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Recent Lanham Act and Consumer Class Action False Advertising Case Developments

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Introduction

This paper discusses recent developments in two types of false advertising litigation: cases brought under the federal trademark and false advertising statute known as the Lanham Act, and consumer class actions brought under state law. The Lanham Act section covers interesting and important false advertising decisions issued in 2012, grouped by topic**.** The consumer class action section focuses on recent decisions granting or denying motions for class certification**.**

Lanham Act Developments

I. Damages

Merck Eprova AG v. Gnosis S.P.A, 2012 U.S. Dist. LEXIS 142061 (S.D.N.Y. Sept. 30, 2012)

Plaintiff Merck alleged that defendant Gnosis falsely advertised Gnosis' folate product Extrafolate by using chemical names and abbreviations that Merck truthfully used to describe its well-known folate product Metafolin, but that did not accurately describe Gnosis' folate product.

By convention in the field of steriochemistry, as reflected in various published rules and guidelines, the chemical names and guidelines used by Merck and later adopted by Gnosis denote various properties of certain steriochemicals, including the properties of purity and stability. In its complaint, Merck alleged that it was the first company to produce a substantially stable and pure folate product, and that in its own marketing, it properly used certain chemical names and abbreviations to identify its product because they truthfully identified the properties of its product. Merck claimed that Gnosis deliberately used the same chemical names and abbreviations for its competing, lower-quality product, despite that its product did not have the same properties as Merck's.

After a bench trial, the court entered judgment in favor of Merck, finding that Gnosis' use of the same names and abbreviations Merck used constituted intentionally false advertising intended to capture Merck's share of the folate market by deceiving purchasers into believing Gnosis' product was chemically identical to Merck's. The court (i) awarded Merck damages consisting of all of Gnosis' profits from the sale of its folate product during the period in question; (ii) treated all of Gnosis' sales revenue as profit after finding that Gnosis

did not carry its burden of demonstrating the extent to which it incurred costs that reduced its profit from those sales; (iii) trebled the award to Merck of Gnosis' profits, resulting in a damages award of slightly in excess of $500,000; (iv) awarded Merck pre-judgment interest and its attorneys fees; (v) permanently enjoined Gnosis from using the same or similar chemical names in labeling its product; and (vi) directed it to engage in a campaign of corrective advertising either approved by the court or developed by Merck.

Skydive Ariz., Inc. v. Quattrocchi, 673 F.3d 1105 (9th Cir. 2012)

Plaintiff Skydive Arizona, owner of one of the largest skydiving centers in the world, sued Quattrocchi for false advertising, trademark infringement, and cybersquatting. Quattrocchi operated SKYRIDE, an Internet and telephone-based advertising service that made skydiving arrangements for customers and issued certificates that could be redeemed at various skydiving facilities around the country. Skydive Arizona alleged that through false advertisements on its websites, which used domain names that contained various iterations of the words "skydive Arizona," SKYRIDE misled consumers wishing to skydive in Arizona into believing that SKYRIDE owned and operated Arizona skydive centers, that it was affiliated with Skydive Arizona, and/or that Skydive Arizona would accept SKYRIDE certificates. In reality, SKYRIDE had no connection with Skydive Arizona, did not own or operate any skydiving facilities in Arizona, and had no arrangement with Skydive Arizona in which Skydive Arizona would accept SKYRIDE certificates.

Following partial summary judgment in favor of Skydive Arizona on its false advertising claims and a jury verdict in Skydive Arizona's favor on its trademark and cybersquatting claims, the jury awarded Skydive Arizona $1 million in actual damages for false advertising, $2.5 million in actual damages for trademark infringement, an additional $2,500,004 representing SKYRIDE's profits resulting from trademark infringement, and $600,000 in statutory damages for cybersquatting. The trial judge subsequently doubled the actual damages from an aggregate of $3.5 million to $7 million. SKYRIDE appealed the decision and the trial court's modification of the actual damages awards.

The Ninth Circuit affirmed in all respects except for the trial court's enhancement of actual damages. The Court of Appeals reasoned that

the enhanced damages were punitive and thus were an abuse of the trial court's discretion under the Lanham Act. Thus, as modified, the appellate court affirmed an award in favor of Skydive Arizona for $1 million in actual damages for false advertising, $2.5 million in actual damages for trademark infringement, $2,500,004 in lost profits for trademark infringement, and $600,000 in statutory damages for cybersquatting.

Munchkin, Inc. v. Playtex Prods., LLC, 2012 U.S. Dist. LEXIS 94531 (C.D. Cal. July 20, 2012) [jury verdict]

Munchkin and Playtex, competitors in the baby diaper pail market, countersued for false advertising. The jury found that Playtex's advertising of its Diaper Genie Elite as "Proven #1 In Odor Control" was literally and knowingly false. The jury also found that Playtex's false ads deceived a substantial number of consumers and likely affected consumer purchasing decisions. The jury also found that Playtex's advertising claim that its "Pink Pail" diaper pail was "#1 Recommended Among 1st Time Moms" was literally and knowingly false. The jury rejected Playtex's counterclaims, finding that Munchkin's advertising claiming that its "Arm & Hammer Diaper Pail" was "The New #1 in Odor Control--Proven Better at Odor Control than Diaper Genie II and Diaper Genie II Elite in a Laboratory Test" and "Preferred by Moms 2 to 1 over Diaper Genie II in an independent, national in-home study with 100 moms" was neither false nor misleading. The jury awarded Munchkin $13.5 million in damages.

Fishman Transducers, Inc. v. Paul, 684 F.3d 187 (1st Cir. 2012)

Plaintiff Fishman, a developer and manufacturer of acoustic equipment providing sound amplification for guitars, sued Paul, Paul's company Daystar Productions, and HSN Interactive LLC, a website marketer that is a sister company of the Home Shopping Network, for false advertising, trademark infringement and related state law claims. In 2006, HSN sold thousands of guitars that Paul incorrectly identified in his HSN pitches as having Fishman pickups. Paul's error was not deliberate; the evidence showed that Force, a Chinese company that made the guitars in question for Paul and Daystar, had told Paul the pickups were Fishman pickups. Paul repeated this incorrect information in the advertisements at issue.

The jury found the defendants liable for false advertising and trademark infringement but also found that neither violation was willful on the part of any of the defendants. Willfulness is not an element of a claim for false advertisement (or trademark infringement), nor is it required for a damage award of the plaintiff's lost profits. However, the trial court ruled that Fishman's evidence of lost profits was insufficient to be considered by the jury. In the First Circuit, willfulness is a required element for an award of disgorgement of the defendants' profits; the jury having found that the defendants' false advertising and trademark infringement were not willful, awarded Fishman no damages.

Fishman argued on appeal that the trial court's jury instructions on willfulness and burden of proof were erroneous. The First Circuit agreed, but found that neither error was material, because no reasonable jury could find that Paul's false statement that the Daystar guitars contained Fishman pickups was either knowingly false or reckless. Therefore, the Court of Appeals affirmed the trial court's award of no damages.

II. Literal Falsity

Northern Star Indus., Inc. v. Douglas Dynamics LLC, 848 F. Supp. 2d 934 (E.D. Wis. 2012)

Plaintiff Northern Star and Defendant Douglas both manufacture trip-blade and trip-edge snowplows, an extremely important product for Wisconsin (and Colorado) winters. Northern sought a preliminary injunction enjoining Douglas from engaging in false and misleading advertising in violation of the Lanham Act and requiring corrective advertising.

The ability of a working snowplow to "trip" immobile hidden objects, and thus scoop them without disabling or impairing the operation of the plow, is a vitally important product feature. Northern Star alleged that Douglas' print ads, video ads and Facebook posts falsely stated that (1) the Boss Power V-XT V-Blade (Northern Star's product) cannot trip in the 'V' or scoop mode, (2) users of Boss' Trip-Blade V-Plow run a heightened risk of physical injury in operating the plow compared to users of Douglas' plows, and (3) Boss plows will not, and Fisher and Western plows (Douglas' products) will, safely trip over obstacles in any snowplow configuration. Some of these ads featured depictions of persons with bloodied faces, as if badly injured

by using Northern Star's plows. Northern Star claimed that it had not received a single complaint or claim that any of its Boss V-Plow devices failed to trip or caused personal injury.

The court granted preliminary injunctive relief, finding that Douglas' advertisements were literally false because (a) there was substantial evidence, including from the raw footage of videos taken by Douglas, excerpts of which were used in the challenged ads, that Northern Star's products did in fact trip under the circumstances in which Douglas claimed they did not, and (b) there was no evidence Northern Start's products caused personal injury, or were more likely to do so than Douglas' plows.

