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,
Plaintiff-Appellee,

v.

SUPPLE, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR PLAINTIFF-APPELLEE ARLEEN CABRAL

Gillian Wade
MILSTEIN ADELMAN LLP
2800 Donald Douglas Loop North
Santa Monica, CA 90405
(310) 396-9600

Deepak Gupta
Peter Conti-Brown
GUPTA BECK PLLC
1625 Massachusetts Avenue, NW
Suite 500
Washington, DC 20036
(202) 888-1741

Counsel for Plaintiff-Appellee Arleen Cabral

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Books and Articles

INTRODUCTION

Since 2007, Supple, LLC, and its founder, Peter Apatow, have told consumers—through websites, television infomercials, and telemarketing—that spending $114.90 per shipment of the company's special juice will "completely reverse[] and halt[] the disease process" for any joint disease, including arthritis. 8 ER 1678. But the scientific evidence behind Supple's claims points, at best, to a chemical compound (glucosamine sulfate) that the company admits isn't even in its juice. In truth, the juice is no better than placebo.

In this interlocutory appeal, Supple contends that the district court abused its discretion in certifying a class of consumers defrauded by Supple's false claims. Class certification is unwarranted, says Supple, because many customers were actually "satisfied" with the juice. But, as the district court found, "the record does not demonstrate" the existence of these "satisfied" customers. 1 ER 5. Supple asks this Court to set aside that factual finding based on two kinds of evidence—unauthenticated, anonymous "testimonials" claiming "positive results" and data showing that many customers failed to cancel their automatically renewing subscriptions for shipments of Supple's juice.

But such evidence, even if admissible, wouldn't prove that Supple's customers experienced anything beyond the placebo effect. And, in any event, the product's efficacy is a question for the merits, not class certification. On the merits,

"the truth or falsity of Supple's advertising will be determined on the basis of common proof"—*i.e.* the scientific evidence of its efficacy, or lack thereof—"rather than on the question whether repeat customers were satisfied or received multiple shipments … because of automatic renewals." 1 ER 7. Because the veracity of Supple's advertising is an objective question, answered from the perspective of a reasonable consumer, "the class is entirely cohesive: It will prevail or fail in unison." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

Supple's contrary argument would transform the placebo effect into a license to commit fraud: The fact that baseless enthusiasm for any ostensible therapy can create a modest psychosomatic benefit—the definition of the placebo effect—would always defeat class certification. That is not the law, and this Court should not make it the law. The district court's decision should be affirmed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332(d)(2) and this Court has appellate jurisdiction under Federal Rule of Civil Procedure 23(f). Supple's petition for interlocutory review of the district court's February 15, 2013 class certification order was timely filed on February 28, 2013, and a panel of this Court (*O'Scannlain, Callahan, W. Fletcher, J.J.*) granted the petition on May 30, 2013.

STATEMENT OF THE ISSUES

1. Customer "satisfaction" defense. The district court concluded that the record does not demonstrate a substantial number of "satisfied" Supple customers. Was that factual finding an abuse of discretion because the district court did not credit Supple's unauthenticated, anonymous "testimonials" and evidence that consumers failed to cancel their automatically renewing subscriptions? And if so, should such evidence of subjective consumer "satisfaction" have precluded class certification in a case alleging that the product does not, as an objective matter, deliver its promised therapeutic benefits?

2. Common course of advertising conduct. Did the district court abuse its discretion in certifying a class based on its conclusion that the defendant's advertising made claims about its product's efficacy that were sufficiently uniform across the class?

3. Evidentiary objection. Should the district court's class certification decision be reversed because it quoted two representative sentences (from the defendant's website and an infomercial) to which the defendant unsuccessfully objected on grounds of relevance under Federal Rule of Evidence 401?

STATEMENT OF THE FACTS AND OF THE CASE

Plaintiff Arlene Cabral suffers from crippling joint pain. 10 ER 2076.[1] Through television infomercials, websites, and telemarketing, Supple markets a fruit juice to those like her, promising them that scientific research confirms that the juice's active ingredients will rebuild joint cartilage and relieve their joint pain. To support these therapeutic assertions, the company relies on scientific studies that have documented some slight, heavily contested correlations between glucosamine sulfate and joint-pain relief.

But glucosamine sulfate is not an ingredient in Supple's fruit juice. Rather, Supple contains only glucosamine *hydrochlorid*e. And there is no credible scientific research that establishes a systematic correlation between glucosamine hydrochloride and joint pain relief. Joint pain sufferers who purchase Supple's juice never learn of the company's sleight of hand. Because of this obfuscation, and because the juice is purchased exclusively via a difficult-to-cancel subscription, there is no evidence in the record that purchasers of the juice actually experienced any of the product's promised therapeutic benefits or are aware that the company's central scientific assertion is provably false.

[1] The case caption incorrectly spells Ms. Cabral's name "Arleen."

I. FACTUAL BACKGROUND

A. Joint pain afflicts millions of Americans.

Arlene Cabral, like tens of millions of over Americans over the age of 65, suffers from joint pain. 8 ER 1621-27; 10 ER 2076. In Cabral's case, her joint pain comes from arthritis, a medical term that means "joint inflammation" and refers to over 100 different diseases that affect the joints themselves as well as the tissues and cartilage surrounding them. 8 ER 1619. Examples of arthritic joint diseases include osteoarthritis, fibromyalgia, rheumatoid arthritis, gout, and lupus. 2 ER 263. This family of diseases is the nation's most common cause of disability. *Id.* It shares with other forms of joint injuries and disorders the patient's loss of cartilage in the joints and the resulting pain from inflammation caused by bone-on-bone friction. *Id.* Although these joint diseases afflict people of all ages, they are most common among the elderly. *Id.* According to a report published by the U.S. Center for Disease Control, the disabling and debilitating pain associated with these diseases has "notable implications for the nation's health and economy." *Id.* There is no known cure for this family of joint disease. 5 ER 859.

B. Supple aggressively promotes its juice with therapeutic claims.

By 2009, Cabral's joint disease had left her in severe pain. During this time, she saw a infomercial promising that Supple's special juice could relieve joint pain and "rebuild" damaged joints. 10 ER 2076. Supple is a for-profit corporation

that—in the words of its founder and CEO, Peter Apatow—aims to make its profits from selling a product aimed at those suffering from "musculoskeletal diseases." 2 ER 85. Its product: a subscription for recurring shipments of fruit juice, delivered in pallets of forty-eight cans for a total of $114.90 every seven weeks, including shipping and handling, 6 ER 1087.

Supple pushes its product through five avenues: (1) internet advertising, including click-through advertising and Supple's own website, http://www.supplebodies.com; (2) half-hour infomercials produced to appear like a news interview program; (3) outbound telemarketing; (4) a pyramid program or "associates plan," http://www.suppleassociates.com, whereby current customers could "earn money through the referral of Supple" to other people, who could in turn earn money through their own referrals, and so on, 2 ER 125; and (5) "affiliate" marketing, through which the company pays a 30% commission on sales by anybody who chooses to sign up and sell the product, *see* http://suppleaffiliates.com. The most important of these marketing channels, during the relevant period, were the first three: internet marketing, infomercials, and telemarketing. Supple does not sell its product in stores.

Although Apatow testified that the company's online advertising is "continually in flux" and varies significantly over time, the basic message is the same: the fruit juice, with its special chemical additions, is "clinically proven

effective" to "safely rebuild cartilage, reduce swelling, and address the causes of joint suffering." 6 ER 1097. Supple asserted that the juice is not only effective to these ends, but that "[n]othing is as proven, safe or effective as the key ingredients" contained in the juice. 6 ER 1114.

Although several different versions of the website existed at various times, including some test versions, there is no dispute that the elements cited here were featured on the company's website throughout the period. The image below is a typical, illustrative example of Supple's online marketing. Volume 6 of the record excerpts contains many other such examples.

