

No. 13-55943

**In the United States Court of Appeals
for the Ninth Circuit**

ARLEEN CABRAL, et al.,
individually and on behalf of all others similarly situated,
Plaintiff-Appellee,

v.

SUPPLE, LLC,
Defendant-Appellant.

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

BRIEF AMICUS CURIAE OF AARP
IN SUPPORT OF PLAINTIFF-APPELLEE

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CORPORATE DISCLOSURE STATEMENT OF AARP

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, Experience Corps, d/b/a, AARP Experience Corps, AARP Insurance Plan, also known as the AARP Health Trust, and AARP Financial.

AARP has no parent corporation, nor has it issued shares or securities.

January 22, 2014

Respectfully Submitted

/s/Julie Nepveu

Julie Nepveu

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STATEMENT OF AARP'S INTEREST¹

On an hourly basis, older people are bombarded with deceptive advertisements for dietary supplements and other products that falsely promise to end their pain, cure their ills, or make them healthier. Unscrupulous businesses that make false claims about purported health benefits—designed to appeal to Americans' desire to live healthier lives—are not in the health business, they are in the fraud business. They lure and trick people into parting with their hard-earned cash, without regard for their health or safety. Instead of making lives better, these modern day snake-oil salesmen make false health-benefit promises that injure society's most vulnerable members. They erode people's financial security and may directly injure, or indirectly endanger, the health and well-being of people who delay or forgo treatments that would actually help them.

Marketing trends that “capitalize” on the burgeoning population of older people are well-established. In the dietary supplement industry in particular, marketing to older people is exceptionally lucrative, but is still considered a largely untapped opportunity. Older people often have multiple chronic health conditions, increasingly live longer lives, and are anxious to resist the effects of aging. AARP

¹ Pursuant to F. R. A. P. 29(c)(5), AARP states that this brief was not authored in whole or in part by any party or its counsel, and that no person other than AARP, its members, or its counsel contributed any money that was intended to fund the preparation and submission of this brief.

works to ensure that unscrupulous businesses do not profit from making false health-benefit claims that exploit and manipulate older people, putting them at an increased risk of harm.

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families—such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. As the leading organization representing the interests of people aged fifty and older, AARP is greatly concerned about marketing, like that alleged to be false in this case, which promises purported health benefits that it can't deliver. AARP's participation in this case will assist the Court in resolving the issues on appeal.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The district court properly certified the class in this case based on evidence that Supple promoted its beverage—containing glucosamine hydrochloride rather than glucosamine sulfate—as being “effective” in relieving joint pain caused by arthritis. *See* Cabral Br. at 11. Supple's reasons for challenging class certification, if accepted, would vitiate private enforcement of laws prohibiting the promotion of products based on false and deceptive health-benefit promises. Supple's arguments—that the court should have considered only express statements, viewed

in isolation rather than as part of the whole advertisement, and that repeat or satisfied purchasers prevent class certification—should be rejected because they are inconsistent with the law and reality. Imposing such legal constraints would open the floodgates to marketing fraud specifically designed to profit by subterfuge, sleight of hand, and intentional confusion. The most successful frauds—those that dupe the most people in the most deceptive ways—would be the hardest to remedy.

Simply put, businesses are not permitted to trick people into purchasing products that will not deliver the purported health benefits promised. “[A]ccurate and truthful” information about dietary supplements “allows individuals to make informed decisions, and it preserves the overall integrity of our marketplace.” *Advertising Trends And Consumer Protection, Subcomm. on Cons. Prot., Product Safety and Insur., Comm. on Commerce, Science, and Transp.* (July 22, 2009) (hereinafter “*Advertising Trends And Consumer Protection*”) (Stmt. of Sen. Pryor). Where “dishonest companies insist on bogus claims about their products,” enforcement is “essential”. *Id.*

Importantly, the integrity of dietary supplement information in the marketplace directly impacts people’s health and safety. According to the F.T.C., “claims that [] products actually can prevent, treat, or cure diseases . . . place consumers at great risk, putting their faith in unproven remedies in lieu of getting

established therapies.” *Advertising Trends And Consumer Protection* (testimony of David Vladek, Director, Bureau of Consumer Protection) (hereinafter “*Advertising Trends And Consumer Protection* (testimony of David Vladek)”). “Those who succeed in selling products based on fear or unsubstantiated claims that they will treat or cure serious diseases prey on the fear and desperation of the sick, the elderly, or those without the means to afford conventional medical care.” *Id.*

This raises significant concerns particular to the dietary supplement industry. Many people who use dietary supplements incorrectly assume that products being sold in the United States are regulated and have been tested for safety. They are not. Safety concerns about unregulated supplements typically are revealed only after large numbers of people are injured from using the product. *See* Eskin, Sandra, *Dietary Supplements and Older Consumers*, Data Digest #6, AARP Public Policy Institute (Dec. 2001). Unfortunately, “marketers of dietary supplements and other products have become very bold in the medical-benefit claims they are making to sell their goods. Many are going far beyond the basic structure/function claims that are permitted under the Dietary Supplement Health and Education Act.”² *Advertising Trends And Consumer Protection* (Prepared Statement of

² “Structure/function” claims are representations about a dietary supplement’s effect on the structure or function of the body for maintenance of good health and nutrition. These claims are not subject to pre-authorization by the Food and Drug Administration.

