Use of Negative Option Plans by Sellers in Commerce, Federal Trade Commission, Final Rule, 63 Fed. Reg. 44555 (Aug. 20, 1998).

The concept that consumers often fail to cancel delivery or return autoshipped products - known as "status-quo bias" - is well-established and frequently exploited:

> The status-quo bias implies that individuals tend to prefer the present state of the world to alternative statements … These forces imply that if, for a given choice, there is a default option - an option that the chooser will obtain if he or she does nothing - then we can expect a large number of people to end up with that option, whether or not it is good for them. **Sellers could take advantage of the status-quo bias of consumers, for example, by adopting an automatic renewal clause in the contract**. Such clauses are part of many subscription contracts. Automatic renewal clauses specify that the contract will be automatically renewed for a new term unless the consumer gives notice of his intent to terminate. If the consumer takes no action to cancel the agreement, he would be bound for

> another term. **It turns out that many consumers fail to cancel their agreement if the benefits from continuance are lower than the price that needs to be paid**.

Anne-Sophie Vandenberghe, "Behavorial approaches to contract law," Contract Law and Economics, Gerrit de Geest, ed., 419 (2011) (emphasis added).

Indeed, these tendencies are exploited to maximize profits:

> [P]rofit-maximizing firms can and do exploit the predictable inconsistencies and biases of their customers. Through contract design, pricing schedules, and marketing techniques they exploit their customers' self-control problem, their status quo bias and their sensitivity to defaults and choice complexity. Automatic renewal of contracts and non-monetary transaction costs of switching exploit the status quo bas and default sensitivity of the customer.

Zvi Bodie and Henriette Prast, "Rational pensions for irrational people: behavioral science lessons," in The Future of Multi-Pillar Pensions, Lans Bounvenberg, et al, eds. 307 (2012) (emphasis added).

Because these negative option plans shift the burden to the consumer to opt out of receiving the product or service, the FTC has stated skepticism of the strategy:

> At the FTC, status quo bias explains why the **FTC has tended to look askance at negative options where the default position is a continuation of the status quo**. . . . In these circumstances, there is a sales term or condition that allows a seller to interpret a customer's silence or failure to take an affirmative step as acceptance of an offer; this means the burden is on the consumer to cancel the purchase.

"Behavioral Economics: Observations Regarding Issues That Lie Ahead," June 9, 2010 (emphasis added).

This strategy has been judicially recognized as the "life blood" of nutraceutical businesses such as Supple where "shipments and charges would continue until the customer decided to withdraw from the program, which required the customer to notify the company." *United States v. Warshak*, 631 F.3d 266, 277 (6th Cir. 2010). These strategies make it more than likely that a consumer will continue receiving and paying for the product for at least some period of time whether or not it works.

Businesses that rely on such consumer manipulation should not be permitted to claim that these deceptive marketing tactics equate to customer satisfaction. Particularly where, as here, there is no evidence in the record that the product being marketed has any efficacy whatsoever. Thus, the underlying scheme to defraud at issue is the deceptive

marketing practice of a product that lacks any efficacy whatsoever and it is this scheme to defraud that demand attention.

B. A Placebo Effect Does Not Justify Fraud.

"The placebo effect can be defined as an inert or innocuous treatment that works not because of the therapy itself, but because of its suggestive effect." *F.T.C. v. QT Inc.*, 448 F.Supp.2d 908, 939 (N.D. Ill. 2006), *aff'd*, F.T.C. v. QT, Inc., 512 F.3d 858, 862-63 (7th Cir. 2008) ("The placebo effect is well established. . . Tell the patient that the pill contains nothing but sugar, and there is no pain relief; tell him (falsely) that it contains a powerful analgesic, and the perceived level of pain falls. *** That's why the placebo effect cannot justify fraud in promoting a product."). *See also*, *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1100 (9th Cir. 1994) (where "a product's effectiveness arises solely as a result of the placebo effect, a representation that the product is effective constitutes a 'false advertisement' even though some consumers may experience positive results. In such circumstances, the efficacy claim " 'is 'misleading' because the [product] is not inherently effective, its results being attributable to the psychosomatic effect produced by the advertising and the marketing of the product.' ") (emphasis in original).

The Ninth Circuit has previously held that evidence of customer satisfaction may simply indicate the scheme to defraud was successful:

> By contrast, Ciccone's proffered evidence would not have shown that donors actually gained or that his scheme was beneficial to anyone but Ciccone. Rather, the evidence showed merely that donors thought that they had received a benefit. **** Where, as here, the proffered evidence relates not to the nature of the scheme or the defendant's intent, but rather to the uninformed opinion of the victims, it is not an abuse of discretion to exclude it. *See e.g., United States v. Elliott*, 62 F.3d 1304, 1308 (11th Cir.1996) (upholding exclusion of evidence of satisfied victims where the proffered evidence would not be probative of intent), amended by 82 F.3d 989 (11th Cir.1996); *United States v. Diamond*, 430 F.2d 688, 693 (5th Cir.1970) ("[C]omplimentary letters may very well be an indication that the fraud is succeeding rather than an indicia of good intent. In view of the wide latitude accorded trial courts in the determination of relevancy of evidence we cannot say that there was an abuse of discretion in this instance.").

Ciccone, *supra*, 219 F.3d at 1082-83 (emphasis in original).