"Supple: Healthy Joints" and "Comfort, Lubricate & Rebuild Your Joints!" are the company's message for online purchasers. 6 ER 1084.

As important as Supple's website is to the placement of its fruit juice, the company spent more time and money on television advertising. Recognizing the greater reach and flexibility of television, Supple orchestrated a tightly scripted advertising effort in the form of television infomercials. The investment paid off:

two-thirds of the putative class purchased the juice after calling designated 800 numbers associated with Supple's infomercials. 7 ER 1521.

The infomercial is designed with the appearance of a medical interview show, called *Smart Medicine*. The "interview show" opens with the following introduction:

> Hello, my name is Dr. Monita Poudyal, and welcome to another eye-opening edition of *Smart Medicine.* 70 million Americans suffer from arthritis. You know what it's like, you know the pain, the stiffness, the immobility. You're probably frustrated that standard medicine has failed you, and now you have to live with the pain or take drugs with harmful side effects or wait for surgery.
>
> But are these really your only options? What if I told you that doctors around the world are using treatments that not only take away joint pain, but also help preserve the heart of the joint, the cartilage, with no surgery and no harmful side effects?
>
> My guest today is arthritis patient advocate Peter Apatow. He's the creator of the cutting-edge supplement called Supple. If you suffer from joint pain, arthritis, back pain, knee pain or work related joint problems, then this is a show you do not want to miss, so stay with us. Peter, welcome back to the show.

8 ER 1759 (paragraph breaks added).

Apatow is therefore the returning "guest," Dr. Poudyal the host, and the topic of the "show" is the "cutting-edge" supplement that Apatow "created." What the viewer does not know is that the "host," Dr. Poudyal is in fact not an independent medical expert, but is Apatow's wife and one of the two shareholders (along with Apatow) of Supple LLC. 5 ER 891.

The images below give more of a sense of the format of *Smart Medicine*:

Some of the text that runs beneath Apatow's picture throughout the "interview," in English and Spanish, asserts: "clinical research proves arthritis can be beat," "extensive research confirms arthritis can be healed," and "can you end joint pain, arthritis pain, back pain, and bone pain naturally?"

The claim that arthritis and other joint diseases can be cured is central to Apatow's marketing strategy. Apatow—a former accountant with no scientific or medical training—describes himself not only as an arthritis "patient advocate," the term used by his wife in her introduction, but also as an "arthritis survivor." 8 ER 1653. Apatow insisted that "arthritis survivor" be used in a Spanish translation version of the infomercial, even after the translator expressed concern that the

Spanish equivalent was more appropriate for the context of a "Cancer Survivor or an accident survivor," and was inappropriate for arthritis. 8 ER 1652. Apatow insisted: "Arthritis survivor is an edgy concept that I am using that is being used by some in the patient market as well. It is strong. Arthritis can kill. 16,500 people die every year from taking prescription pain drugs for arthritis." 8 ER 1653. The concept gives consumers the impression that Supple's fruit juice can heal arthritis, that they—like Apatow—can become an arthritis survivor.[2]

The new terminology, the banner headlines, and the format of the faux-interview show *Smart Medicine* demonstrate Apatow and Supple's television marketing strategy. Each of the two versions of the program that aired during the class period began with the same lead-in: "If you suffer from joint pain, 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 1675. Prompted by questions from his wife, Apatow goes on to claim that his fruit juice has "clinically proven" ingredients that have "disease-modifying qualities," which he clarifies to mean "[d]isease-modifying for arthritis pain, it's something that completely reverses and

[2] During his deposition, Apatow asserted that he did "not believe that Supple treats anything." 2 ER 119. Apatow also denied that Supple had anything to do with arthritis, asserting instead that: "Supple is not marketed in a way that we would discuss symptoms or—or disease classes. Supple is marketed as a product that could help promote joint health." 2 ER 122. Although the explanation in Apatow's deposition was not available to purchasers of the fruit juice, the company's contrary claims in its infomercials and on its website were.

halts the disease process." 8 ER 1678. According to Apatow, Supple "stops the vicious cycle of cartilage breakdown and degeneration" and "actually rebuilds your joints . . . [and] actually helps your joints heal," thereby offering "permanent relief, never another day of pain swelling or immobility" in as little as 7 days. *Id.*

Apatow brings his "interview" to a more personal conclusion, claiming that his own arthritis was healed by drinking his company's fruit juice: "I suffered from crippling arthritis pain for 20 years. Today my life is completely different. I have no more pain, no more immobility, no more suffering at all and it's all because of Supple." *Id. Smart Medicine* then closes with this charge:

> If you're out there and you suffer from any type of arthritis, osteoarthritis, rheumatoid arthritis, gout, if you have joint pain and swelling and you tried everything and you're fed up, pick up the phone and call the number on the screen . . . it's a delicious drink for complete joint pain relief that really works.

8 ER 1682.

Even the juice's can, when it arrives, delivers the message: the fruit juice will "comfort, lubricate & rebuild your joints." 8 ER 1566. To be sure, the company claims to have made an extraordinary range of other assertions about the benefits of its fruit juice: that product provides benefits to those suffering from Vitamin D deficiency; overall weakness; fatigue problems; general bone, back, and muscle discomfort; general inflammation; and even helps you lose weight. 5 ER 890, 892-93. But *Smart Medicine* and the juice's can itself make clear that sufferers of joint

pain are the primary targets of Supple's marketing scheme. For nearly all the remaining purportedly advertised benefits, the record contains only Apatow's own declarations, rather than the actual substance of the advertisements themselves.

C. Supple's sales strategy makes cancellation difficult and undermines any inference of customer satisfaction based on automatic renewals.

When potential customers make the call, telemarketers at a customer service call center continue the advertising campaign. 2 ER 128. Supple provides its telemarketing companies with a detailed script that instructs the operator to trumpet the alleged healing powers of the fruit juice and to make every effort to up-sell the product. 9 ER 2017. For example, if a potential customer asks about the effect that the fruit juice will have if she has "no cartilage left and there is bone on bone," the telemarketer must respond that, "[y]es, Supple can help comfort sore joints and improve overall joint function and range of motion. Supple can also help repair and preserve remaining cartilage cells and can even help to generate new cartilage cells." *Id.*

The nature of the purchase is also carefully scripted. A potential customer who commits to a purchase cannot buy a single can of juice. She must commit to a case containing forty-eight eight-ounce cans and costing $114.90. 7 ER 1514. The company advises customers to drink at least one can of juice per day; at most, the order will last forty-eight days. 9 ER 1986.

Key to the company's sales strategy, a customer who makes the initial purchase also commits, at that time, to a subscription. At $114.90 per shipment, she will continue to receive, without reinitiating the purchase or otherwise expressing any opinion about the efficacy of the product, the same $114.90 order forty-eight days, or sooner. Even if the customer manages to cancel the subscription, the company instructs its telemarketers to reach out to former customers to urge reentering the subscription. 5 ER 891-92.

During the class period, the company also offered a limited refund. If customers succeeded in canceling the subscription and turning back the telemarketing efforts they would encounter upon doing so, they could request a refund if they had made the purchase within the last sixty days. 6 ER 1145. That refund did not include reimbursement for the $20 shipping and handling. *Id.* Importantly, however, while Supple claims that results are visible within seven days, 6 ER 1210, Apatow insisted that "benefits accumulate week after week." Those customers who wait beyond the sixty-days return period on the hope of accumulated benefits can receive no refund for their purchases outside that window.