III. Summary Judgment

Innovation Ventures, LLC v. N.V.E., Inc, 694 F.3d 723 (6th Cir. 2012)

Plaintiff Innovation Ventures ("IV"), the maker of the popular energy shot 5-Hour Energy, sued NVE, the maker of a competing product, 6 Hour Power, for trademark infringement. NVE counterclaimed for false advertising. The false advertising counterclaim was based on the fact that IV, after obtaining a favorable judgment for trademark and trade dress infringement against another competitor selling a 6 hour energy shot under a different name, had sent notices to retailers stating: "'6 Hour' Shot Recalled" and that a court had enjoined the "sale of 6 Hour Energy shot." NVE alleged that the recall notices constituted a literally false communication that all 6 Hour energy shots had been enjoined. Cross-motions for summary judgment dismissing these claims were granted and the parties then filed cross appeals to the Sixth Circuit.

The Sixth Circuit reversed the district court's dismissal of IV's trademark infringement claim and NVE's false advertising counterclaim. Regarding the false advertising claim, the district court had found that IV's notice to retailers was neither literally nor impliedly false. The Court of Appeals agreed that IV's notice to retailers was not literally false, but found that, contrary to the district court's conclusion, the notice nonetheless could reasonably have been understood by retailers to include NVE's product. The appellate court reasoned that (1) whether the recall notice was misleading or tended to deceive its intended audience and (2) whether retailers were "tricked into believing an untruth" were issues for trial. Interestingly, the Sixth Circuit opinion discussed only in passing the evidence on

which NVE relied in alleging that retailers were deceived by the notice, and did not indicate that NVE had proffered any consumer survey, which courts generally require in cases where the challenged advertisement is (as the Sixth Circuit found here) ambiguous.

Keurig, Inc. v. Sturm Foods, Inc., 769 F. Supp. 2d 699 (D. Del. 2012)

Defendant Sturm Foods created a line of beverage cartridges for use in Keurig brewers that contained the phrase "*For use by owners of Keurig coffee makers" to compete with Keurig's own patented K-Cups. Keurig sued Sturm Foods for false advertising, patent infringement and trademark infringement. Sturm Foods asserted several counterclaims, including a false advertising claim alleging that Keurig advertising statements that its K-Cups contain a filter and ground coffee were literally false. Sturm Foods' theory was that certain K-Cup products, including hot cocoa and chai latte, do not contain either a filter or ground coffee. Keurig argued that in context, it was clear that its advertising statements were talking generally about the brewing process for its K-Cup coffees, and that consumers would understand that K-Cup hot cocoa and chai lattes do not include ground coffee and do not need to be filtered. In essence, Keurig argued, the statement is not rendered false by the existence of portion packs that do not contain ground coffee or filters.

The court granted summary judgment in favor of Keurig on the issue of literal falsity, finding that the challenged statements were not unambiguous representations that all K-Cup products contain a filter and ground coffee.

FLIR Sys., Inc. v. Sierra Media, Inc., 2012 U.S. Dist. LEXIS 145721 (D. Or. Oct. 9, 2012)

FLIR, a maker of infrared cameras, thermography, and thermal imaging equipment, sued Fluke, a manufacturer of thermal imaging cameras, and Sierra, Fluke's marketing company. FLIR and Fluke were competitors in the "entry level" infrared camera market. Since at least 2008, FLIR has used images captured by higher resolution thermal imaging cameras superimposed on the display of lower resolution cameras offered for sale in its online and print advertising. In its counterclaims for false advertising, Fluke contended that FLIR's use of images from higher resolution and more expensive thermal imaging cameras on the displays of lower resolution cameras pictured in its advertising was literally false advertising. FLIR's false

advertising claims against Fluke and Sierra concerned a video that explicitly compared "drop test" results of thermal imaging equipment made by Fluke and FLIR, and thus was an "establishment" claim under Lanham Act jurisprudence. FLIR claimed that the video was literally false because of flaws in the test methodology and testing environment.

The district court denied Fluke's motion for summary judgment on its counterclaims. Regarding the advertisements that were the subject of that motion, the court concluded that it was a jury question whether those ads communicated a literal visual message that the products for sale produced images of the quality featured in the ads. The district court also denied FLIR's motion for summary judgment on its claims against Fluke, concluding that whether the testing depicted in the video adequately substantiated Fluke's comparative "drop" claims was also for the jury. However, because FLIR was not a direct competitor of Sierra, Fluke's marketing company, the court found that FLIR did not have standing to sue Sierra for false advertising.

IV. Standing

Marvellous Day Elec. Co. v. ACE Hardware Corp., 2012 U.S. Dist. LEXIS 142529 (N.D. Ill. Oct. 2, 2012)

Marvellous Day manufactured patented LED light bulbs. Defendant HBL imports and resells Marvellous Day's light bulbs to retailers and Ace Hardware sells the light bulbs to customers in retail stores. Subsequently, HBL began manufacturing LED lights allegedly infringing Marvellous Day's patent, selling them to retailers and advertising them as "always lit." Marvellous Day sued HBL and Ace Hardware for, *inter alia*, false advertising and patent infringement. HBL and Ace moved to dismiss.

According to Marvellous Day, "always lit" means that when an individual LED bulb in a string of lights is damaged or burned out, the remaining lights will remain lighted and the individual bulb can be replaced without extinguishing the remaining lights. Marvellous Day contended that HBL's lights did not have this quality. Therefore, Marvellous Day alleged that the defendants' use of the "always lit" term amounted to a false or misleading description of fact which misrepresents the nature, characteristics, or qualities of the LED bulbs.

The court found that Marvellous Day lacked standing because it failed, as Seventh Circuit law requires, to allege that it is a commercial competitor of either Ace Hardware or HBL, as it operates at a different level of the distribution chain. In addition, the court found that Marvellous Day failed to allege any "discernible competitive injury" because there was no plausible basis to believe that the claim "always lit" actually influenced purchasing decisions. Accordingly, Ace's and HBL's motion to dismiss was granted.

Am. Specialty Health Grp., Inc. v. Healthways, Inc., 2012 U.S. Dist. LEXIS 147522 (S.D. Cal. Oct. 12, 2012)

Defendant Healthways sought leave to amend its counterclaims to include allegations of false advertising against plaintiff American Specialty Health Group ("ASH"). The parties are direct competitors in the senior fitness benefits market. Both companies contract with fitness facilities to provide a network of facilities for their health plan customers to offer to seniors. ASH argued that leave to amend should be denied because, even though the parties were direct competitors, Healthways lacked standing because it had failed to allege a discernible competitive injury.

The proposed amended counterclaims alleged that ASH's website included false statements about the size of its fitness facilities network and the identity of some of the facilities allegedly included in that network. Healthways contended that the alleged false statements were material because, in the senior benefits market, customers choose health plans based upon the size and composition of the network. The court granted Healthways motion for leave to file an amended counterclaim for false advertising, finding that Healthways alleged a plausible discernible competitive injury, and thus adequately alleged standing.

V. Motion to Dismiss Granted

Sensible Foods, LLC v. World Gourmet, Inc., 2012 U.S. Dist. LEXIS 21446 (N.D. Cal. Feb. 21, 2012)

Sensible Foods ("Sensible") and World Gourmet ("World") both use trademarks that prominently feature the word "sensible" in connection with snack foods. Sensible sued World for false advertising and other claims, alleging that World made false statements by: (1) using the word "veggie" in the names of certain products that were made primarily with potatoes; (2) using the word "apple" in the name of its

"Apple Straws" product when it was made primarily with potatoes; and (3) making various statements that mislead the public into thinking that World's products are healthy, including positioning the "Sensible Portions" mark in front of a heart-shaped design. World sought to dismiss the false advertising claims in their entirety.

The court granted World's motion, finding that while plaintiff adequately pled facts allowing the court to ascertain the viability of its false advertising claims, the claims failed to meet the plausibility test required under the Supreme Court's *Iqbal* and *Twombly* decisions. The court found that (1) it was implausible for Sensible to allege that products made primarily from potatoes could not truthfully be advertised as made of "veggies," (2) it was equally implausible for Sensible to allege that the name of World's "Apple Straws" product was false advertising because the amended complaint affirmatively alleged that it contained pureed apples in addition to potatoes, and (3) the allegedly false health statements, including that World's food products contained the "right" ingredients and were "guilt free," were non-actionable puffery, as was World's use of the heart symbol.

VI. Motion to Dismiss Denied

ONY, Inc. v. Cornerstone Therapeutics, Inc., 2012 U.S. Dist. LEXIS 69956 (W.D.N.Y. May 17, 2012)

Plaintiff ONY is the manufacturer of an animal derived surfactant, a calfactant known as Infasurf, which is used in the treatment of Respiratory Distress Syndrome ("RDS") in prematurely born infants. In March 2011, defendants, which included Chiesi, a competitor of ONY, and various medical doctors, submitted a revised study for publication in a peer-reviewed medical journal called the Journal of Perinatology (the "Journal"); ONY alleged that the article included false claims that preterm infants treated with Chiesi's Curosurf poractant alfa product have a lower mortality rate than those treated with Plaintiff's Infasurf.