The CAOC urge this Court to reject Supple's argument that continued receipt of an ineffective product and/or a placebo effect demonstrate that the consumers were not deceived by its marketing. As discussed, where a product is not inherently effective, customer satisfaction does not negate the falsity of the claims. Rather, it is the

scheme to deceive consumers into believing that the product is effective that requires attention, not the success of Supple's ability to pass off a placebo as effective. *See F.T.C. v. QT, Inc.*, 512 F.3d 858, 863 (7th Cir. 2008)("That's why the placebo effect cannot justify fraud in promoting a product.").

III. The Fraudulent Scheme at Issue Is Readily Demonstrated by "Common Course of Conduct."

A. The Order Certifying the Class Was Proper

Class treatment has been permitted in fraud cases where, as here, a standardized sales pitch is employed. In *In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 140 F.R.D. 425 (D. Ariz. 1992), the court correctly rejected a "talismanic rule that a class action may not be maintained where a fraud is consummated principally through oral misrepresentations, unless those representations are all but identical," observing that such a strict standard overlooks the design and intent of Rule 23. *Id.* at 430. *Lincoln Savings* involved a scheme that included, among other things, the sale of debentures to individual investors who relied on oral representations of bond salespersons who in turn had received from defendants fraudulent information about the value

of the bonds. The *Lincoln Savings* court focused on the evidence of a "centrally orchestrated strategy" in finding that the "center of gravity of the fraud transcends the specific details of oral communications." *Id*. at 430-31. As the court explained:

> [T]he gravamen of the alleged fraud is not limited to the specific misrepresentations made to bond purchasers.... The exact wording of the oral misrepresentations, therefore, is not the predominant issue. **It is the underlying scheme which demands attention**. Each plaintiff is similarly situated with respect to it, and it would be folly to force each bond purchaser to prove the nucleus of the alleged fraud again and again.

Id. at 431 (bold added); *see also Schaefer v. Overland Express Family of Funds*, 169 F.R.D. 124, 129 (S.D. Cal. 1996) (citing *Lincoln Savings* for the proposition that representations made to brokers or salesmen which are intended to be communicated to investors are sufficient to warrant class standing, even where the actual representations to individuals varied).

Relying on *Lincoln Savings* and similar cases, the Ninth Circuit "has followed an approach that favors class treatment of fraud claims stemming from a 'common course of conduct.' " *In re First Alliance Mortgage Co.*, 471 F.3d 977, 990-91 (9th Cir. 2006). A company is not "immune from class-wide accountability" just because its ads do not "consist of a

specifically-worded false statement repeated to each and every [class member]." *Id*.

B. Supple's Pervasive Health-Benefit Claims Are Presumptively Material.

Claims under the UCL and FAL are particularly appropriate for class certification because these consumer protection statutes focus on the defendant's conduct and not that of the plaintiff or absent class members. Tobacco II, 46 Cal. 4th at 312, 324. "[I]f [the plaintiff] can show that 'material misrepresentations were made to the class members, at least an inference of reliance (i.e., causation/injury) would arise as to the entire class.' " *Steroid Hormone*, 181 Cal.App.4th at 157. "The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence." *Vasquez v. Superior Court*, 4 Cal.3d 800, 814 (1971). "Causation as to each class member is commonly proved more likely than not by materiality." *Mass. Mut. Life Ins. Co. v. Superior Court*, 97 Cal.App.4th 1282, 1292 (2002). "That showing will undoubtedly be conclusive as to most of the class." *Id*.

A statement is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct

regarding, a product." *F.T.C. v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (quoting *Matter of Cliffdale Associates, Inc.*, 103 F.T.C. 110, 165). It is well-established that representations involving "health, safety, or other areas with which the reasonable consumer would be concerned[, such as] the purpose, safety, efficacy, or cost of the product," are presumptively material. *Cliffdale*, 103 F.T.C. 110 app. at 182-83 (Letter from the Federal Trade Commission to Hon. John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce (Oct. 14, 1983)) (FTC Policy Statement on Deception); *see also Novartis Corp. v. FTC*, 223 F.3d 783, 786-87 (D.C. Cir. 2000); *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992). Moreover, all express product claims are presumptively material. *Pantron I*, 33 F.3d at 1095-96.

Here, Supple's pervasive uniform representations about its product make this case ideally suited for class treatment. As such, CAOC urges this Court to uphold the Class Certification order of the District Court.

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CONCLUSION

For all of the foregoing reasons, the district court's order certifying the Class should be affirmed.

Dated: January 22, 2014

Respectfully submitted,

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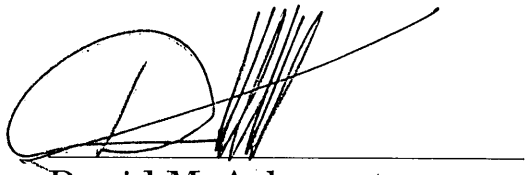
CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C); the undersigned counsel for Plaintiffs-Appellants hereby certifies that:

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B)(i). As measured by the word-processing system used to prepare this brief, there are 4086 words in the brief.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface at least 14-point or larger (Century Schoolbook, 14-point) using WordPerfect Version X5.

Dated: January 22, 2014



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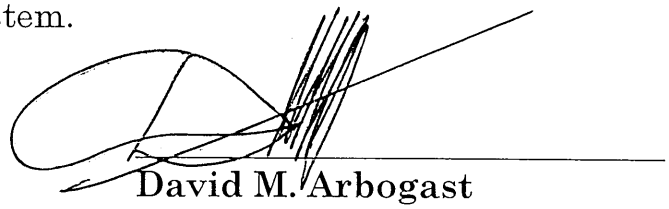
CERTIFICATE OF SERVICE

I hereby certify that 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 on January 22, 2014.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.



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