Federal Trade Commission) (hereinafter “*Advertising Trends And Consumer Protection*, F.T.C. Prepared Statement”) (citing Dietary Supplement Health and Education Act of 1994, Pub. L. No. 103-417, 108 Stat. 4325).

The district court did not abuse its discretion in rejecting Supple’s argument that class certification is improper in this case. Class issues predominate because the “[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.” Order at 5. The court properly found that the purported evidence of satisfaction—which the court properly rejected—does not show that “most, if not all, of the potential class members have no claims to be asserted by the class representatives.” Order at 5 (citations omitted in original) (citing *Joseph v. Gen. Motors Corp.*, 109 F.R.D. 635 (D. Colo. 1986) (cited in 6 William B. Rubenstein, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 21:32 n.3 (4th ed. 2012))).

Supple’s use of testimonials and news-style infomercials served to bolster the credibility of Supple’s purported health-benefit claims. Such methods are particularly effective at reaching older people, who spend more time than any other segment of the population watching TV. Bureau of Labor Statistics, *American*

Time Use Survey, available at <http://www.bls.gov/tus/charts/chart10.pdf> (reporting in 2012, people over age 75 spent, on average, 4.2 hours per day watching TV compared to the national average of 2.3 hours for all ages). Supple's tightly-scripted telephone sales pitches and outbound telemarketing scheme further exploited the vulnerabilities of older people to such marketing and sales schemes, allowing Supple to capitalize on its purported health-benefit claims. The increasingly sophisticated slew of bogus health claims delivered by increasingly sophisticated marketing and sales strategies should not immunize lawbreakers who seek to profit by making false health-benefit claims that prey on the vulnerabilities of older people. *See In re First Alliance Mortgage Co.*, 471 F.3d 977, 992 (9th Cir. 2006) ("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.").

Older people in particular are vulnerable to the harm caused by false health-benefit claims, such as the false claims allegedly made by Supple, because the prevalence and debilitating impact of joint pain caused by arthritis and other conditions increases significantly with advancing age. The health, social, emotional, and financial impacts of arthritis can be devastating. People who suffer from the debilitating pain and limitations caused by arthritic conditions may be desperate to believe marketer's claims, such as those made by Supple's

advertising, that a “tasty liquid delivery system” can safely and effectively relieve all their suffering. Supple Br. at 27. Snake-oil salesmen should not be able to avoid liability for their false health-benefit claims merely because their sales methods are exceptionally successful at confusing and defrauding the most vulnerable members of society.

This Court should affirm the class certification order in this case to protect against false health-benefit claims that prey upon the vulnerabilities of older people.

ARGUMENT

I. MARKETING AND SALES TECHNIQUES USED TO DECEIVE AND TRAP OLDER PEOPLE VULNERABLE TO FALSE HEALTH-BENEFIT CLAIMS DO NOT DEFEAT CLASS CERTIFICATION.

The promotion of dietary supplements through objectively false health-benefit claims drains millions of dollars annually from the pockets of Americans who are vulnerable specifically because of their interest in living a healthy lifestyle. *Advertising Trends And Consumer Protection*, F.T.C. Prepared Statement. The district court properly certified a class to challenge Supple’s marketing claims that its “key ingredients—*i.e.*, glucosamine hydrochloride and chondroitin sulfate—are clinically proven effective, produce evidence-based solutions for joint problems, and provide fast relief from joint suffering caused by ailments such as arthritis.” Order at 2. *See* Order at 8 (citing *Johns v. Bayer Corp.*,

280 F.R.D. 551, 558 (S.D. Cal. 2012) (“[W]hen plaintiffs are exposed to a common advertising campaign, common issues predominate.”). The fact that a particular marketing strategy is successful—i.e., that some purchasers do not realize that they have been duped—does not and should not preclude class certification. *See* Cabral Br. at 38 (citing *United States v. Diamond*, 430 F.2d 688, 693 (5th Cir. 1970) (“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.”)).

Supple’s arguments, if accepted, would grant unscrupulous businesses virtual immunity from private enforcement for making false health-benefit claims. Older people are regularly bombarded by advertising messages couched in creative and sophisticated formats, like those used by Supple and many others, which deceive people into believing that purported health-benefit claims are true. It is difficult for people to discern whether such claims *objectively* are true because, as Supple is accused of doing, marketers present complex scientific information in a deceptive and confusing manner, and then support misimpressions they create with expertly crafted telemarketing sales pitches. Using the power of status quo bias, they use automated shipping and billing sales practices to trap people into making multiple purchases *without people making any subjective judgment* about the

product.³ *See* Cabral Br. at 13. Thus, the court did not abuse its discretion in declining to infer that making repeat purchases of Supple is evidence of satisfaction that raises individual issues to defeat class certification.