As specified in ONY's proposed Amended Complaint, these statements include: "Result: Calfactant was associated with a 49.6% greater likelihood of death than poractant alfa;" "Conclusion: Poractant alfa treatment for RDS was associated with a significantly reduced likelihood of death when compared with calfactant;" "Calfactant was found to be associated with a 49.6% greater likelihood of death than poractant alfa;" "This model found calfactant

to be associated with a significantly greater likelihood of death than poractant alfa;" This study "show[ed] a significant greater likelihood of death with calfactant than poractant alfa;" and "[T]his large retrospective study of preterm infants with RDS found lower mortality among infants who received poractant alfa, compared with infants who received either calfactant or beractant, even after adjusting for patient characteristics such as gestational age and BW, and after accounting for hospital characteristics and center effects." The Journal is the official journal of Defendant American Academy of Pediatrics ("AAP"), the "preeminent organization for physicians who practice in general pediatrics and its subspecialties, including neonatology."

ONY alleged that the data which served as the basis for the Article was not based upon an actual clinical study. Rather, the data was culled from a database of information which defendants collected from various reporting hospitals and physicians. As a result, ONY alleged, the data was retrospective and subject to selective distortion.

The court granted defendants' motion to dismiss the false advertising claims. Recognizing that the audience for the journal article, consisting of medical doctors and other health professionals, was highly sophisticated, the court found that a reasonable reader would not have concluded that the article was conveying proven facts about ONY's product. Rather, the context of and statements in the article itself made it apparent to the journal's sophisticated readership that the article represented the opinions of the authors, and not proven facts. Therefore, plaintiffs failed to state a cognizable claim for false advertising under the Lanham Act or related state law.

Leonetti's Frozen Foods, Inc. v. Am. Kitchen Delights, Inc., 2012 U.S. Dist. LEXIS 47815 (E.D. Pa. Apr. 4, 2012)

This case is proof that good Italian food can be worth fighting for. Plaintiff Leonetti's manufactures and sells stromboli to food service and retail customers. For many years, Leonetti's manufactured stromboli using its proprietary recipes and formulas for Maglio, a distributer. But in 2007, American Kitchen, a competing stromboli maker, began making all of Maglio's stromboli. Leonetti's alleged that when compared to the stromboli it made for Maglio, American Kitchen's stromboli has "different ingredients and nutrition facts," is "folded differently," is "substantially different in appearance," and is

"made using less meat and less expensive ingredients." Of course, there is nothing wrong with that as a legal matter, however it might have harmed Leonetti's profits or offended the sensibilities of true stromboli lovers. But what really gave Leonetti's agita is that Maglio distributed its American Kitchen-made stromboli in packaging (made by American Kitchen) that contained images of Leonetti's stromboli instead of American Kitchen's.

This caused Leonetti's to sue American Kitchen for false advertising under the Lanham Act. In turn, American Kitchen moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The court denied American Kitchen's motion to dismiss, finding that Leonetti's had adequately pled facts that plausibly alleged that American Kitchen's use of packaging with images of Leonetti's stromboli constituted literally false advertising that caused or was likely to cause injury to Leonetti's.

VII. Preliminary Injunction Denied

Euro-Pro Operating LLC v. TTI Floor Care North Am, 2012 U.S. Dist. LEXIS 95744 (D. Mass. July 11, 2012)

Plaintiff Euro-Pro, a company that markets steam cleaning and vacuum products, sued a competitor, TTI, owner of the Hoover brand of steam cleaners and vacuums, for false advertising based upon claims made in two infomercials. Euro-Pro moved for a preliminary injunction prohibiting TTI from making certain statements and using certain demonstrations comparing its products to Euro-Pro's Shark steam mop and Shark Navigator vacuum cleaner.

The two infomercials promoted TTI's TwinTank steam mop and WindTunnel vacuum cleaner. Euro-Pro first asserted that a claim made at various points throughout the TwinTank infomercial, that the TwinTank renders other steam mops "obsolete," was literally false. Second, Euro-Pro objected to sections of both infomercials that contained demonstrations (commonly referred to as "demos") comparing the parties' products.

The court denied Euro-Pro's motion for a preliminary injunction as to the "obsolete" claim on the ground that it appeared to be mere puffery. It held that in the First Circuit, "puffery encompasses vague and general assertions that a product's superiority renders competing products comparatively useless." Further, the court found that none of the demos communicated any literal, unambiguous message, and thus

could not be literally false, and that Euro-Pro had not alleged in its motion, or produced any evidence showing, that a significant percentage of consumers were misled by the demos.

Pamlab, LLC v. Macoven Pharms., LLC, 2012 U.S. Dist. LEXIS 92228 (S.D.N.Y. June 29, 2012)

Plaintiff Pamlab developed a dietary supplement that it markets under the name of Foltx and also licenses to be sold as a generic product called Folbic. Foltx and Folbic contain 2.5 mg of Folic Acid, 2 mg of Vitamin B12, and 25 mg of Vitamin B6, and are designed to treat elevated levels of homosysteine. Defendant Macoven began marketing a competing folic acid product which, according to its label, contained the same active ingredients in the same amounts as Foltx and Folbic. Based upon these representations, Macoven's product was designated as equivalent to Foltx - and as a substitute for Folbic - in the databases utilized by pharmacy chains to identify products that are equivalents. The label of Macoven's product also included an expiration date two years after the date of manufacture.

Pamlab alleged that Macoven's labeling constituted false advertising under the Lanham Act and sought a preliminary injunction. Pamlab principally argued that (1) Macoven's identification of its product's active ingredients and amounts was misleading because it did not test its product prior to release to confirm the contents, and (2) the expiration date was false because it was not supported by adequate stability testing.

The court denied Pamlab's preliminary injunction motion. The court found that the label statements did not promise consumers that the active ingredients and amounts had been verified before the product was sold, and that post-sale testing confirmed that the statements were materially accurate. As for the label's stated expiration date, the court found that, contrary to Pamlab's contention, there was no industry consensus on the type of stability testing required to be conducted, and that the FDA, which regulates dietary supplements, had declined to offer guidance on the type of data necessary to support an expiration date claim. The court thus concluded that Pamlab had not demonstrated that Macoven's stated expiration date for its product was literally false.

VIII. Types of Statements that can Constitute Advertising

NTP Marble, Inc. v. AAA Hellenic Marble, Inc., 2012 U.S. Dist. LEXIS 93856 (E.D. Pa. Feb. 24, 2012)

> Plaintiff NTP and Defendant Hellenic compete in the marble and granite installation business. Each provides retail service to predominantly residential customers looking to build and/or remodel counter-tops, walls, or floors in kitchens, bathrooms, and elsewhere with customized stone fabrication. NTP sued Hellenic for false advertising based upon negative reviews supposedly posted by consumers on certain websites. Hellenic moved for summary judgment.
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> According to NTP, the negative reviews were actually posted by Hellenic on internet product review sites as part of a smear campaign against NTP. During discovery, NTP learned that the IP addresses used to make the negative reviews came from Hellenic's offices. Subsequently, a Hellenic employee named Moser claimed responsibility for all of the reviews, including those made from another Hellenic employee's home, and stated that he made them entirely of his own accord based on his resentment of NTP dating back to his previous employment with NTP. In its motion for summary judgment, Hellenic argued that Moser's "confess[ion]" insulated it from liability.
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> The court denied Hellenic's motion, finding that, based upon evidence of the number and internet location of the reviews, NTP had established a disputed question of fact as to whether Moser was the only source of the reviews and whether he posted them with the knowledge or encouragement of defendants. The court found that a jury could conclude that the false consumer reviews, if generated by Hellenic or at its direction, constituted advertising under the Lanham Act.

Premier Comp Solutions, LLC v. Penn Nat'l Ins. Co, 2012 U.S. Dist. LEXIS 42524 (W.D. Pa. Mar. 28, 2012)

> Plaintiff Premier is a Pennsylvania-based limited liability company "whose services include the development of functional panels of healthcare providers, injury management, discontinued physical therapy and diagnostic networks, medical bill review, and repricing services." Defendant Penn National ("PNI") is a Pennsylvania-based mutual insurance company that provides workers' compensation

insurance coverage to employers. Defendants Inservco and Hoover, each related to PNI, are, respectively, a third-party insurance administrator and a competitor of Premier; both are, like the other parties, Pennsylvania-based.

The case arose from an email sent by a PNI and Inservco employee in Harrisburg, Pennsylvania to a number of defendants' Pennsylvania-based employees. The email stated that Premier may be committing Medicare fraud and that the FBI was reviewing the situation, and advised the recipients not to make any reimbursement payments to Premier. The statements concerning Medicare fraud and FBI review were false. Those false statements were repeated by employees of the defendants to five other persons, all located in Pennsylvania.

Premier sued defendants in Pennsylvania state court for false advertising under the Lanham Act and various state law claims. Defendants removed to federal court and moved for summary judgment on the Lanham Act claim.