Because of this combination—the opt-out design of the subscription, and the targeting of former customers via aggressive telemarketing—the presence of repeat and rejoining customers provides essentially no information about those customers' satisfaction. Rather than "unrebutted evidence of substantial numbers of satisfied

customers," Supple Br. 40, the subscription system and telemarketing provides the arguable inference that these members of the class have been further victimized by Supple's claims.[3]

D. Supple's therapeutic claims lack any scientific basis.

Supple's claims about its fruit juice—the "clinically proven" benefits, based on scientific research—rest in part on sleight of hand, in part on a single Chinese research paper not available in English, and in part on a misleading interpretation of a damning government study. The two chemical compounds at the heart of this controversy, and contained in Supple's juice, are glucosamine hydrochloride and chondroitin sulfate. Another compound, glucosamine, is a basic building block of cartilage, and chondroitin is found in the cartilage of many mammals. 5 ER 862.

Supple's basis for the many assertions just summarized regarding treatment of joint disease boils down to this: because cartilage consists, in part, of these two core compounds, a juice containing different compounds will directly rebuild the lost cartilage that occurs in virtually all joint disorders. The theory is essentially that eating animal cartilage—in this case, cow cartilage, *see* 6 ER 1026—will heal the disease that eliminated human cartilage.

---

[3] In its opening brief, Supple admits that the members of the class who canceled and then resubscribed did so "due to outbound marketing efforts and their own positive experiences with Supple." Supple Br. 2. The company offers conclusive evidence for the first explanation (the "outbound marketing efforts") but none for the second ("their own positive experiences").

There is no scientific basis for these claims. In response to Ms. Cabral's request for the support for its many claims of its fruit juice's efficacy, Supple produced 220 unique studies that, it asserted, substantiated its claims. Each study analyzed the effect of glucosamine, glucosamine sulfate, chondroitin, chondroitin sulfate, and in 3% of the studies—just seven of the 220—glucosamine hydrochloride on arthritis (as opposed to other kinds of joint disorders).

The overwhelming majority of studies cited by Supple point toward the presence of either glucosamine by itself, or another compound, glucosamine sulfate. The research finding a link between glucosamine sulfate and relief for joint disease is weak and contested. 5 ER 863-64. The methods used in several of the studies that endorsed the use of glucosamine sulfate as a therapy for joint pain have been challenged as insufficiently robust; one, relied upon by Apatow and Supple, never claimed to offer any insight into the therapeutic relevance of glucosamine sulfate at all. *Id.*

The contest over the therapeutic utility of glucosamine sulfate is ongoing. But, again, it is of at most tangential interest to anyone assessing Supple's promises of the radical benefits of its fruit juice. As even Supple's opening brief to this Court has continued to obscure, the uncontested reality is that glucosamine sulfate is not an ingredient in Supple's juice. Supple contains glucosamine *hydrochloride*, not

glucosamine *sulfate*. Any claims, then, about the efficacy of glucosamine sulfate are not relevant to Supple's juice, which does not contain that ingredient.

Despite its continued conflation of the two compounds glucosamine sulfate and glucosamine hydrochloride—including in its opening brief to this court—the company understands the difference. When challenged, Apatow cited six references to clinical trials that, in his opinion, support the contention that glucosamine hydrochloride validates its therapeutic claims. 8 ER 1582-83. In three of those studies, the results were "marginal and barely distinguishable from the response to placebo." 5 ER 864, 866. Two others aren't even clinical studies at all, but are case reports that focus on single patients' case histories. 5 ER 866.[4]

The last study Apatow cites to this end, by Qiu, *et al.*, is written in Chinese; only the abstract is available in English. 5 ER 866. While Apatow and Supple can claim, from the abstract, that the study evaluated the effect of glucosamine hydrochloride on joint pain, neither they nor other non-Chinese speakers—including the American courts—can evaluate the study methodologically and substantively. It is unclear, then, how Apatow and Supple know that the research associated with the study supports their conclusion and is reliable as scientific research. The study appears not to have even included a placebo control. 5 ER 866.

[4] Apatow is aware of the difference between the two glucosamine subcompounds. He alternatively described them as "identical" and "interchangeable," and claimed that glucosamine hydrochloride is "more attractive" and "purer" than glucosamine sulfate. 2 ER 93-94.

In its submissions to the district court, Supple also cited a seventh study, the Glucosamine/Chondroitin Arthritis Intervention Trial (GAIT), a research study funded by the National Institute of Health. While the GAIT study suggested some potential evidence regarding minor benefits from glucosamine for certain classes of joint pain—effusion, for example—the study's overall conclusion was unequivocal and categorical: "the rate of response"—meaning, the effectiveness at reducing joint pain—"to glucosamine [hydrochloride] and chondroitin sulfate, either alone or in combination, was not significantly higher than the rate of response to placebo." 9 ER 1838.

For more support of these scientific claims, Supple hired as its expert Dr. Jose Verges, a physician not licensed in the United States, at a rate of $1,000 per hour and $10,000 per day of depositions. Rebuttal Expert Report of Jose Verges, Dist. Ct. Dkt. 92 at 3 ("Verges Report"). (By contrast, Cabral's expert—Dr. Lynn R. Willis, a distinguished research scientist who spent thirty-three years as a professor of the medicine and pharmacology at Indiana University School of Medicine—received $500 per hour. 5 ER 849-51.)

More troubling than his rate of compensation, Verges is the research director for Bioiberica, a Spanish pharmaceutical company. Verges Report at 2. Although Verges does not disclose it in the report, Supple elsewhere makes clear that Bioiberica is its "exclusive[]" supplier of chondroitin. 6 ER 1155. Because of

this financial relationship, his suitability and credibility as an expert guide to these technical issues of biochemistry are suspect. It is certainly questionable whether, as Verges avers in his report, that his "compensation is not contingent on the outcome of this matter." Verges Report at 3. If Supple loses the case, Verges's employer loses corporate business. The record is silent as to Verges's stock ownership in Bioiberica.

Even ignoring Verges's obvious conflict of interest, the testimony breaks little new ground from the assertions made by Apatow. Verges relies on the same studies, although Verges also makes assertions about studies relied upon in Europe that also apparently evaluated glucosamine hydrochloride's efficacy at providing relief for joint pain. Verges Report at 5. But the general scientific consensus cuts exactly against the conclusion that glucosamine hydrochloride provides any relief to sufferers of joint pain. In the words of one study cited by Supple, "glucosamine hydrochloride cannot be recommended [for treatment of osteoarthritis pain] based on the available clinical data." 5 ER 870.

There is in fact evidence that Verges has not reviewed the research he cites. Verges cites, as did Apatow, Qiu et al. But since it is not available in English, it is not apparent from his testimony whether he has read the study itself: knowledge of Chinese is not mentioned among his qualifications.

Glucosamine hydrochloride is not the only active pharmacological ingredient in Supple's fruit juice. It also contains chondroitin sulfate. 6 ER 1080. As with glucosamine hydrochloride, there is no scientific basis for the conclusion that chondroitin sulfate provides any of the benefits advertised. As the authors of one of the studies on which Supple relies recently wrote: "Efficacy of chondroitin sulfate over placebo for treating pain in [osteoarthritis] was reported in many of the smaller, earlier studies, but the estimates varied considerably from study to study. In recent years, larger-scale trials have reported little to no effect of chondroitin sulfate treatment on the symptoms of [osteoarthritis]." 9 ER 1951.