Moreover, even if people believed they were duped, Supple made it difficult for them to cancel their automated shipments and targeted outbound telemarketing sales pitches at them to try to get them to reenroll. This Court should not establish a rule that precludes class certification where, as here, a common marketing scheme for a product whose efficacy is difficult to judge *subjectively* because of the placebo effect, and individual issues, if any, are inherent features of the overall scam.⁴ *See* Cabral Br. at 28 (arguing “allowing advertisers to rely on the placebo

³ Status quo bias is the tendency, recognized by behavioral economics, “that human beings are creatures of habit—we tend to stick with what we have even if that doesn’t make sense. . . . the status quo bias can also play a role in the world of marketing, as companies have learned to their chagrin when they radically redesign packaging or ingredients of popular products: consumers will often refuse to buy the product, simply because of the new packaging.” *Behavioral Economics: Observations Regarding Issues That Lie Ahead*, Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, before the Vienna Competition Conference, Vienna, Austria (June 9, 2010), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/behavioral-economics-observations-regarding-issues-lie-ahead/100609_viennaremarks.pdf.

⁴ The National Center for Complementary and Alternative Medicine defines the placebo effect as “a beneficial health outcome resulting from a person's anticipation that an intervention—pill, procedure, or injection, for example—will help them. A clinician's style in interacting with patients also may bring about a positive response that is independent of any specific treatment.” *See* <http://nccam.nih.gov/health/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)).

A. The District Court Correctly Found That Ostensibly Individual Issues Do Not Predominate.

As Cabral rightly argues, the district court did not abuse its discretion in finding that the objective classwide issue—whether the health-benefit claims Supple made in promoting the beverage are false—predominates over any ostensibly individual issues. *See Cabral Br.* at 33-34. If plaintiffs are ultimately successful in proving on the merits that the health-benefit claims made by Supple are false, then none of the purchasers—satisfied or not—received the benefit of the bargain and they have claims that may be represented by the class representative. The district court correctly found that the class may include people, at this stage, who “d[o] not perceive” that Supple does not live up to its advertising claims. *Galvan v. KDI Distrib. Inc.*, No. SACV 08-0999-JVS (ANx), 2011 WL 5116585, at *5 (C.D. Cal. Oct. 25, 2011) (“In this case, the class definition may include individuals who did not perceive that they were short changed . . . individuals who do not wish to pursue action, and individuals that have inadequate proof to go forward with the class. . . . these ascertainability issues are not fatal to class certification and may be addressed later in the litigation.”); *see Cabral Br.* at 38.

B. Evidence Of Repeat Purchases Does Not Indicate Satisfaction Or Preclude Class Certification.

It was not an abuse of discretion for the district court to refuse to draw the “arguable” inference that repeat purchases demonstrate customer satisfaction. As Cabral aptly argues, individual issues do not predominate under California law that prohibits objectively false health-benefit claims. *See Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1146 (2001). In making its finding that class issues predominate, the court considered evidence that the sales practices used by Supple made it difficult for class members to avoid making multiple purchases. Marketing and sales mechanisms that automatically result in repeat purchases, such as those used by Supple, do not depend on a person’s subjective satisfaction. In fact, they are designed expressly to remove subjective satisfaction from the sales equation, because inertia can be a significant barrier to sales. As recognized by the district court, repeat purchases in this case do not give rise to individual issues that defeat class certification.

After being exposed to Supple’s uniform television and internet promotions, as fully described by Cabral in its brief, class members were required to enroll in Supple’s automated shipping and billing subscription service upon making their first purchase. This automated service enabled Supple to bill people \$114 for recurring shipments, whether or not they were satisfied with the product. Contrary to Supple’s argument, the success of its automated billing mechanism in fact

eliminates any claim that repeat purchases were motivated by subjective satisfaction and should not defeat class certification. Marketers and economists have long recognized that sales are greatly enhanced by such automatic renewals compared to those that require customers to take affirmative action to make a repeat purchase. *See* Cabral Br. at 40-41; F.T.C., Report, “*Negative Options*” (Jan. 2009), *available at* <http://www.ftc.gov/os/2009/02/P064202negativeoptionreport.pdf>. Thus, repeat purchases do not indicate subjective satisfaction: they are simply the primary goal and inexorable outcome of instituting an automatic billing mechanism. *Id.*

To avoid being billed for recurring shipments of Supple, people had to affirmatively cancel their subscription. But evidence indicates people who tried to cancel met with Supple’s carefully-scripted sales pitches that encouraged them to try to product for a longer period of time to realize the purported health benefits. *See* Cabral Br. at 45 (citing testimony that “[a]ffiliates 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.”). Those who sought to take advantage of the 60 day money-back guarantee were similarly dissuaded from cancelling pursuant to Supple’s telephone sales scripts. People who attempted to cancel but were unsuccessful were automatically billed for additional shipments. *Id.*, at 40-41. If purchasers succeeded in cancelling their subscriptions or their payment

information lapsed, Supple initiated outbound telemarketing calls to encourage them to reenroll in the automatic billing and shipping subscription.