The district court granted the motion on two grounds, and remanded the state law claims to state court. First, the district court found that the email and oral communications were insufficient to meet the Lanham Act's "use in commerce" requirement, because all of the allegedly false communications were intrastate communications made and received entirely in Pennsylvania, and because Premier failed to show that any of those communications had any effect on interstate commerce. Second, the court found that even if the use in commerce requirement were satisfied, the statements did not constitute "commercial advertising" because plaintiffs could not show that they were sufficiently disseminated to the relevant purchasing public.

Neuros Co. v. KTurbo, Inc., 2012 U.S. App. LEXIS 21259 (7th Cir. Sept. 5, 2012)

Plaintiff Neuros was the first company to offer its turbo blowers to waste water treatment facilities in North America. Defendant KTurbo subsequently entered the same market. In 2008 Neuros won a bidding contest to supply high speed turbo blowers to a waste water treatment plant in Utah. KTurbo came in third in the bidding—last, because there were only three bidders. After losing the bid to sell its blowers, KTurbo prepared a series of PowerPoint slides and related tables that accused Neuros of fraudulently representing to the Utah purchaser that its blowers would achieve a "total efficiency" that was

unattainable. KTurbo's accusation of fraud was facially false, as it misrepresented what Neuros actually represented to the Utah purchaser. KTurbo gave its presentation to most of the engineering consulting firms that advise waste water treatment plants on which turbo blowers to buy.

Neuros sued KTurbo for false advertising under the Lanham Act and on various state law theories. After a bench trial, the trial court found in favor of Neuros on certain of the state law claims, and awarded Neuros small amounts of general and punitive damages. However, the court dismissed Neuros' Lanham Act claim on the ground that KTurbo's slides did not constitute "commercial advertising or promotion" because they were not disseminated to the general public. In a typically entertaining opinion by Judge Posner, the Seventh Circuit held that the district court erred in dismissing the Lanham Act claim. The district court should not have been troubled by the fact that no members of the general public had seen KTurbo's presentation, for the simple reason that the general public does not buy turbo blowers for waste water treatment plants, or advise those plants as to which manufacturer's blowers to purchase. The Court of Appeals correctly recognized that liability for false advertising under the Lanham Act is not limited to advertising or promotion directed to the general public, and that where, as here, KTurbo had disseminated its false presentation to a significant portion of the consulting firms that advise plants as to which turbo blowers to purchase, the "commercial advertising or promotion" standard was satisfied.

IX. Preemption/Deference to Federal Regulatory Agencies

Pom Wonderful, LLC v. Coca-Cola Co., 679 F.3d 1170 (9th Cir. 2012)

Plaintiff Pom Wonderful produces, markets, and sells bottled pomegranate juice and pomegranate juice blends, including a pomegranate blueberry juice blend. In 2007, Coca-Cola announced a new product called "Pomegranate Blueberry" (whether that was the product's full name was disputed, but neither the district court nor the Ninth Circuit felt it necessary to resolve that dispute definitively). Coca-Cola's product contained about 99.4% apple and grape juices, 0.3% pomegranate juice, 0.2% blueberry juice, and 0.1% raspberry juice. The product's front label displayed the product's name and an image depicting all four fruits. Pom Wonderful sued Coca-Cola for false advertising under the Lanham Act and state law, claiming that

the name, labeling and other advertising of Coca-Cola's product falsely communicated that the product was composed primarily of pomegranate and blueberry.

The Ninth Circuit affirmed the district court's award of summary judgment to Coca-Cola. The Court of Appeals first concluded that Pom Wonderful's Lanham Act challenge to the name of Coca-Cola's product was precluded because the FDA, acting pursuant to Congress's delegation under the Food, Drug and Cosmetic Act ("FDCA"), authorized juice beverage makers to use any flavoring juice as part of the beverage name even if none of the juices after which the product is named is the predominant juice by volume. Because Pom's Lanham Act challenge to the name of Coca-Cola's product conflicted with the FDA's determination, summary judgment dismissing that challenge was warranted.

The Ninth Circuit reasoned that the same analysis required affirmance of the grant of summary judgment regarding Coca-Cola's other product labeling. Pom's principal objection to the labeling related to the size and prominence of the references to the various fruit juices contained in the Coca-Cola beverage. However, the size and prominence of those label references were also compliant with FDA regulations, and therefore, this aspect of Pom Wonderful's Lanham Act challenge also would have required the district court to second guess the FDA's regulatory determination.

Consumer Class Action Developments

I. Class Certification Denied

In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig., No. 3:09–md–02100–DRH–PMF, 2012 WL 865041 (S.D. Ill. Mar. 13, 2012).

Plaintiff claimed that two TV commercials for the oral contraceptive YAZ failed to disclose that YAZ was neither approved for nor shown effective in treating symptoms of premenstrual syndrome ("PMS") and premenstrual dysphoric disorder ("PMDD"). Plaintiff also claimed that references to the symptoms of PMS and PMDD in the ads were misleading. The motion for class certification was denied.

The materiality of the misrepresentations or omissions here varied too much person-to-person to make a class-wide presumption about

materiality. Plaintiff also did not satisfy Rule 23's implicit requirement that a class be sufficiently definite, which requires the class to be (i) ascertainable and (ii) not overly broad, because there was no objective way to determine whether all class members saw the ads in dispute. Additionally, the proposed class failed the typicality requirement because of variation in materiality and reliance, evinced by the fact that the named plaintiff did not know YAZ was not approved for treatment of PMS while others in the putative class did. The named plaintiff also did not satisfy the adequacy prong because of her close relationship with counsel's wife. Finally, individual specific factors would have determined amount of restitution. Therefore, the putative class failed Rule 23(b)(3) because individual issues predominated.

The court also observed that the plaintiff could not establish conduct that was "likely to deceive" on a class-wide basis because of a lack of uniformity and common materiality under California False Advertising Law, Unfair Competition Law, and Consumer Legal Remedies Act. *Id.* at *20-21. However, the contention that the named plaintiff overpaid for YAZ was sufficient to establish statutory standing.

Konik v. Time Warner Cable, No. CV 07–763 SVW (RZx), 2010 WL 8471923 (C.D. Cal. Nov. 24, 2010).

Plaintiff brought California Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act claims against Time Warner Cable ("TWC") for representing, through mailers and the TWC website, that consumers would receive the same product at no additional cost from Adelphia after TWC acquired Adelphia and that consumers would experience no service interruptions. The motion for class certification was denied.

Although the numerosity and commonality requirements were met, plaintiff could not establish typicality. Plaintiffs would be required to show reliance, which could vary for each individual because he or she may have had a variety of reasons for continuing cable service with TWC. A presumption of reliance was appropriate here because everyone in the putative class was at least exposed to the allegedly false materials. However, class certification was denied because plaintiffs did not provide "sufficient evidence to support a conclusion

that the challenged statements were actually false as applied to all." *Id.* at *9.

Kowalsky v. Hewlett-Packard Co., No. 5:10-cv-02176-LHK, 2012 U.S. Dist. LEXIS 34597 (N.D. Cal. Mar. 14, 2012).

Plaintiff alleged that the Hewlett-Packard ("HP") 8500 printers could not achieve the scanning, copying, and faxing speeds that HP advertised, and asserted claims under California's Unfair Competition Law and Consumer Legal Remedies Act. Plaintiff's motion for class certification was denied.

Because proposed class members conducted transactions for printers in different jurisdictions, materially different consumer protection laws would apply. The court found these variances "overwhelm[ed] common issues and preclude[d] [Rule 23(b)] predominance." *Id.* at *7. Accordingly, the court declined to certify a nationwide class asserting claims under the UCL and the CLRA. *Id.*

Kremers v. Coca-Cola Co., 712 F.Supp.2d 759 (S.D. Ill. 2010).

Plaintiffs alleged that Coca-Cola's use of "Original Formula" in labeling its cans and bottles was deceptive under the Illinois Consumer Fraud and Deceptive Business Practices Act because Coca-Cola used high fructose corn syrup (HFCS) as a sweetener at the time of the case rather than sucrose as it did in 1866. Class certification was denied.

The court first considered whether the named plaintiffs had viable claims before it would consider issues about class certification because class representatives without viable claims would put the interests of the entire proposed class in jeopardy. The court granted manufacturer's motion for summary judgment finding: (1) one consumer's claim was untimely; (2) other consumer was not actually deceived by manufacturer's use of HFCS; and (3) manufacturer's use of HFCS to sweeten its product did not constitute unfair trade practice. Plaintiffs' class certification motion was thus denied as moot.

Mann v. TD Bank, N.A., No. 09–1062 (RBK/AMD), 2010 WL 4226526 (D.N.J. Oct. 20, 2010).

Plaintiffs claimed that TD Bank failed to disclose to consumers that VISA gift cards were subject to dormancy fees a year after purchase. Plaintiffs alleged TD Bank misled consumers in violation of the New

Jersey Consumer Fraud Act by advertising the cards as "free." The motion for class certification was denied.