The state of the science regarding the active ingredients in Supple's fruit juice is therefore easily summarized: "[a]lthough consensus has not been reached in the clinical community regarding the efficacy of glucosamine sulfate in osteoarthritis, this is not the case for glucosamine hydrochloride. *All of the currently available clinical evidence clearly shows that glucosamine hydrochloride lacks efficacy in the treatment of osteoarthritis*." 5 ER 870. So too for chondroitin sulfate. 9 ER 1951.[5]

[5] *See, e.g.*, Vlad, et al., *Glucosamine for Pain in Osteoarthritis*, 56 ARTHRITIS & RHEUMATISM 2267 (July 2007) ("[W]e conclude that glucosamine hydrochloride has no effect on pain and that future studies of this preparation are unlikely to yield useful results.") (included in the record at 9 ER 1882); Clegg, *et al.*, *Glucosamine, Chondroitin Sulfate, and the Two in Combination for Painful Knee Osteoarthritis*, 354 NEW ENG. J. MED. 795 (Feb. 2006) (glucosamine hydrochloride does "not reduce pain") (part of the GAIT study, included in the record at 9 ER 1833); Houpt, et al., *Effect of Glucosamine Hydrochloride in the Treatment of Pain of Osteoarthritis of the Knee*, 26 J. RHEUMATOLOGY 2423 (Nov. 1999) (glucosamine hydrochloride performed no

E. Consumers cannot independently verify Supple's claims about its product's efficacy.

The foregoing discussion of sulfates and hydrochlorides, glucosamine and chondroitin, demonstrates how Supple's claims about its fruit juices can be persuasive to consumers—even when there is no scientific basis for those claims. The science behind the fruit juice's promised benefits are out of reach for most consumers. One needs to have a rather sophisticated sense of the biochemical differences between a sulfate and a hydrochloride to put a finger on the tangle of false claims that Supple advances. This dynamic—a promised benefit that is difficult or even impossible for laymen to evaluate—is a common one in the marketing and production of what economists call "credence goods." A credence good is one whose qualities are "known only through the benefits promised by the product's manufacturer and distributor at the time of purchase." *Lee v. Carter-Reed Co., LLC*, 4 A.3d 561, 526-27 (2010). When purchasing credence goods or services (such as securities, insurance, medical services, prescription drugs, or chemically-enhanced fruit juices like Supple's), a consumer has no choice but to rely on representations made by a manufacturer or service provider. *See* William A. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 284 (1987).

---

better than placebo in reducing pain) (included in the record at 9 ER 1848); R. Christensen, et al., *Superiority Trials in Osteoarthritis Using Glucosamine Hydrochloride as Comparator*, 1 O.A. ARTHRITIS 1 (Feb. 2001) ("This paper clearly illustrates the ineffectiveness of GH [glucosamine hydrochloride] in the treatment of OA [osteoarthritis]").

Unlike "search goods," such as clothing, which consumers can evaluate before making a purchase, the properties and benefits of credence goods are only knowable to consumers through manufacturer representations. As the Third Circuit observed in a case involving pills, "[b]ecause consumers cannot accurately rate the products for themselves, advertising, and the expectations [that] it engenders, becomes a significantly more influential source of consumer beliefs than it would otherwise." *Am. Home Prods. Corp. v. FTC,* 695 F.2d 681, 698 (3d Cir. 1983). Still, for all the complexities of consumer purchasing decisions, at a minimum no consumer buys a product unless and until he or she at least knows (or believes to be true) *something* about the product's properties or benefits. For this reason, credence goods place consumers at a disadvantage: If a "consumer cannot personally evaluate" goods or services, he or she will be "more vulnerable to fraud or deception." Dan L. Burk & Brett H. McDonnell, *Trademarks and the Boundaries of the Firm,* 51 Wm. & Mary L. Rev. 345, 378 (2009).

The architecture of Supple's success, then, relies on three pillars: (1) the misleading similarities in name between glucosamine sulfate (for which there is a marginal, strongly contested link to joint pain relief) and glucosamine hydrochloride (the actual ingredient in Supple's fruit juice, for which there is essentially zero such evidence); (2) the fact that Supple is selling a credence good, the quality of which can only be asserted rather than assessed prior to purchase;

and (3) the opt-out cancellation policy, supported by an aggressive telemarketing campaign aimed at those who do cancel.

Whether by infomercial, telemarketing, pyramid program, or website, Supple's message to sufferers of all kinds of joint pain—arthritis, "work-related repetitive motion or extended periods of standing, sports-related overexertion, falls, surgery, and joint problems associated with aging or activity," Supple Br. at 10—was identical: Supple's fruit juice will heal you by virtue of the presence of a hard-to-pronounce chemical compound. And the company supported the claim with a non-sequitur: Because studies have shown that a distinct chemical compound with a similarly hard-to-pronounce name can ease joint pain, our fruit juice carries the same benefits. It is this claim, presented in this way, to this class of Supple juice customers, that Cabral seeks to prove fraudulent.

II. PROCEEDINGS BELOW

A. Cabral sues Supple and the district court denies the company's motion to dismiss her amended complaint

Cabral sued Supple in state court, alleging violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act, and Supple removed the case to federal district court. Dkt. 1. After Cabral amended her complaint, Supple sought to dismiss it. 10 ER 2082; Dkt 37. The district court denied Supple's motion. Dkt. 49. Among other things, the district court rejected Supple's argument that Cabral's complaint depended on her *knowing* that the fruit

juice contained glucosamine hydrochloride while the research offered concerned only glucosamine sulfate. "Rather," the district court concluded, "the [First Amended Complaint] alleges that Supple's statements that the Beverage is composed of 'clinically proven effective ingredients' is false and misleading because Supple's purported 'clinical proof' relies exclusively on studies of glucosamine sulfate, which is not an ingredient in the Beverage." *Id.*

B. The district court certifies a class of Supple purchasers

Cabral then filed a motion seeking certification, under Federal Rule of Civil Procedure 23(b)(3), of 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 2.

On February 14, 2013, the district court certified the class. The certification order set forth the four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Because Supple conceded that it "does not contest numerosity," and because the questions as to the latter three elements were essentially identical, the district court focused on whether Cabral's interaction with Supple's advertising and use of the fruit juice was sufficiently similar to the interactions and uses of other members of the class. 1 ER 3.

The court emphasized that it was not and could not "conduct a 'mini-trial' or determine at this stage whether Cabral actually could prevail." 1 ER 2-3 (citing

Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981, 983 n.8 (9th Cir. 2011)). Instead, the district court focused on Supple's argument that "common questions of fact do not predominate because (1) the Beverage is effective and class members therefore were not misled; (2) Cabral has not demonstrated that class members were exposed to the advertisement on which she bases her claim; (3) materiality varies among class members; and (4) reliance cannot be presumed on a class-wide basis." 1 ER 3.

The district court mostly dismissed the first argument as one concerned with the merits of the underlying litigation. But it did focus on the contention that class members received the "benefit of the bargain" by virtue of the opt-out subscriptions and telemarketing strategy that targeted customers that had canceled their subscriptions. On that issue, the district court concluded, contra Supple, that "the record does not demonstrate that there are a 'substantial number of satisfied customers,'" but instead presented a triable issue that gets to the merits of customer's relationship with the company and its advertising. 1 ER 5. And as to the law, the court concluded that "[t]he truth or falsity of Supple's advertising will be determined on the basis of common proof—*i.e.*, scientific evidence that the Beverage is 'clinically proven effective' (or not)—rather than on the question whether repeat customers were satisfied or received multiple shipments of the Beverage because of automatic renewals." 1 ER 7.

The district court also dismissed Supple's argument that common issues did not predominate because of its varied advertising strategies. Finding that variety "not dispositive," the district court concluded that, whatever other benefits Supple advertised for its fruit juice, the central message, in every medium, was that Supple targeted sufferers of "arthritis, joint pain, back pain, kne[e] pain" and promised relief for that pain. 1 ER 7 (citing record evidence). "The record demonstrates that class members necessarily would have been exposed to Supple's advertising before purchasing the Beverage." 1 ER 8.

Supple also argued that not all of the company's alleged falsehoods were material to every member of the class. The district court, in dismissing this argument, concluded that the question was not, "at this stage in the litigation . . . whether the alleged misrepresentations were in fact material," but instead "whether plaintiff can use common proof to prove whether a misrepresentation or nondisclosure is material." 1 ER 9.