Susceptibility to particular marketing and sales practices should not be mistaken for satisfaction. Older people are known to be particularly vulnerable to telemarketing sales pitches, like those employed by Supple to reenroll them. *See Off The Hook: Reducing Participation in Telemarketing Fraud*, AARP Foundation, A-18 (2003), available at http://assets.aarp.org/rgcenter/consume/d17812_fraud.pdf. Traits that make older people vulnerable to telemarketing fraud may include:

- Mild cognitive impairment;
- Social isolation, boredom, loneliness;
- Enjoyment of the attention and perceived companionship of telemarketers;
- Socialization to be trusting, polite, not to lie, and to expect the same from others (including telemarketers and law enforcement personnel);
- Respect for authority;
- Distrust of the government;
- Desire to keep financial activities hidden from scrutiny by family members or government agencies;
- Resentment of anyone questioning their behavior; Need not to appear foolish or stupid;
- Need for financial security.

Id., at A-21.

Moreover, Supple's argument that the failure of class members to cancel their automatic subscription cannot be considered evidence of dissatisfaction is irrelevant. A plaintiff challenging false advertising is not required to show that class members were *subjectively* dissatisfied. Plaintiffs must show, on the merits,

only that Supple's health-benefit claims were *objectively* false. *See* Cabral Br. at 39. Accepting Supple's argument would give advertisers a new form of "satisfied-customer immunity" not available under California false advertising law. It would encourage unscrupulous businesses to establish automatic billing practices expressly to avoid liability for a wide variety of marketing scams. Scammers who make money by luring victims into revealing their bank account numbers, then debiting their accounts on an ongoing basis for products or services of little or no value, would always be able to defeat class certification.

C. Clever Advertisers Should Not Avoid Liability For False Health-Benefit Promises Simply Because They Create Confusion.

The legitimate goal of laws preventing false advertising is to avoid confusing, inaccurate information in the marketplace. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 593 (1980). Supple argues that the district court's "net impression" finding should be reversed because Supple advertisements varied and the evidence does not permit a finding that every purchaser was exposed to an express claim, evaluated in isolation through extrinsic evidence, that Supple is "clinically proven effective to treat arthritis." This Court should reject Supple's arguments, which are not consistent with the law or reality. The court properly found that "[u]nder the facts of this case, the question is whether a reasonable person contemplating purchase of the Beverage would attach

importance to Supple’s alleged misrepresentation—*i.e.*, that the Beverage is clinically proven effective for the treatment of joint pain.” Order at 9.

Supple’s assertion on appeal that extrinsic evidence is necessary to establish the net impression a reasonable person would take away from an ad is wrong. “[W]hen confronted with claims that are implied” yet “reasonably clear from the face of the advertisement” “extrinsic evidence is unnecessary.” *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 319-20 (1992), cert. denied, 507 U.S. 909 (1993) (citations omitted); *F.T.C. v. QT, Inc.*, 448 F. Supp. 2d 908, 958 (N.D. Ill. 2006) *aff’d*, 512 F.3d 858 (7th Cir. 2008) (“the Court looks to the overall, net impression made by the advertisement to determine whether the net impression is such that the ads would be likely to mislead reasonable consumers”). *See Cabral Br.* at 35.

Also contrary to Supple’s argument, courts are not constrained to consider only express statements made in an advertisement. There is no “loophole” for claims that are “implied, not express.” *F.T.C. v. Figgie Int’l, Inc.*, 994 F.2d 595, 603-04 (9th Cir. 1993) (finding that defendant “misled customers about the single most useful piece of information they could have used”) (quotation and citation omitted). Regulation of commercial “speech” captures verbal and visual advertising messages alike. Otherwise, society “would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means

other than, or in addition to, spoken words.” *Am. Home Prods. Corp. v. F.T.C.*, 695 F.2d 681, 688 (3d Cir. 1982).

The law is clear that a facial analysis must consider the advertisement as a whole “without emphasizing isolated words or phrases apart from their context[.]” *Removatron Int’l Corp. v. F.T.C.*, 884 F.2d 1489, 1496 (1st Cir. 1989) (quoting *Am. Home Prods. Corp. v. F.T.C.*, 695 F.2d 681, 687 (3d Cir. 1982)); *F.T.C. v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) (explaining “[t]he entire mosaic should be viewed rather than each tile separately”). The district court’s “net impression”—that Supple’s common advertising scheme claimed that Supple is “clinically proven effective for the treatment of joint pain”—should be affirmed. Order at 9.