The proposed class failed Rule 23(b) predominance requirements because there was no way to know who held the cards when they incurred dormancy charges without individual anecdotal evidence. The proposed class failed Rule 23(b) superiority requirements as well because the administrative burdens of identifying class members outweighed the benefit of aggregating nominal claims. Also, the named plaintiffs failed the adequacy and typicality requirements of Rule 23(a) because they did not prove that they themselves held cards during the disputed period. Finally, the putative class was too indeterminate as: (1) individual inquiries would be required to know who held the cards and (2) the class included cardholders without a legal right to recovery.

McNair v. Synapse Grp. Inc., 672 F.3d 213 (3d Cir. 2012).

Plaintiffs, former customers of Synapse, claimed Synapse's mailings about magazine subscriptions were deceptive because the sparse information and design made it look like an offer for a new subscription rather than an automatic renewal notice for an existing subscription. The district court denied plaintiff's motion for class certification, and subsequently denied plaintiffs' motion for reconsideration. Plaintiffs appealed under Rule 23(f) which provides for interlocutory review of an order denying class certification. The court affirmed the district court's order denying class certification.

The district court denied the initial motion for class certification because without a causal link between the alleged deception and alleged injuries, predominance could not be assumed. Therefore, predominance was lacking, and 23(b)(3) certification for monetary damages was denied. In their ultimate amended complaint, the plaintiffs sought class certification under 23(b)(2) by asking for injunctive relief. The Third Circuit found that because the plaintiffs cancelled their subscriptions and were no longer Synapse customers, there was no likelihood of future injury. Therefore, the plaintiffs lacked standing to sue for injunctive relief. Without standing to sue, the named plaintiffs lacked the requisite adequacy and typicality for class certification.

Moua v. Jani-King of Minn., Inc., No. 08-4942 ADM/JSM, 2010 WL 93575 (D. Minn. Mar. 12, 2010).

Plaintiffs alleged that Jani-King promised a certain amount of business after plaintiffs paid franchise fees, completed training, and obtained supplies and equipment, but that Jani-King could not and did not fulfill the promise and used deceptive tactics in the process. Accordingly, plaintiffs brought claims for breach of contract, breach of the implied covenant of good faith and fair dealing, violations of the Minnesota Franchise Act, fraudulent misrepresentation, unjust enrichment, quantum meruit, and violations of the Minnesota False Statement in Advertising Act. The motion for class certification was denied.

Plaintiffs could not show that common questions predominated under Rule 23(b). The breach of contract claim would require too many mini-trials to show how Jani-King used deceptive tactics against each individual to prevent him or her from realizing the monthly business promised. Therefore, individualized inquiries would overwhelm the common questions. Similarly, individual issues predominated over common issues with respect to good faith and fair dealing claims because evidence of interactions between franchisees and defendant were individualized. Finally, the fraud claims failed predominance because even assuming the entire class was exposed to misrepresentations, reliance still required individual inquiries.

O'Shea v. Epson Am., Inc., No. CV 09–8063 PSG (CWx), 2011 WL 4352458 (C.D. Cal. Sept. 19, 2011).

The named plaintiff believed the statement, "replace only the color you need with individual ink cartridges," on a printer box to mean only a black cartridge was required to print in black. However, the printer actually required all cartridges to function. Accordingly, the plaintiff brought claims for unfair business practices and false advertising in California. The motion for class certification was denied.

The putative class satisfied all four Rule 23(a) requirements for certification. The laws under which plaintiffs brought their claims required only that a reasonable person be "likely to be deceived" and not that all putative class members be aware of how the printers functioned. *Id.* at *3. However, members of the putative class lacked standing to pursue their claims. *Id.* at *7. Article III requires some showing of injury or causation between the alleged misconduct and harm. The causal link was not established here because of the

different methods available to purchase the printers, including e-commerce in which consumers were not exposed to the labeling on the box. Therefore, without standing to sue, plaintiffs could not be certified as a class.

Finally, the court noted that under the California laws, reliance and materiality were not elements of the plaintiffs' claims and, therefore, did not overwhelm the commonality of issues under 23(b).

Oscar v. BMW of N. Am., LLC, 274 F.R.D. 498 (S.D.N.Y. 2011).

Plaintiff alleged that defendant did not disclose that its Run Flat Tires, despite being able to run for relatively long distances after they became flat, were less durable and more expensive than standard tires. Plaintiff brought claims under the Magnuson–Moss Warranty Act ("MMWA") and brought New York law claims for breach of contract, breach of express and implied warranty, deceptive business practices, and false advertising. The motion to certify the class was denied.

The proposed class met the 23(a) requirements. The MMWA imposes a numerosity requirement of at least 100 class members. The court found that numerosity was satisfied for the nationwide class but not for the New York sub-class because, with respect to the former, the court could make reasonable assumptions about the proportion of flats experienced by consumers to satisfy the member requirement, but with respect to the latter, the court was required to make unsupported inferences. As for typicality, the court found that even if non-named plaintiffs had different levels of information before purchasing the tires, it did not "vitiate BMW's basic responsibility to avoid providing consumers with materially misleading information." *Id.* at 508. The plaintiffs also satisfied the commonality and adequacy requirements.

However, the proposed class failed the 23(b) requirements because individualized inquiries predominated over common questions. The MMWA requires courts to follow individual state laws for implied warranty claims. The proposed class included states with different privity requirements, and even using privity-by-agency, the court would have had to analyze individual transactions. Additionally, the plaintiffs did not demonstrate that flats arose because of a particular common defect. The state law claims failed predominance requirements for similar reasons. Even though the non-disclosure claims here precluded the plaintiffs from having to show that all class members were exposed to common misrepresentations, plaintiffs

failed to show that individual issues did not predominate with respect to injuries.

Picus v. Wal-Mart Stores, Inc., 256 F.R.D. 651 (D. Nev. 2009).

Plaintiffs alleged that retailers deceived consumers by labeling pet food, "Made in the USA," even though ingredients were manufactured outside the USA. Plaintiffs brought claims under the Nevada Deceptive Trade Practices Act and similar statutes in other states along with claims for fraud and unjust enrichment. Following removal and consolidation, retailers moved to deny class certification. Retailers' motion was granted.

Plaintiffs failed to satisfy the 23(b) requirements because individual issues of reliance and damages predominated and because class action was not the superior method of adjudication. The laws under which the claims were brought required reliance, and the questions of whether each class member relied on the "Made in the USA" labeling and the extent of damages were too individualized for common questions to predominate. The different legal requirements in the eight subject states and determinations of reliance and damages precluded class action from being the superior method of adjudication.

Porcell v. Lincoln Wood Prods., Inc., 713 F.Supp.2d 1305 (D.N.M. 2010).

Plaintiffs alleged that the information Lincoln provided in its sales literature did not clearly explain (i) that Lincoln manufactured both low altitude and high altitude windows and (ii) that customers in the western United States received high altitude windows exhibiting inferior resistance compared to low altitude windows. Plaintiffs brought claims for breach of express warranties and violation of consumer protection statutes. The motion for class certification was denied.

Plaintiffs satisfied the four Rule 23(a) requirements. However, the 23(b) requirements of predominance of common issues and superiority were not met. The types of damages sought under the limited warranty claims were not susceptible to class-wide proof. Moreover, each state's notice requirements could not be addressed on a class-wide basis. Additional individual fact-finding was also required because some class members were relying on equitable estoppel to overcome the statute of limitations. With regard to plaintiffs' false advertising claim, the requested damages, which were beyond a simple price differential, required individual class members

to demonstrate reliance to establish a "causal nexus" between misrepresentations and loss. Further, the diminution-in-value damages sought precluded a presumption of reliance on a class-wide basis.

Red v. Kraft Foods, Inc., No. CV 10–1028–GW(AGRx), 2011 WL 4599833 (C.D. Cal. Sept. 29, 2011).

Plaintiffs brought claims under California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act, alleging that the presence of trans fat in certain Kraft foods made Kraft's claims about their products' healthfulness deceptive. Class certification was denied.

The court found there to be significant questions under Rule 23(a) about whether the proposed class was overly broad, whether it was ascertainable, whether common issues of fact predominated, whether Plaintiffs were typical of the purported class, and whether California law applied to the claims of non-residents. Furthermore, the court expressed doubts as to whether Rule 23(b) was satisfied because not all members may have been exposed to the disputed advertisements, barring a presumption of class-wide reliance.

Stanley v. Bayer Healthcare LLC, No. 11cv862–IEG(BLM), 2012 WL 1132920 (S.D. Cal. Apr. 3, 2012).

Plaintiff sued defendant for allegedly over-representing the effectiveness of its probiotic supplements and for allegedly misleading consumers to believe regular consumption of the supplements would improve digestive health. The package stated, "Helps Defend against Occasional DIARRHEA." *Id.* at *1. Plaintiff alleged violations of California's Consumer Legal Remedies Act and Unfair Competition Law, breach of express warranty, and unjust enrichment. Defendant filed a motion for summary judgment. Defendant's motion was granted thus mooting plaintiff's motion for class certification.