Finally, the district court rejected Supple's argument that Cabral failed to establish superiority because the company offered the "very relief" that Cabral seeks, namely, a full refund. The refund in question, as mentioned above, applied only for sixty-days after purchase and did not include shipping and handling. *Id.* at 10. Cabral seeks, instead, a full refund of the entire purchase for anyone who

accepted as fact Supple's many claims regarding the therapeutic benefits of its fruit juice to sufferers of joint pain and joint disease.

C. Supple files this interlocutory appeal

Supple then filed a petition for interlocutory review under Federal Rule of Civil Procedure 23(f), which was granted by a panel of this Court (*O'Scannlain, Callahan, W. Fletcher, J.J.*). Supple's petition argued that the district court abused its discretion by misreading the record evidence in two ways. *First*, it contended that the evidence indicates that many Supple purchasers "liked the product" because they effectively "placed multiple orders" by failing to cancel their automatically renewing subscriptions. Petition for Permission to Appeal at 1. *Second*, it argued that "the evidence did not support the district court's finding that the uniform 'net impression' of the ads was that Supple was 'clinically proven to treat arthritis joint pain.'" *Id.* at 2.

SUMMARY OF THE ARGUMENT

I.A. The district court did not abuse its discretion by certifying a class of consumers challenging the veracity of Supple's marketing campaign. Supple does not seriously dispute that (a) all class members were necessarily exposed to the company's advertising (because the product is not sold in stores), (b) the advertising claims that the product delivers some efficacy in alleviating joint pain, (c) the veracity of that claim can be determined on the basis of common proof, and (d) the

answer to that objective inquiry will be the same for every class member. Rule 23 demands no more.

On appeal, Supple argues that the district court abused its discretion in concluding that common issues predominate over individual issues, but it does not identify *any* legally relevant individual issues that will have to be decided in this case. Instead, Supple challenges the district court's factual findings based on claims about (a) consumers' subjective "satisfaction" with the product and (b) consumers' subjective perception of the advertising. But fraud under California's consumer laws turns entirely on whether a "reasonable" consumer would be deceived. Because that "objective" question can answered "through evidence common to the class," predominance is satisfied. *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013).

B. Supple asks this Court to set aside the district court's finding that the record does not establish a substantial number of "satisfied" Supple customers. As explained above, the finding is irrelevant: What matters is whether Supple's claims of efficacy are objectively true. In any event, Supple's anonymous testimonials are unauthenticated hearsay. At best, they would prove only that some customers "*thought* they had received a benefit," which could "very well be an indication that the fraud is succeeding." *United States v. Ciccone*, 219 F.3d 1078, 1082 (9th Cir. 2000). The same goes for evidence that consumers made repeat purchases by failing to

cancel their subscriptions. They may have continued to pay in the hopes that the drink would eventually relieve them of their joint pain, or they may have simply forgotten to cancel, or they may have experienced the placebo effect. But "allowing advertisers to rely on the placebo effect" would permit them "to fleece large numbers of consumers who, unable to evaluate the efficacy of an inherently useless product, make repeat purchases of that product." *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1100 (9th Cir. 1994).

C. Supple next complains that the district court relied on findings about the "net impression" of the company's marketing campaign rather consumers' subjective perceptions of specific statements. That argument gets things wrongs in three ways.

First, it is at odds with this Court's precedent: "[T]his Court 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]."

Second, the objective content of Supple's advertising message is a question of fact, for the merits. And because an "advertising campaign may seek to persuade by cumulative impact" rather than "a particular representation on a particular

date," *Committee on Children's Television v. General Foods*, 673 P.2d 660, 674 (Cal. 1983), "[a] solicitation may be likely to mislead by virtue of the net impression it creates." *F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006).

Third, the focus is not on whether each class member "formed her own impression of what Supple could or would do." Br. 53. Again, the inquiry under California consumer law is purely objective. Supple claims to do *something* for joint pain. The plaintiffs will show that it does nothing.

II. Finally, Supple's evidentiary objection is meritless. The district court's certification decision should not be reversed merely because it quotes two sentences from a website and an infomercial that were not viewable throughout the class period. Supple's objection just underscores its failure to grapple with Circuit precedent, under which certification is appropriate so long as Supple's advertising reflects "a common course of conduct." *In re First Alliance Mortgage*, 471 F.3d at 990-91. Because it does, the district court's decision should be affirmed.

STANDARD OF REVIEW

This Court reviews an order granting class certification for abuse of discretion and "appl[ies] a two-step test to determine whether a district court abused its discretion." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) (citing *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009)).

First, the Court "look[s] to whether the trial court identified and applied the correct legal rule to the relief requested." *Id.; see Wolin v. Jaguar Land Rover N. Am.*, LLC, 617 F.3d 1168, 1171 (9th Cir. 2010) ("Our review is limited to whether the district court correctly selected and applied Rule 23 criteria.").

Second, the Court "look[s] to whether the trial court's resolution of the motion resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Leyva*, 716 F.3d at 513. "[O]nly then [may the Court] have a definite and firm conviction that the district court … abused its discretion by making a clearly erroneous finding of fact." *Hinkson*, 585 F.3d at 1262; *see Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1018 (9th Cir. 2011) ("To the extent that a ruling on a Rule 23 requirement is supported by a finding of fact, we review that finding for clear error."). Similarly, the Court "review[s] a district court's determination of whether information is immaterial under that clearly erroneous standard." *Id.*

As to both steps, the Court's review is "deferential" because "the ultimate decision as to whether or not to certify the class … involve[s] a significant element of discretion." *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1090-92 (9th Cir. 2010). Moreover, "[w]hen reviewing a grant of class certification, [this Court] accord[s] the district court noticeably more deference than when [the Court] review[s] a denial of class certification." *Wolin*, 617 F.3d at 1171 (9th Cir. 2010).

ARGUMENT

I. The district court did not abuse its discretion in concluding that common questions predominate over individual questions.

A. The veracity of Supple's efficacy claims is a question capable of common proof, with a single answer common to the class.

Applying settled principles of class-action jurisprudence, the district court certified a class of consumers challenging the veracity of the central claim in Supple's aggressive marketing campaign: that its drink has proven efficacy in alleviating joint pain, when it fact it is no better than a placebo. Across all of its advertising—in carefully scripted television infomercials, websites, and telemarketing calls—Supple claims that the key ingredients in its drink "are clinically proven effective, produce evidence-based solutions for joint problems, and provide fast relief from joint suffering caused by ailments such as arthritis." 1 ER 2.

Because *every* class member was exposed to the company's core message that is product offers some efficacy for joint pain—and because the plaintiff's case on the merits will rise or fall on whether that claim is false—the class certification inquiry in this case is straightforward. Although Supple quibbles about the district court's findings of fact, it does not seriously dispute that (a) the record demonstrates that class members necessarily would have been exposed to Supple's advertising, (b) that advertising claims the product helps alleviate joint pain, (c) the veracity of that

claim can be determined on the basis of common proof, and (d) the answer to that objective inquiry will be the same for every class member. That should be the end of the matter.

On appeal, Supple nevertheless presses its view that the district court abused its discretion in concluding that "questions of law or fact common to class members predominate over any questions affecting only individual members," Fed. R. Civ. P. 23(b)(3). But Supple's brief never really grapples with the logic of predominance. As the Supreme Court recently made clear in rejecting a predominance-based challenge to class certification in a fraud case, "whether a statement is materially false is a question common to all class members and therefore may be resolved on a class-wide basis after certification." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1197 (2013). For this reason, "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). As Rule 23's drafters recognized, "fraud perpetrated on numerous persons by use of similar misrepresentations may be an appealing situation for a class action." Fed. R. Civ. P. 23, 1966 Adv. Comm. Notes.