Considering the net impression of an advertisement is particularly important because advertising is increasingly sophisticated and effective at conveying messages without explicit statements. See McQuarrie, Edward F. & Phillips, Barbara J., *It's Not Your Father's Magazine Ad: Magnitude and Direction of Recent Changes in Advertising Style*, 37 J. Advertising 95, 99 (2008) (finding a dramatic reversal from text-dominated to picture-dominated magazine ads occurring between the mid-1990s and 2002). Every element is designed to bolster the desired net impression. Indeed, the more clever the ad, the better it captures a viewer’s attention and the more successful it is. Because the mode of transmitting

messaging is so integral to the message, the F.T.C. is alert to scams that “are marketed through so-called ‘infomercials’ or ... fake news broadcasts.” *Advertising Trends And Consumer Protection* (testimony of David Vladek). According to the F.T.C., such presentations can be particularly effective at deceiving people because “[i]t is not often clear to viewers that what they are watching is a very long sales pitch and not an independent television program about an amazing breakthrough new technology.” *Id.*

The health-benefit claims challenged as false in this case are not unlike the myriad fraudulent pitches hurled at older people every day. Such fraud involves the “deliberate deception of an individual with the promise of goods, services or other financial benefits that are actually nonexistent, were never intended to be provided, or were grossly misrepresented.” Deevy, *et al.*, *Scams, Schemes and Swindles*, Fin. Fraud Research Center, 6 (2012), available at <http://fraudresearchcenter.org/wp-content/uploads/2012/11/Scams-Schemes-Swindles-FINAL-On-Website.pdf> (quoting Titus, *et al.*, *Victimization of Persons by Fraud*, Crime & Delinquency, Vol. 41, No. 1, 54–72 (1995)). The F.T.C. has recognized that “monitoring and pursuing false and deceptive advertising claims has grown more daunting and more complex over the past few decades. It will only grow more complicated as new technologies give marketers more tools, and more sophisticated tools, to sell their products.” *Advertising Trends And Consumer Protection* (testimony of David

Vladek). Because resources for government enforcement to prevent injuries from untested dietary supplements and other frauds are completely inadequate, private enforcement is increasingly necessary to protect the public from harm. *See id.*

Supple's efficacy claims are clearly juxtaposed with specific disease-treatment or prevention claims. These claims are logically connected through the associated explanatory text, imagery, and references to diseases or medical conditions. Indeed, Supple urges this Court to slice hairs more finely than any reasonable person would in arguing it "promoted a variety of qualities other than joint discomfort relief, such as: preservation of joint health; and relief from bone, back, muscle, weakness, and fatigue problems. All of these are unrelated to efficacy for treating joint discomfort" Supple Br. at 27. Supple's "fake" news-format styled infomercial bolstered the appearance that Supple's claims were scientifically proven. *See Cabral Br. at 7.* Its testimonials implied that other people could expect typical results. *See Guides Concerning Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255.2 (ads with endorsements will likely be interpreted as conveying that the endorser's experience is representative of what consumers will generally achieve, even when they include disclaimers such as "Results not typical" and "These testimonials are based on the experiences of a few people and you are not likely to have similar results").

Advertisers often misuse scientific studies in confusing ways to promote their products. Advertisers may present “only select portions of scientific studies that benefit them” even where the ultimate conclusions of the studies contradict their purported health-benefit claims. *Does the Evidence Make a Difference in Consumer Behavior? Sales of Supplements Before and After Publication of Negative Research Results*, J Gen Intern Med, Sept. 2008; 23(9): 1495–1498, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2518024/> (hereinafter “*Does The Evidence Make A Difference*”). Such tactics send deceptive mixed messages at best and engender confusion on the predominant material question of whether the product will work as promised.

The evidence showed that Supple used this tactic in its advertising. The GAIT study, described in Cabral’s brief at 17, provided equivocal and highly contested support for the proposition that glucosamine sulfate might, under certain circumstances, be effective at treating arthritis. Supple highlighted the secondary outcomes of the trial showing benefit from a different but similar sounding compound, *even though glucosamine sulfate is not an ingredient in Supple*. Supple excluded reference to primary study results showing that the ingredient actually used in Supple—glucosamine hydrochloride—is no more effective than a placebo. Supple’s advertising used confusing and irrelevant scientific evidence to bolster

sales. It should not be heard to complain that class certification is improper on that same basis.