In granting defendant's summary judgment motion, the court found plaintiff failed to demonstrate a genuine issue of material fact as to (i) defendant's compliance with federal regulations for substantiation and (ii) whether the supplements worked as a reasonable person would have expected based on advertisements. The court did not address the motion for class certification.

Stephens v. Gen. Nutritional Cos., No. 08 C 6296, 2010 WL 4930335 (N.D.Ill. Nov. 23, 2010).

> Plaintiffs claimed that GNC engaged in unfair and deceptive practices in the sale of its steroids in violation of the Illinois Consumer Fraud Act and that GNC knew that if its steroids were effective, they would be illegal. Class certification was denied.
>
> Plaintiffs offered no satisfactory method for determining an identifiable class because there was no way to know who purchased the disputed product without individual hearings. Additionally, plaintiffs did not meet the predominance requirement because a showing of proximate cause between the deceptive statements and purchase "must be made on an individual basis." *Id.* at *3.

Thompson v. Bayer Corp., No. 4:07CV00017 JMM, 2009 WL 2424352 (E.D. Ark. Aug. 6, 2009).

> Plaintiffs alleged that defendant claimed One-A-Day WeightSmart vitamins increased the metabolism of people as they age without reliable substantiation. The motion for class certification was denied.
>
> The court found that evidence of whether members saw the alleged false representations and then purchased the product would have to be proven on an individual basis. Damages would similarly be awarded based upon individual issues. Therefore, common issues of law and fact did not predominate.

Walewski v. Zenimax Media, Inc., No. 6:11-cv-1178-Orl-28DAB, 2012 WL 834125 (M.D.Fla. Jan. 30, 2012), *adopted*, 2012 WL 847236 (M.D. Fla. Mar. 13, 2012).

> Plaintiff alleged that an animation defect in the defendant's video game product caused secondary animations to "freeze and. . .[prevent] players from progressing in the game, forcing players to forfeit all progress, erase their existing game and restart from the beginning of the game." *Id.* at *3. Plaintiff brought claims under Maryland law for deceptive trade practices, false advertising, breach of implied warranty of merchantability, and unjust enrichment. The motion for class certification was denied.
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> Plaintiff failed to set forth an adequately defined and workable class because the proposed class included millions of potential members and secondary market members without a cause of action or privity with the defendant. Therefore, the four Rule 23(a) requirements were

not evaluated. Additionally, the named plaintiff did not have standing to sue in Maryland because Florida law applied to the plaintiff's claims.

Webb v. Carter's Inc., 272 F.R.D. 489 (C.D. Cal. 2011).

Plaintiffs brought claims against a manufacturer of children's tagless clothing for breach of implied warranties and for violations of California's Unfair Competition Law, California Consumers Legal Remedies Act, California's Fair Advertising Law, and the Magnuson-Moss Act. Plaintiffs alleged that the clothing contained toxic chemicals that could cause adverse skin reactions and that Carter's knowingly failed to disclose this information. The motion for class certification was denied.

Plaintiffs did not have standing to sue because those who acquired garments and did not purchase them did not suffer monetary damage. Also, a majority of children suffered no adverse effects. Plaintiffs did not meet the predominance or superiority requirements. Predominance was not met because materiality - whether a consumer would have been aware of a disclosure and whether he would rely on that disclosure - varied per individual. Finally, class certification was not the superior method because Carter's offered alternative resolution remedies.

Wiener v. Dannon Co., 255 F.R.D. 658 (C.D. Cal. 2009).

Plaintiff brought claims for breach of express warranties and violations of state unfair competition and consumer protection laws, alleging that the yogurt seller's claims that its products were "scientifically proven" to regulate digestion were unsubstantiated and deceptive. The motion for class certification was denied.

Typicality was not satisfied because the named plaintiff had only purchased Activa and never purchased DanActive, which advertised different claims from Activa. The other three Rule 23(a) requirements were met. Plaintiffs also met the Rule 23(b) predominance requirement because plaintiff relied on the alleged misrepresentations about health benefits that were "prominently displayed;" the misrepresentations were material as they concerned the characteristics that distinguished the product from others in the market; and the purchases made were consistent with reliance on the alleged misrepresentations. Plaintiffs also met the superiority requirement.

Yumul v. Smart Balance, Inc., No. CV 10-00927 MMM (AJWx), 2011 WL 1045555 (C.D. Cal Mar. 14, 2011).

> Plaintiff brought action against Smart Balance under California's unfair competition law, false advertising law, and Consumer Legal Remedies Act. Plaintiff alleged that defendant's product Nucoa contained artificial trans fat, which raised bad cholesterol levels in humans, but packaged Nucoa with labels reading, "No Cholesterol," "Cholesterol Free," or "healthy." The motion for class certification was denied.
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> The court found that plaintiff's claims were preempted by federal law. Therefore, the court dismissed the complaint for failure to state a claim. The court directed the plaintiff to file a renewed motion for class certification, along with an amended complaint that asserted non-preempted claims.

In re Light Cigarettes Mktg. Sales Practices Litig., 271 F.R.D. 402 (D. Me. 2010).

> Plaintiffs alleged violations of California's UCL, FAL, and CLRA, the District of Columbia Consumer Protection and Procedures Act, D.C. CODE §§ 28-3901, et seq., and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505, as well as unjust enrichment where defendants allegedly misrepresented light cigarettes as healthier than regular cigarettes. *Id.* at 405-07. The court denied certification because the proposed classes included class members without standing, and the plaintiffs failed to satisfy Rules 23(b)(2) and (3). *Id.* at 420, 423.
>
> First, the court held that class members who knew light cigarettes were not healthier than other cigarettes "did not buy a misrepresented product as to them and did not suffer a 'concrete and particularized' injury within the meaning of Article III." *Id.* at 420-21. Next, class certification was inappropriate because the Family Smoking Prevention and Tobacco Control Act rendered the plaintiff's claim for injunctive relief moot. *Id.* at 422. Regarding Rule 23(b)(3), the court held that individual issues of injury, causation, and affirmative defenses predominated over common issues and defeated the superiority of class treatment. *Id.* at 416-17, 421-22. That is, the extent of light cigarette smokers' compensation and whether there was a causal connection between defendants' misrepresentations and smokers' purchases of light cigarettes could not be proven on a class-

wide basis. *Id.* at 416-17. Finally, plaintiffs' statute of limitations and voluntary payment defenses were individual inquiries that weighed against certification. *Id.* at 421.

Pelman v. McDonald's Corp., 272 F.R.D. 82 (S.D.N.Y. 2010).

Plaintiffs claimed defendant violated N.Y. GEN. BUS. LAW § 349 by misleading consumers into falsely believing that its food products could be consumed on a daily basis without incurring any adverse health effects. *Id.* at 84-85. Plaintiffs asserted that, as a result of defendant's allegedly deceptive marketing scheme, plaintiffs and putative class members suffered injury in the form of the development of certain adverse medical conditions. *Id.* The court denied certification because the plaintiffs failed to satisfy Rule 23(a)'s numerosity requirement, Rule 23(b)(3)'s predominance requirement, and Rule 23(c)(4). *Id.* at 85.

The Rule 23(a) numerosity requirement was not satisfied because "Plaintiffs have not yet established that there are any other persons within the relevant age group who were exposed to the nutritional marketing at issue, then regularly ate at McDonald's, and subsequently developed the same medical injuries as those allegedly suffered by Plaintiffs." *Id.* at 99. Regarding Rule 23(b)(3), individualized inquiries predominated regarding: (1) the causal connection between the consumption of products of a certain nutritional make-up and the development of certain physical or medical conditions in particular plaintiffs; (2) the extent to which defendant's establishments were the primary source of these types of products for each particular plaintiff; and (3) the causal connection between each plaintiff's exposure to the allegedly misleading aspects of defendant's advertising scheme and each plaintiff's subsequent consumption of the defendant's allegedly injurious products. *Id.* at 95. Finally, the court denied plaintiffs' motion for certification of an issue class under Rule 23(c)(4) because the plaintiffs failed to satisfy all of the requirements of Rules 23(a) and (b)(3). *Id.* at 100.

Peviani v. Natural Balance Inc., No. 3:10-cv-2451 AJB (BGS), 2011 WL 1648952 (S.D. Cal. May 2, 2011).

Plaintiff alleged defendant violated California's UCL, FAL, and CLRA by deceptively labeling its dietary supplement as a "powerful men's formula" that provides "sexual energy," aphrodisiac effects, and health benefits. *Id.* at *1. Plaintiff purchased the product for her

husband's use, and alleged that it did not provide the advertised benefits and posed an unreasonable health risk to its users. *Id.* Certification was denied because the plaintiff failed to satisfy Rule 23(a)'s typicality and adequacy requirements. *Id.* at *2.