Nor does Supple's brief confront this Court's most relevant precedents concerning the certification of consumer fraud class actions. "[T]his Court 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). "Confronted with a class of purchasers allegedly defrauded over a period of time by similar misrepresentations," this Court has "taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in broad outlines actionable"—an interest "not defeated by slight differences in class members' positions." *Id.* (quoting *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975)). Thus, a company is not "immune from class-wide accountability" simply because its advertising does not "consist of a specifically-worded false statement repeated to each and every [member] of the plaintiff class." *Id.* "The class action mechanism would be impotent if a defendant could escape much of his potential liability for fraud by simply altering the wording or format of his misrepresentations across the class of victims." *Id.*

Although it hangs its hat on predominance, Supple never identifies any legally relevant individual questions that will have to be decided in this case, let alone individual questions that *predominate* over common questions. Instead, Supple contends that the district court abused its discretion by (1) failing to credit Supple's evidence that some class members were "satisfied" with its product (which the company interprets as evidence that its advertising was "not false as to them") and (2) by concluding that "class members uniformly interpreted the advertisements" to make certain claims about the product's efficacy. Supple Br. 5-6.

These arguments are addressed in detail in Parts A and B below. But three overarching defects are worth highlighting at the outset. *First*, both arguments are at war with the district court's factual findings—namely, that there was *no* evidence of a substantial number of truly satisfied customers and that the overwhelming net impression of Supple's advertising is that the product will alleviate joint pain. 1 ER 5, 7-8. Supple faces the high hurdle of showing these findings to be "clear error." *Stearns v. Ticketmaster*, 655 F.3d 1013, 1018 (9th Cir. 2011).

Second, even if Supple were right on the facts, these are really arguments about the merits—about the meaning of its advertising campaign and whether its claims of efficacy are true or false—rather than class certification. Contrary to what Supple says (at 26), "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 133 S. Ct. at 1194. The merits may be considered "only to the extent" that they are "relevant to determining whether the Rule 23 prerequisites are satisfied." *Id.* And all that "Rule 23(b)(3) requires [is] a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id.* To conclude otherwise would "put the cart before the horse." *Id.*

Third, Supple's arguments are not even relevant to the merits: They focus on consumers' *subjective* perceptions (of the advertisement's meaning and the veracity of the company's efficacy claims) whereas California consumer protection law

requires a purely *objective* inquiry into whether a "reasonable" consumer, not any particular consumer, would be deceived. *See Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).[6] "[T]here is no reason to look at the circumstances of each individual purchase in this case, because the allegations of the complaint are narrowly focused on allegedly deceptive [representations] of [Supple's] own marketing … and the fact-finder need only determine whether those [representations] were capable of misleading a reasonable consumer." *Yokoyama v. Midland National Life Ins. Co.*, 594 F.3d 1087, 1089, 1094 (9th Cir. 2010). For that same reason, the Supreme Court held in *Amgen* that common questions predominated in a securities fraud class action because the central issue (materiality) was "an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor" and thus could "be proved through evidence common to the class." 133 S. Ct. at 1195.

Ultimately, "there is no risk whatever that a failure of proof on the common question … will result in individual questions predominating." *Id.* at 1196. If the

---

[6] "[R]elief under the UCL is available without individualized proof of deception, reliance and injury." *Stearns*, 655 F.3d at 1020 (quoting *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009)). Likewise, under the CLRA, "[c]ausation on a class-wide basis may be established by materiality." *Id.* at 1022 (quoting *In re Vioxx Class Cases*, 180 Cal.App.4th 116, 129 (2009)). "If the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance [under the CLRA] arises as to the class." *Id.*; *see also Mass. Mutual Life Ins. v. Superior Court*, 97 Cal.App.4th 1282, 1292–93 (2002) (causation may be satisfied if record permits "inference of common reliance" where the information "would have been material to any reasonable person").

class members fail to prove their case, that "would not cause individual reliance questions to overwhelm the questions common to the class. Instead, the failure of proof … would end the case for once and for all." *Id.* But whether they win or lose, the class members will do so together. Rule 23 requires no more. It "allows certification of classes that are fated to lose as well as classes that are sure to win." *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010). The "common issues" that must predominate under Rule 23 are those issues of fact or law "*capable* of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (emphasis added). So long as a case has the "capacity … to generate common answers apt to drive the resolution of the litigation"—so long, in other words, as the questions are capable of being resolved as to all class members "in one stroke"—both fairness and efficiency require certification of the proposed class. *Id.*

B. The district court did not abuse its discretion in rejecting Supple's customer "satisfaction" defense.

1. Supple argues (at 21-25) that the district court abused its discretion by ignoring evidence that "many class members were satisfied with Supple." This evidence comes in two categories: (1) unauthenticated, anonymous testimonials describing "positive results" with the product and (2) evidence that customers made repeat purchases, either by failing to successfully cancel their automatically renewing subscriptions or by re-subscribing after cancelling in response to telemarketing calls.

Citing this evidence, Supple asks this Court to reverse the district court's contrary finding that, "[f]actually, the record does not demonstrate that there are a substantial number of satisfied customers." 1 ER 5. To reverse the district court on this ground, Supple must show that this "factual finding … was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) (discussing standard of review in class-certification context). "[O]nly then [may this Court] have a 'definite and firm conviction' that the district court reached a conclusion that was a 'mistake' or was not among its 'permissible' options, and thus that it abused its discretion by making a clearly erroneous finding of fact." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009).

a. *Anonymous Testimonials*. Supple's only direct evidence of consumer "satisfaction" consists of anonymous testimonials describing "positive results" with the product. The district court was right not to rely on this evidence. *First*, all of these "testimonials" are unsworn, unauthenticated and completely anonymous hearsay, and are therefore inadmissible. *See* Fed. R. Evid. 801(c), 901(a). "[I]t is clear that unsworn, unauthenticated documents—let alone anonymous ones—cannot be considered." *Washington v. City of Charlotte*, 219 F. App'x 273, 277 (4th Cir. 2007); *see Orr v. Bank of Am.*, 285 F.3d 764, 774 (9th Cir. 2002).

Second, even if they were otherwise admissible, the testimonials would not show that anyone has experienced actual, medical relief from joint pain or disease (at least beyond the placebo effect) as a result of using Supple. Rather, as this Court has explained, such customer testimonials would demonstrate, at best, that some purchasers "*thought* they had received a benefit." *United States v. Ciccone* 219 F.3d 1078, 1082 (9th Cir. 2000) (emphasis in original). "For a fraud to be completely successful it is essential that it be undetected, unnoticed and for the victim to be satisfied or perhaps more appropriately, duped. Thus complimentary letters [from customers] may very well be an indication that the fraud is succeeding." *United States v. Diamond*, 430 F.2d 688, 693 (5th Cir. 1970). Hence, this Court and others have held that "it is not an abuse of discretion to exclude" evidence of the "uninformed opinion of the victims" of an alleged fraud. *Ciccone*, 219 F.3d at 1082.[7]

That approach is consistent with California consumer protection law, which requires a purely objective inquiry: the existence of fraud will turn on whether

[7] *Accord United States v. Elliott*, 62 F.3d 1304, 1308 (11th Cir. 1996), *amended by* 82 F.3d 989 (11th Cir. 1996) (trial court was correct to exclude testimonials of "satisfied" customers because proof of fraud "lies in the substance of [the defendant's] misrepresentations," not the victims' subjective perceptions); *United States v. Biesiadecki*, 933 F.2d 539, 544 (7th Cir. 1991) (customer-satisfaction evidence "improperly shift[s]" the focus from the defendants' misrepresentations to "the beliefs of the victims of the alleged scheme to defraud"); *Diamond*, 430 F.2d at 693 (upholding exclusion of "letters received by the defendants from customers indicating satisfaction"); *United States v. Woolf*, 2008 WL 5156313, at *2 (E.D. Va. 2008) ("[I]t is clear that subjective, opinion testimony by a customer about that customer's ultimate satisfaction—unlike the factual testimony about … [the veracity of the defendant's] promises … —is not relevant" in a fraud case).