Similarly, marketers often seek to avoid liability by making ineffective disclaimers about false or deceptive health-benefit claims. The use of clear disclaimers are required if they are necessary to prevent a representation from being deceptive. *See, e.g., F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1101 (9th Cir. 1994). But F.T.C. “research and law enforcement efforts [show] that so-called disclaimers of typicality are not effective in preventing consumer deception. Consumers generally believe that they, too, will be able to achieve the dramatic, but atypical, results depicted.” Thus, even express disclaimers are often “unlikely to cure the deception.” *Advertising Trends And Consumer Protection* (testimony of David Vladek); F.T.C. Report, *Many Consumers Believe “Up To” Claims Promise Maximum Results* (June 2012), available at <http://www.ftc.gov/opa/2012/06/uptoclaims.shtm> (when marketers use the phrase “up to” in their ads, such as making a claim that consumers will save “up to 47%” in energy costs by purchasing replacement windows, the qualifier does not affect consumers’ overall takeaway that the percentage savings depicted is typical of what they can expect to achieve).

Thus, consumers face persistent challenges in interpreting marketing messages that are confusing, self-contradictory, or that imply support of their

claims with clinical proof. The district court correctly found that “a false or misleading advertising campaign need not ‘consist of a specifically-worded false statement repeated to each and every [member] of the plaintiff class.’” Order at 8 (citing *In re First Alliance Mortgage Co.*, 471 F.3d 977, 992 (9th Cir. 2006)). The court aptly recognized that “[t]he 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.” Order at 8 (quoting *In re First Alliance Mortgage Co.*, 471 F.3d at 992).

This Court should not adopt Supple’s arguments because they would lead to absurd and harmful results. In particular, they would permit advertisers to make vague or confusing claims that reasonable consumers would believe to be true, but that rely on the confusion and sleight of hand inherent in such ads to avoid liability for false claims.

D. Background Beliefs And Doctor Recommendations Do Not Provide A “Clean Slate” Defense For Making False Health-Benefit Claims.

As discussed above and in Cabral’s brief, Supple’s marketing depends heavily upon people being unable to perceive the significance of the difference between glucosamine sulfate and glucosamine hydrochloride. Supple incorrectly asserts that individual issues defeat certification because consumers have background beliefs—equivocal at best and pertinent only to glucosamine sulfate—

that “glucosamine” may provide some health benefits. Additionally, doctors sometimes recommend supplements containing ingredients like those in Supple. Ironically, Supple’s assertion that such background beliefs provide it a safe harbor for making false health-benefit claims relies on this Court falling prey to the same fallacy that makes their marketing deceptive for its target market. It also illuminates the pernicious impact that false health-benefit claims can have: even doctors may be hoodwinked by hype and sleight of hand that marketers use to promote their products.

Even if background beliefs about a particular product provided some sort of safe harbor—which it does not—it would not provide Supple a defense, because Supple does not contain the ingredient which gave rise to the legitimacy of any background beliefs. Moreover, general recommendations by doctors to patients to try a product that contains glucosamine does not relieve Supple of liability for making an allegedly false representation that Supple is clinically proven effective at treating joint pain. Regardless of what other advertisers have represented about glucosamine, Supple is responsible for the health-benefit claims it makes about Supple.

The logical conclusion to Supple’s background belief and doctor-recommendation arguments is that plaintiffs would be required to prove not only that an advertisement is false, but that no other advertising or recommendation for

its product or any similar product influenced their purchasing decision. To succeed on the merits, although not at the class certification stage, class plaintiffs are required to prove that the health-benefit claims they challenge are materially false. They are not also required to prove that the challenged marketing is the sole source of such false health-benefit claims.

Moreover, Supple's "clean slate" argument, if adopted, would place a higher burden on challenges to false health-benefit claims with a long history of duping people or that capitalize on confusion in the marketplace than applies to false claims that are less well accepted or less apt to confuse people. This is not and should not be the law. No "clean slate" safe harbor exists—and one should not be superimposed—for marketers huddled in a pit full of snake oil salesmen.

Most likely, sales of Supple were enhanced because of the advertising success of its predecessors and competitors. Advertising campaigns are known to be more successful where the target audience is familiar with and accepts a product for a particular use. *See* Jacquelyn Smith, *The World's Most Reputable Companies*, *Forbes* (June 7, 2012), *available at* <http://www.forbes.com/sites/Jacquelyn-smith/2012/06/07/the-worlds-most-reputable-companies/>. Indeed, advertisers study the needs of the target population extensively and carefully craft their messages to align their marketing so it appeals to the needs of the target audience. Market competitors may share the product's key material message (in this case regarding

efficacy in relieving joint pain) while highlighting features that will differentiate and promote their product over similar competing products. Such differences do not, however, negate or deflect from the materiality of the health-benefit claims made by Supple. *See* Supple Br. at 27.

This Court should not impose class certification requirements that treat consumers as if they live in a vacuum and they can decipher the sophisticated advertising methods used to peddle their snake oil. Adopting Supple's arguments would subject the marketplace to rampant fraud at the expense of consumers and honest businesses.