Typicality was not satisfied because the plaintiff did not actually consume the product. As such, she did not "possess the same interest and suffer the same injury" as the male class members who did consume it. *Id.* at *3. Plaintiff's injury was limited "solely to the loss of the money spent to purchase [the product]." Her interests were thus unaligned with claims of male consumers experiencing serious health consequences associated with the drug's consumption. *Id.* Similarly, the plaintiff was an inadequate representative because she argued that males who consumed the product may suffer from differing injuries and have differing causes of action. *Id.* at *4.

Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742(DLC), 2010 WL 3119452 (S.D.N.Y. Aug. 5, 2010).

Plaintiffs asserted claims for violation of N.Y. GEN. BUS. LAW § 349, unjust enrichment, and breach of express and implied warranty where defendant allegedly misled consumers by labeling its drinks "All Natural" despite their inclusion of high fructose corn syrup. *Id.* at *1-2. The court denied certification because the class was not ascertainable and Rule 23(b)(3)'s predominance and superiority requirements were not met. *Id.* at *5, *12-13.

The class was not ascertainable because soliciting declarations from putative class members regarding their history of Snapple purchases would invite speculation and "be extremely burdensome for the court." *Id.* at *13. Regarding Rule 23(b)(3), predominance was not satisfied because "individualized inquiries as to causation, injury, and damages for each of the millions of putative class members would predominate over any issues of law or fact common to the class." *Id.* at *6. Finally, plaintiffs failed to show that a class action was superior because they "offered no explanation for how such a geographically-dispersed class of consumers who purchased Snapple beverages in different locations, at different times, and for different prices, could be effectively managed." *Id.* at *12.

Aberdeen v. Toyota Motor Sales, U.S.A., No. CV 08-1690 PSG (VBKx), 2009 WL 7715964 (C.D. Cal. June 23, 2009), *aff'd in part*, *rev'd in part*, 422 F. App'x 617 (9th Cir. 2011).

Plaintiff alleged that defendant engaged in false and deceptive advertising with respect to the Prius's EPA estimated fuel economy. Plaintiff's motion for class certification was denied. As an initial matter, the court concluded that plaintiff did not have standing because he did not see any actionable advertisements prior to purchasing his Prius and therefore could not establish reliance. Plaintiff argued that he was not required to establish reliance because his claims were based on a "pure omission" theory. The court rejected this theory because it found that defendant had no duty to disclose.

The court then addressed two additional barriers to class certification under Rule 23, typicality and predominance. The court found that because plaintiff did not actually view any of Toyota's allegedly deceptive advertisements, his claims were not typical of consumers who saw and relied on those ads. Furthermore, the court found that plaintiff failed to satisfy his burden to show that common questions predominated because a number of individual questions of fact existed, such as whether each class member saw any actionable advertisements and whether he or she relied on Toyota's alleged misrepresentations.

The Ninth Circuit Court of Appeals affirmed the denial of class certification on the ground that the plaintiff was not a typical representative, but noted that plaintiff had standing to raise a "pure omission" claim because the district court's conclusion that defendant had no duty to plaintiff rested on improper assumptions.

Buetow v. A.L.S. Enters., Inc., 259 F.R.D. 187 (D. Minn. 2009).

Plaintiffs alleged that defendants misrepresented that their hunting clothing eliminated human odor. Plaintiffs' motion for class certification was denied. The court found that common questions of law or fact did not predominate. The court noted that the resolution of the potential liability as to each plaintiff would be dominated by individual issues as defendants would have the right to present evidence at trial negating a plaintiff's showing of reliance and causation. Furthermore, the court concluded that there would be a need for individual factual inquiries with respect to damages, which weighed strongly against class certification. Lastly, the court found that claims of numerous class members would be time-barred, and that to apply a defense based on statute of limitations,

individualized proof would be needed with regard to when class members purchased their odor-eliminating clothing.

Campion v. Old Republic Home Prot. Co., 272 F.R.D. 517 (S.D. Cal. 2011), reconsideration denied, No. 09-CV-748-JMA(NLS), 2011 U.S. Dist. LEXIS 54104 (S.D. Cal. May 20, 2011).

> Plaintiff alleged that defendant misrepresented that it would pay the cost of certain items under home warranty plans when, in fact, it maintained policies to deny legitimate claims or to shift the majority of the costs for repair work to the policyholder. Plaintiff's motion for class certification was denied.
>
> With respect to Rule 23(a), the court found that numerosity was satisfied because there were hundreds of thousands of customers in the proposed class. Regarding commonality, the court noted that each member of the proposed class made a claim under a home warranty plan purchased from defendant, and that the arguments made on their behalf in the case were based on a common theory of liability. The court next addressed typicality, concluding that plaintiff's claims were "reasonably co-extensive with those of absent class members." *Id.* at 527-28. Lastly, the court found that there was no reason to believe either plaintiff or his counsel would not fairly and adequately represent and protect the interests of the proposed class.
>
> However, the court found that the Rule 23(b) requirements of predominance and superiority were not satisfied. The court concluded that individualized inquiries would be required for a number of issues. Regarding reliance, for example, the proposed class members might not have seen defendant's advertisements prior to the purchase of their home warranty plans due to the varying ways in which they acquired their plans. The court also concluded that the proposed class action was not superior as numerous difficulties would be encountered in the management of the case as a class action in view of the pervasive individual issues. Plaintiff alternatively sought certification under Rule 23(b)(2). The court denied plaintiff's request because Plaintiff's claims were ultimately predicated on monetary restitution, not declaratory or injunctive relief.

Fine v. ConAgra Foods, Inc., No. CV 10-01848 SJO (CFOx), 2010 WL 3632469 (C.D. Cal. Aug. 26, 2010).

> Plaintiff alleged that defendant falsely claimed that it did not use diacetyl, a compound shown to be hazardous to health, in its

microwave popcorn. Plaintiff's motion for class certification was denied. As a threshold issue, the court found that class certification was improper because the class was defined such that no one in the proposed class would have standing. Plaintiff made no mention of the class being comprised of members who purchased defendant's product *as a result of* defendant's allegedly false statements.

Next, the court noted that even if standing was not an issue, plaintiff failed the typicality and adequacy requirements of Rule 23(a). Plaintiff did not establish that she was a typical representative of the class because she neglected to show that the other class members were injured by the same course of conduct that she asserted injured her. Although plaintiff's injury was caused by her reliance on defendant's allegedly misleading statements, she sought to certify a class that would include people with various reasons for purchasing defendant's popcorn. Thus, she failed to establish that she was typical of the class. As such, the court also concluded that she was not an adequate representative.

Franulovic v. Coca-Cola Co., No. 07-0539(RMB), 2009 WL 1025541 (D.N.J. Apr. 16, 2009).

Plaintiff claimed that defendant engaged in false advertising in relation to the sale of Enviga, a weight loss product. The court granted defendant's motion for summary judgment and thus dismissed as moot plaintiff's motion for class certification.

Gianino v. Alacer Corp., No. SACV 09-01247-CJC(RNBx), 2012 WL 724322 (C.D. Cal. Feb. 27, 2012).

Plaintiffs claimed that defendant falsely represented that its product, Emergen–C, benefits one's immune system. Plaintiffs' motion for class certification was denied as the court found that the predominance and superiority requirements of Rule 23(b)(3) were not satisfied. The court noted that because plaintiff sought to certify a nationwide class, the laws of fifty states would have to be applied per California's choice of law rules. The different legal issues affecting individual class members would thus eclipse any common issues of law and common issues would not predominate. As such, the court found that a class action would not be superior.

Haggart v. Endogastric Solutions, Inc., No. 10-346, 2012 WL 2513494 (W.D.Pa. Jun. 28, 2012).

Plaintiff attests that he relied on misrepresentations made by defendant in its advertising regarding the "reversibility" of the insertion of defendant's device, EsophyX. Plaintiff's motion for class action certification was denied.

Plaintiff proffered two alternative class definitions. In the first, he defined the class to include only those who relied on defendant's representations related to reversibility. The court concluded that under the proposed definition, the court would be unable to determine whether a given individual was a member of the class. In the second definition, plaintiff proposed a class that included "all individuals who have undergone the EsophyX procedure in the United States since September 24, 2007." *Id.* at *4. The court concluded that this proposed class failed the typicality requirement under Rule 23(a) due to "marked differences" in, among other things, the information received and relied upon by the putative class members.

The court added that even if the putative class could satisfy Rule 23(a), it would fail to meet the certification requirements of either Rule 23(b)(2) or (b)(3). First, plaintiff's request was primarily one for monetary relief. Rule 23(b)(2) was, therefore, not appropriate. Furthermore, plaintiff satisfied neither the "predominance" nor "superiority" requirement of Rule 23(b)(3). Individual issues would predominate given that class members received information regarding the procedure which likely varied and affected their decisions to undergo the procedure. Additionally, due to the extent to which liability determinations would need to be made on an individual basis, the court concluded that the Plaintiff failed to satisfy the superiority requirement.