Supple's representations would likely mislead a "reasonable consumer," based on all the facts and relevant scientific evidence, *Williams*, 552 F.3d at 938—not on how many of Supple's customers *believed* the company's false promises that drinking its elixir would help alleviate their joint pain. This objective approach is especially apt where, as here, "the placebo effect makes it difficult or impossible for consumers to evaluate by themselves the truth of these claims." *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994).

b. *Repeat purchases.* Supple's only other support for its claim that consumers are "satisfied" with its product is evidence that customers purchased more than one shipment of the drink—in most cases by failing to cancel their automatically renewing shipments. "These customers," Supple asserts, "would not have continued to pay for each shipment if they were not satisfied." Br. 22. Supple likewise points to customers who cancelled their subscriptions but later renewed them in response to telemarketing calls. "These lapsed customers," the company contends, "would not have chosen to re-order a product that did not work for them, even at a discounted price." Br. 23. Whether to draw such inferences is a quintessentially factual inquiry—calling for "the fact-finding tribunal's experience

with the mainsprings of human conduct"—and therefore one for which deference to the district court is at its apex. *Hinkson*, 585 F.3d at 1259-60.[8]

The district court was right to reject Supple's psychological inferences. As with testimonials, the repeat-purchaser evidence at best demonstrates that many people were fooled by Supple's fraud. They may have continued to pay for the juice in the false hope that it would deliver on its promise—that is, that it would relieve them of their joint pain. Or they may have experienced the placebo effect. But, as this Court has pointed out, "allowing advertisers to rely on the placebo effect would not only harm those individuals who were deceived; it would create a substantial economic cost as well, by allowing sellers to fleece large numbers of consumers who, unable to evaluate the efficacy of an inherently useless product, make repeat purchases of that product." *Pantron*, 33 F.3d at 1100.

Even apart from the placebo effect, it is far from "implausible" to infer that consumers allowed payments for Supple to be deducted from their credit card accounts not because they enjoyed any benefits but because they failed "to cancel the automatic shipment feature." Br. 24. Inertia is a powerful force in human

[8] Supple's evidence on this score is the declaration, filed six weeks after discovery closed, of a telemarketer named Todd Thrill, who was never disclosed as a witness in Supple's Rule 26 disclosures other otherwise. 7 ER 1510. Plaintiff, who never had a chance to depose Thrill, moved to strike his declaration. Dkt. 70. Absent justification, "[i]f a party fails to … identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that … witness to supply evidence on a motion." Fed. R. Civ. P. 37(c)(1). Even if relevant, this evidence would be improper.

nature, and companies like Supple know it. *See* Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* 85 (2008) ("If renewal is automatic, many people will subscribe, for a long time, to magazines they don't read."). Marketers use the "immense power of default options" to exploit what behavioral economists call "status quo bias." *Id.* "Those who are in charge of circulation know that when renewal is automatic, and when people have to make a phone call to cancel, the likelihood of renewal is much higher than it is when people have to indicate that they actually want to continue to receive the [product.]" *Id.* at 35. For the same reason, marketers "use money-back guarantees, test drives, thirty-day no-risk trial periods, free samples, and other marketing ploys"—all to get the product in the consumers' hands. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630, 734 (1999).

Dietary supplement manufacturers, in particular, are known to exploit these facts of human nature. *See United States v. Warshak*, 631 F.3d 266, 277 (6th Cir. 2010) (describing one such business in detail: "The 'life blood' of the business was its auto-ship program," under which "shipments and charges would continue until the customer decided to withdraw from the program, which required the customer to notify the company."). Supple's expertly designed "auto-ship" program is no exception.

2. Much of Supple's brief (at 25-40) rests on the mistaken premise that, contrary to the district court's factual finding, there is evidence of substantial numbers of "satisfied" customers. Once that premise is removed, Supple's arguments largely fall away. Thus, for example, Supple argues that if a defendant promotes a product as an effective treatment for a condition and "it was, in fact, an effective treatment for [that] condition," then a plaintiff in Cabral's position would lose. Br. 25. True enough, but the central question here is whether Supple delivers on its promised benefits. That question is *the* merits question in this case. And it is an objective one. It will be answered by common proof—"in one stroke," *Dukes*, 131 S. Ct. at 2551—and that answer will be the same across the class.

Rather than grapple with the logic of predominance, Supple offers a litany of cases in which class certification was denied on materially different facts. Br. 28, 33-35, 37-39. Thus, for example, Supple spends many pages detailing a case where the "scientific data" suggested that the product "works for some, but not work as well for others," Br. 29, another in which doctors prescribing a drug made prescription decisions based on "patient-specific factors," Br. 31-32, and a third in which the class "could include millions who were not deceived" by a relatively trivial misrepresentation concerning the type of sweetener in Diet Coke. Br. 32. None of Supple's cases—involving a range from products and services from soda and yogurt to cable television and stock trading—address the scenario at issue here,

where the plaintiff's legal theory is that the product is true snake oil; as an objective matter, it simply lacks its claimed efficacy (short of the placebo effect) as a pain reliever.

In exhaustively discussing these cases, Supple appears to be advancing some sort of disguised materiality argument: that people could have purchased Supple for reasons other than the core claims of efficacy in its advertising. But under California law, materiality turns on an objective inquiry into whether a reasonable consumer would attach importance to Supple's misrepresentations. The overwhelming focus of Supple's advertising is the company's claim that its product relieves joint pain and rebuilds joints. As the district court noted, "common sense" suggests that the alleged misrepresentation here—"practically speaking," whether the drink "would do what it was advertised to do"—"would be material not only to the reasonable purchaser but to every purchaser." 1 ER 9. At this stage of the litigation, however, it is sufficient that materiality is an "an objective" issue, "involving the significance of an omitted or misrepresented fact to a reasonable [consumer]" and thus "can be proved through evidence common to the class." *Amgen,* 133 S. Ct. at 1195; *see Mass. Mutual Life Ins.*, 97 Cal.App.4th at 1292-93.

C. The district court did not abuse its discretion in concluding that Supple's allegedly false advertising formed a sufficiently common course of conduct to warrant class treatment.

In addition to its "satisfied customer" defense, Supple (at 40-55) argues that

"the district court abused its discretion in interpreting the purported meaning of various individual statements and crystalizing them into a 'uniform' representation." Br. 40 (capitalization omitted). Supple's argument conflates three distinct issues:

(a) whether, as a legal matter, Supple's course of conduct was sufficiently uniform across the class to warrant class treatment of the fraud claims—*i.e.*, whether common issues predominate over individual issues;

(b) what message, as a factual matter, Supple's advertising would objectively have conveyed to a reasonable consumer;

(c) what individual consumers might have subjectively understood Supple's advertising to convey.

The first issue is what matters for class certification. The second issue is an essential component of the plaintiff's case on the merits. And the third is irrelevant as a matter of law. We take each issue in turn.

First, the district court correctly concluded that Supple's advertising formed a sufficiently common course of conduct to warrant class treatment, which is what matters for purposes of Rule 23. *Every* class member was exposed to Supple's claims about the drink's efficacy and, despite Supple's lengthy hairsplitting about the wording and meaning of its representations, the company cannot deny that reality: the message is on the juice can itself. As the district court found, (1) "[t]he record demonstrates that class members necessarily would have been exposed" to these claims of efficacy, (2) "[t]he truth or falsity of Supple's advertising will be

determined on the basis of common proof," and (3) the answer to that question will be the same for every class member. 1 ER 8.