II. FALSE HEALTH-BENEFIT CLAIMS USING INCREASINGLY SOPHISTICATED MARKETING AND SALES PRACTICES CAPITALIZE ON THE VULNERABILITY OF OLDER PEOPLE.

“[M]arketing scams that prey disproportionately on seniors [for] unproven cures or treatments for various health conditions is a prime example of fraud impacting older Americans.” *Deceptive Marketing Of Dietary Supplements F.T.C. Enforcement Activities, Special Committee On Aging*, May 26, 2010 (Prepared Statement of Federal Trade Commission, at 1) (hereinafter “*Deceptive Marketing Of Dietary Supplements*”). “Such marketing scams are particularly cruel by preying on consumers when they are most vulnerable and desperate, offering false hope and even luring them away from more effective treatments. For every serious

disease, especially those with no proven cure, there are hundreds of marketers engaging in such fraud.” *Id.*

The burgeoning older population is recognized as presenting particularly lucrative business opportunities. Indeed, “the marketplace has seen a steady stream of new or reformulated products purporting to help consumers get and stay healthy.” *Advertising Trends And Consumer Protection*, F.T.C. Prepared Statement. Dietary supplement “marketers [are] capitalizing on the aging population world over.” *Global Bone and Joint Health Supplements Market to Reach \$9.09 Billion by 2017, According to a New Report by Global Industry Analysts, Inc.* (Aug. 25, 2011), available at http://www.prweb.com/releases/bone_supplements/joint_health_supplements/prweb8595554.htm (hereinafter “*Global Bone and Joint Health Supplements Market*”). “With the decline in mortality rate globally resulting in increased longevity of life, medicines or dietary supplements catering to the needs of elderly population have gained increased attention.” *Global Glucosamine Market to Reach 46.6 Thousand Metric Tons by 2017, According to a New Report by Global Industry Analysts, Inc.* (August 24, 2011), available at http://www.Prweb.com/releases/glucosamine/glucosamine_supplements/prweb8561248.htm (hereinafter “*Global Glucosamine Market*”).

The prevalence of arthritis among older people makes them particularly susceptible to health-benefit claims such as those made by Supple. While Supple did not ignore the profits to be gained from the market of younger, athletic people, its promise to relieve joint pain caused by arthritis resonates strongly with older people. “[A]ging baby boomers represent the single largest market . . . for joint health supplements/ingredients, including glucosamine in the US market.” *Global Bone and Joint Health Supplements Market*. Promises made by marketers to deceive older people into buying their untested and unproven products has become increasingly difficult for enforcement agencies to police. Not only are there huge increase in the numbers of ad to which people are exposed, but advertising sophistication has advanced beyond the bounds of the current regulations. See Demaine, Linda J., *Seeing is Deceiving: The Tacit Deregulation of Deceptive Advertising*, 54 Ariz. L. Rev. 719 Fall, 2012.

One in every two older people has arthritis. See CDC, *The Prevalence Of Arthritis Is On The Rise*, <http://www.cdc.gov/arthritis/resources/spotlights/prevalence-arthritis-on-the-rise.htm>. As people advance in age, their risk of developing arthritis increases significantly. *Id.* More than 52.5 million Americans had arthritis in 2010-2012 and a projected 67 million people will have arthritis by the year 2030, when the last Baby Boomer turns 65. *Id.*

Arthritis is the leading cause of disability—and its concomitant increase of medical expenses, loss of income, and social isolation, and reduced quality of life—in the United States. *Health-Related Quality of Life of US Adults With Arthritis: Analysis of Data From the Behavioral Risk Factor Surveillance System, 2003, 2005, and 2007*, Arthritis Care & Research, Vol. 63, No. 6, June 2011, pp 788–799, 797, available at <http://onlinelibrary.wiley.com/doi/10.1002/acr.20430/pdf>. The impact, which is even more severe for older people who also suffer from diabetes, heart conditions, and obesity, can be devastating. Arthritis limits the paid work activities of 8.3 million adults. *Id.* Per-person direct medical costs attributable to arthritis and other rheumatic conditions (AORC) arthritis in 2003 averaged \$1,752. CDC, *National and State Medical Expenditures and Lost Earnings Attributable to Arthritis and Other Rheumatic Conditions --- United States, 2003*, Morbidity and Mortality Weekly Report (Jan. 12, 2007), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5601a2.htm>. The total indirect costs in the United States in 2003 attributable to AORC, principally from lost earnings (but excluding unpaid work, such as caretaking or housekeeping), were \$47.0 billion: 29.5 million working-age adults lost earnings of \$1,590 per-person because of arthritis. *Id.*

Even short of causing disability, however, arthritis can cause significant suffering and severely limit a person's activities: more than 22.7 million people

with arthritis suffered from an arthritis-attributable activity limitation. *Id.* Arthritis can make it difficult for people to “climb a flight of stairs” or “walk 3 city blocks . . . a distance equal to walking from the parking lot to the back of a large store or through a mall.” CDC, *About Arthritis Disabilities and Limitations*, http://www.cdc.gov/arthritis/data_statistics/disabilities-limitations.htm. People with arthritis report activities that are “very difficult” or that they “cannot do” are:

- grasp small objects;
- reach above one's head;
- sit more than 2 hours;
- lift or carry 10 pounds;
- climb a flight of stairs;
- push a heavy object;
- walk a 1/4 mile;
- stand more than 2 hours;
- stoop, bend, or kneel

Id.

Because arthritis limits mobility and work activities, as well as other types of community participation, it is a primary cause of social isolation among older people. Five million people report limiting their volunteer activities as a result of arthritis and 7 million report that arthritis prevents them from engaging in volunteering. *Id.* Arthritis also restricts older people’s participation in community activities, which are considered “especially important” for older people. CDC, *Physical Environment and Chronic Conditions Restrict Community Participation in Older Adults*, <http://www.cdc.gov/arthritis/resources/spotlights/modifiable->

environmental.htm. Indeed, “[i]n absolute numbers, the greatest community participation restriction of people over age 50 was among older adults with arthritis (1.9 million).” *Id.*

Faced with the prospect of lost income opportunities, expensive medical bills, decreased mobility, social isolation, debilitating pain, and the lack of an effective treatment, many people with arthritis fall victim to cruel false promises made by marketers of dietary supplements. “[P]ersons with arthritis are among the major consumers of complementary and alternative medicines.” Barnes P.M., Bloom B., Nahin R., *CDC National Health Statistics Report #12. Complementary and Alternative Medicine Use Among Adults and Children: United States, 2007*, 3 (Dec. 2008), available at <http://nccam.nih.gov/sites/nccam.nih.gov/files/news/nhsr12.pdf?nav=gsa>. Of all people who used complimentary or alternative medicines in the US during 2007, Glucosamine containing products were the second most commonly used. *Id.* “Glucosamine presently dominates the joint health market as the best-selling dietary supplement.” *Global Bone and Joint Health Supplements Market*. Additionally, “market analysts suggest that the downturn in the economy has actually led to increased spending on supplements as consumers attempt to manage their own healthcare and avoid expensive doctor visits and prescription medications”

Unfortunately, widespread use of glucosamine does not correlate with its efficacy: it is driven by “promotion” to “the growing aging population” “regarding the health benefits of Glucosamine as a vital dietary supplement for joint health.” *Global Glucosamine Market*. Analysts stress that “[f]uture growth prospects [for dietary supplements] depend on media promotion and attention since it plays a key role in generating consumer interest.” *Id.* Analysts further note that “[s]cientific research and clinical trials backing claims of safety and efficacy of supplements and remedies remain a critical factor in determining long-term success of the category.” *Id.* As noted previously, however, marketers misrepresent the conclusions that a particular product lacks efficacy, which would likely have little impact on purchasing decisions in any event. *See Does The Evidence Make A Difference?*

Thus, despite scientific evidence establishing that glucosamine hydrochloride is not more effective than placebo, and that the benefits of glucosamine sulfate are equivocal at best, “U.S. consumers spent \$753 million in 2012 on supplements of glucosamine and chondroitin in an attempt to relieve pain and stiffness from arthritis.” *The facts about joint supplements*, Consumer Reports (Aug. 2013), available at <http://consumerreports.org/cro/magazine/2013/10/facts-about-joint-supplements/index.htm>. Often, people do not get what they pay for.

See id. (“Of the 16 products we tested, seven didn’t contain all that they claimed.”).

In addition to not getting the benefit of the bargain when health-benefit claims are false, people may delay effective treatment, continue to suffer, and experience a further deterioration in their health. For example, people who suffer joint pain may use products that claim to offer relief rather than embarking on an effective weight-loss and physical-activity regimen. “There is strong evidence that physical activity reduces pain, improves function and mood, and delays disability in adults with arthritis.” CDC, *Spotlight Leisure Physical Activity No Leisure-time Physical Activity in Adults with Arthritis*, <http://www.cdc.gov/arthritis/resources/spotlights/leisure-pa.htm>.

CONCLUSION

False health-benefit claims prolong suffering and delay effective treatment, resulting in increased medical expenses and social isolation and reduced income. Increasingly sophisticated marketing techniques and billing practices that trap older people into making repeat purchases for products that prey cruelly on their desire to live a healthy life should not preclude private enforcement of false health-benefit claims. Amicus Curiae AARP urges this Court to affirm the grant of class certification.

January 22, 2014

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,734 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced type face using Microsoft Word 2010 in 14 points Times New Roman type style.

January 22, 2014

/s/ Julie Nepveu
Julie Nepveu

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2014, I electronically filed the foregoing Brief of AARP as Amicus Curiae in Support of 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.

January 22, 2014

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