Supple's contrary argument—that it does not matter "whether every consumer was exposed" to a common course of advertising, but only whether they were exposed to specific, explicit wording found in specific ads (Br. 41)—gets things exactly backwards, and is foreclosed by Ninth Circuit precedent. As noted above, "this Court 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 at 990-91. To accept Supple's argument would require reversing this Court's holding that a company may not render itself "immune from class-wide accountability … by simply altering the wording or format of his misrepresentations across the class of victims." *Id.*

If this Court's "common course of conduct" rule compels certification even in cases like *First Alliance Mortgage*, where the defendant made individual oral sales pitches that shared a family resemblance, then it *a fortiori* compels certification here. *See Jenson v. Fiserv Trust Co.*, 256 F. App'x 924, 926 (9th Cir. 2007) (applying *First Alliance* and rejecting argument that "a fraud case involving materially differing oral representations is not amenable to class treatment" because, there, "the 'center of gravity' of the fraud predominate[d] over details of individual communications"). In fact, the record shows that Peter Apatow personally exercised strict control of

marketing to ensure a consistent message to consumers. *See*, *e.g.*, 8 ER 1658 (email from Apatow: "Affiliates have to stay strictly within our approved marketing literature and CAN NOT change the language we use or the statements we use to market [S]upple."). Apatow also testified that the "language" on Supple's packaging has been "consistent" throughout the class period: it has always claimed that Supple will "comfort, lubricate, and rebuild your joints." 8 ER 1566-67 ("There's only been a handful of variations," such as the color scheme.).

Either way, what really matters here—and what Supple conspicuously does not deny—is that the company claims, both explicitly and implicitly, that its product *does something* to alleviate joint pain. The plaintiff's theory of the case does not turn on the subtleties of that message; rather, the theory is that Supple is no better than placebo. For purposes of predominance, then, it makes little difference whether Supple's deceptions vary. "A corporate defendant engaged in a marketing scheme founded on a multiplicity of deceptions should not be in a better position in fending off a motion for class certification than a defendant engaged in a sole marketing deception." *Lee v. Carter-Reed Co., L.L.C.*, 4 A.3d 561, 580 (N.J. 2010). All that matters is whether Supple's "promised benefits" are, as plaintiffs allege, "based on untruths and disseminated through false advertising, whatever the medium." *Id.* That allegation is capable of common proof.

Second, the precise *content* of the message conveyed to the reasonable consumer about Supple's efficacy is a question of fact that must be decided on the merits, as Supple acknowledges. Supple Br. 43 (citing *Williams*, 552 F.3d 934). But Supple is wrong to fault the district court for viewing the advertising in terms of its "net impression." Because an "advertising campaign may seek to persuade by cumulative impact, not by a particular representation on a particular date," California law has long recognized that a fraud claim may rest on the campaign as a whole rather than specific wording. *Committee on Children's Television, Inc. v. General Foods*, 673 P.2d 660, 674 (Cal. 1983); *see also In re Tobacco II Cases*, 207 P.3d 20, 39-41 (Cal. 2009) ("[W]here, as here, a plaintiff alleges exposure to a long-term advertising campaign," she "is not required to plead [misrepresentation] with an unrealistic degree of specificity."); *Fuhrman v. Am. Nat. Bldg. & Loan Ass'n*, 14 P.2d 601, 605 (Cal. Ct. App. 1932) ("[E]quivocal meanings … do not mitigate the offense of allowing false or deceptive statements to be made; the true test … being the impression created by the … advertising literature as a whole.").

This Court's precedents, too, recognize that "[a] solicitation may be likely to mislead by virtue of the net impression it creates." *F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006). The cases emphasize that "the tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases." *Beneficial Corp. v. FTC*, 542 F.2d 611, 616

(3d Cir. 1976); *Nat'l Bakers Servs. v. F.T.C.*, 329 F.2d 365, 367 (7th Cir. 1964) ("The important criterion in determining the meaning of an advertisement is the net impression that it is likely to make on the general populace.").

Although Supple's position has evolved in this litigation, the company was initially quite forthright about the intended "net impression" of its advertising: Supple admitted that "Supple bases all of its advertising claims regarding the effectiveness of the main ingredients in the Supple Beverage on [what the company claims are] overwhelming scientific studies and clinical data." 10 ER 2132 ("The Supple Beverage Effectively Treats Osteoarthritis.") (letter from Supple's counsel). To be sure, Supple is always careful to include a standard disclosure—"This product is not intended to diagnose, cure or prevent any disease"—but the advertising campaign's deceptive "net impression" cannot be cured by the presence of such contrary "disclosures." *Cyberspace.Com LLC*, 453 F.3d at 1200.

Third, Supple faults us for failing to present evidence of the class members' subjective perceptions of the company's advertising campaign. Br. 43-53 (citing cases involving breakfast cereal, cigarettes, mouthwash, washing machines, used cars, gambling, and shock treatment). "Each class member," Supple reasons, "necessarily formed her own impression of what Supple could or would do." Br. 53. But, once again, the test for misrepresentation under California law is objective, not subjective, so "there is no reason to look at the circumstances of each individual

purchase in this case." *Yokoyama*, 594 F.3d at 1094. Rather, the question on the merits will be whether Supple's representations "were capable of misleading a reasonable consumer." *Id.*

II. The district court did not abuse its discretion in rejecting Supple's evidentiary objections.

Supple's final argument resurrects an evidentiary objection the company made in the district court. It complains that the court ran afoul of Federal Rule of Evidence 401, concerning relevance, by quoting two sentences as representative of the "net impression" of Supple's overall advertising campaign. These sentences, Supple contends, came from a version of the company's website and an infomercial that were not viewable throughout the class period. Br. 56-59. Supple asks this Court to overturn the entire class-certification order on this basis.

But this Court "review[s] a district court's determination of whether information is immaterial under th[e] clearly erroneous standard," *Stearns*, 655 F.3d at 1018, "and the appellant is additionally required to establish that the error was prejudicial." *Tritchler v. Cnty. of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004). Supple's objection fails that test. The district court was not purporting to quote "specifically-worded false statement[s] repeated to each and every [member] of the plaintiff class," but was rather quoting the statements as representative of Supple's "common course of conduct," *In re First Alliance Mortg.*, 471 F.3d at 990-91—namely, promoting its special fruit juice as effective in relieving joint pain.

Subtracting these sentences from the district court's decision would not alter the overwhelming net impression—which this Court can see for itself throughout the record—that Supple pushes its product based on the promise of therapeutic benefits. Whether that promise is true or false must be left for the merits.

CONCLUSION

The judgment of the district court should be affirmed, and the case should be remanded for further proceedings on the merits.

Respectfully submitted,

/s/ Deepak Gupta

Deepak Gupta
Peter Conti-Brown
GUPTA BECK PLLC
1625 Massachusetts Avenue, NW
Washington, DC 20036
(202) 888-1741

Counsel for Plaintiff-Appellee

Gillian Wade
MILSTEIN ADELMAN LLP
2800 Donald Douglas Loop North
Santa Monica, CA 90405
(310) 396-9600

January 15, 2014

STATEMENT OF RELATED CASES UNDER CIRCUIT RULE 28-2.6

Counsel for Plaintiff-Appellee are unaware of any related cases in this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify that my word processing program, Microsoft Word, counted 11,824 words in the foregoing Brief for Plaintiff-Appellee exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

January 15, 2014 *⁄s⁄ Deepak Gupta*

Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2014, I electronically filed the foregoing Brief for Plaintiff-Appellee with the Clerk of the Court of the U.S. 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.

⁄s⁄ Deepak Gupta

Deepak Gupta