Heisler v. Maxtor Corp., No. 5:06–cv–06634–JF (PSG), 2011 WL 1496114 (N.D. Cal. Apr. 20, 2011).

Plaintiffs alleged that defendant marketed defective hard disk drives. Defendant's motion for summary judgment was granted, and plaintiffs' motion for class certification was therefore denied as moot.

Hodes v. Van's Int'l Foods, No. CV 09-01530 RGK (FFMx), 2009 WL 2424214 (C.D. Cal. July 23, 2009).

Plaintiffs' claims arose from their purchase of frozen waffles with allegedly fraudulent nutritional information. Plaintiffs' motion for class certification was denied because the court found that they failed to satisfy the predominance and superiority requirements of Rule 23(b)(3). The

court concluded that common questions of liability would not predominate over individual questions, such as which brand of frozen waffles each member purchased, in what quantity it was purchased, and for what purpose. Accordingly, the court also found that a class action was not a superior method of adjudication.

Hughes v. Wells Fargo Bank, N.A., No. 2:10–cv–00239–JHN–MANx, 2011 WL 1370649 (C.D. Cal. Mar. 17, 2011).

> Plaintiff alleged that defendant failed to provide an advertised benefit to its customers -the waiver of a monthly service fee on certain checking accounts that maintained the required minimum balance. Plaintiff's motion for class certification was denied because the court found that individual issues predominated over common issues in both of plaintiff's proposed classes and thus the action failed Rule 23(b)(3).
>
> In his proposed Class A, plaintiff sought to include all customers who maintained a "PMA Package" and were charged a monthly fee despite maintaining the requisite minimum balance. However, the proposed class was predicated on the erroneous theory that *all* PMA customers were entitled to the fee waiver, which they were not. The court concluded that if the action was to proceed, individual issues would predominate with respect to which class members were entitled to the waiver.
>
> In his proposed Class B, plaintiff sought to include all customers who maintained an Advantage Account and were charged a monthly fee even though their balance exceeded the required minimum. The court noted that there were variations in the facts surrounding each individual Advantage Account and determined that it did not intend to conduct mini-trials as to individual issues (such as what balance existed on the accounts and whether those balances qualified for purposes of fee waiver).

In re Activated Carbon-Based Hunting Clothing Mktg. and Sales Practices Litig., No. 09–md–2059 (RHK/JJK), 2010 WL 3893807 (D. Minn. Sept. 29, 2010).

> Plaintiffs alleged that defendants engaged in false advertising in the marketing of carbon-embedded hunting clothing. Plaintiffs' motion for class certification was denied. The court noted that, as in *Buetow*, *supra*, the issue was one of predominance under Rule 23(b)(3). Because defendants had the right to present evidence at trial negating a plaintiff's

showing of reliance and causation, individualized proof would likely predominate over common issues.

In re Sears, Roebuck & Co. Tools Mktg. and Sales Practices Litig., No. MDL–1703, Nos. 05 C 4742, 05 C 4744, 2012 WL 1015806 (N.D.Ill. Mar. 22, 2012).

Plaintiff claimed that defendant deceptively advertised its line of "Craftsman" tools as manufactured in the United States when many of the tools were foreign-made or contained significant foreign parts. Plaintiff's motion for class certification was denied. The court first concluded that the proposed class, which included all persons in Florida who purchased Craftsman tools during a certain time period, was overbroad. The court noted that the class contained many individuals who were not deceived and could not have been injured (because, for example, they never saw any Craftsman advertising). The court then added that Plaintiff failed to satisfy the typicality and predominance requirements of Rule 23. Typicality was lacking because the putative class was exposed to a mix of representations, communicated through different channels and absorbed in different ways and to different degrees. Plaintiff therefore could not establish that he was a typical representative. As such, the court found that individual questions of causation would predominate over common questions.

II. Class Certification Granted

Kennedy v. Jackson Nat'l Life Ins. Co., No. C 07–0371 CW, 2010 WL 2524360 (N.D. Cal. Jun. 23, 2010).

Plaintiff alleged that defendant engaged in unlawful practices in the solicitation, offering and sale of its deferred annuity products. Plaintiff's motion for class certification was granted.

The court first concluded that the requirements set forth in Rule 23(a) were satisfied. First, plaintiff satisfied the numerosity requirement because there would be a "substantial number" of people in the class. Commonality was also satisfied as the putative class members were all senior citizens who were exposed to defendant's marketing and thereafter purchased defendant's annuities. Additionally, defendant's alleged liability for each of the class members was predicated on the same legal theories. The court next found that plaintiff was a typical representative. Like the other class members, she purchased one of defendant's annuities after receiving materials from one of

defendant's representatives. Lastly, the court concluded that plaintiff was an adequate representative.

The court then turned to Rule 23(b)(3). It found that individual issues did not predominate as causation could be demonstrated through common proof. Plaintiff put forth evidence indicating that she could show defendant made uniform misrepresentations with respect to material information, which supported an inference of reliance by the entire class. Additionally, the court determined that superiority was met.

Krueger v. Wyeth, Inc., No. 03CV2496 JAH (AJB), 2011 U.S. Dist. LEXIS 154472 (S.D. Cal. Mar. 30, 2011).

Plaintiff alleged that defendant's advertising campaign misrepresented the benefits and failed to disclose the risks of its hormone replacement therapy drugs. After restricting the class to individuals who actually heard or read one of defendant's representations, the court granted plaintiff's motion to certify the class.

The court first found that the requirements of Rule 23(b)(3) were met. Individual issues did not predominate because the the key issue - *i.e.*, whether defendant misrepresented the benefits and risks of its HRT drugs - was subject to common proof. Similarly, the court found plaintiff satisfied the superiority requirement because where, as here, the majority of pertinent issues were subject to common proof, judicial economy weighed in favor of allowing the case to proceed as a class action.

Next, the Rule 23(a) requirements were satisfied. The court focused its analysis on the typicality and adequacy requirements. Plaintiff's claims were typical because plaintiff saw the same advertising scheme and alleged the same injury as the other class members. Regarding adequacy, the court stated that it would monitor the professional relationship between one of the named plaintiffs and counsel, but allowed the class action to go forward.

Mathias v. Smoking Everywhere, Inc., No. 2:09–cv–03434–GEB–JFM, 2011 WL 5024545 (E.D. Cal. Oct. 20, 2011).

Plaintiff alleged that defendant misrepresented that electronic cigarettes were a safe alternative to traditional cigarettes. Plaintiff's motion for class certification was granted.

First, plaintiff satisfied the Rule 23(a) requirements. The class contained at least six hundred individuals, meeting the numerosity requirement. Commonality was satisfied because the class members' claims depended on common issues, such as whether defendant's advertising represented that electronic cigarettes were safe and whether the representation was truthful. Next, the court concluded that the typicality requirement was met because plaintiff's evidence suggested that the putative class members suffered the same harm from defendant's uniform misrepresentations. Lastly, plaintiff was an adequate representative as his interests in proving defendant's allegedly false advertising aligned with those of other class members. Additionally, plaintiff presented evidence showing that his counsel had experience litigating class actions.

Second, plaintiff sufficiently established that common issues predominated. Here, the central issue was whether defendant made misrepresentations about the presence of toxins in its product. Plaintiff and the other class members relied on this misrepresentation. Accordingly, common questions predominated over individual issues. The court additionally found that the superiority requirement was met because the difficulties in managing a class action were minimized due to the fact that all of the proposed class members were California residents.

Montanez v. Gerber Childrenswear, LLC, No. CV 09–7420 DSF (DTBx), 2011 WL 6757875 (C.D. Cal. Dec. 15, 2011).

Plaintiffs claimed that defendant sold clothing with labels containing excessive amounts of chemical irritants without disclosing the presence of such irritants. Plaintiffs' motion to certify the class was granted. As a threshold matter, the court concluded that the absent class members had standing. Although defendant argued that many of the absent class members did not actually suffer skin irritation and, therefore, did not have any injury, the court noted that they spent money on a garment that was less valuable than it was represented to be and were thus harmed financially.

Plaintiffs satisfied the Rule 23(a) and 23(b) requirements. The court found that the numerosity requirement was met because the class likely included thousands of consumers. The court also found that commonality was satisfied, as defendant's representations (or lack thereof) regarding chemicals in its garments and their actual chemical

contents were issues common to all class members. The court also concluded that the plaintiffs were typical of the absent class members. Plaintiffs received, for example, the same representations from defendant as any other class member. Lastly, the adequacy representation requirement was satisfied because plaintiffs and their proposed counsel were well qualified. With respect to Rule 23(b)(3), common issues substantially predominated over individual ones and therefore class treatment of the claims was a superior method of adjudication.

Nelson v. Mead Johnson Nutrition Co., 270 F.R.D. 689 (S.D. Fla. 2010).

Plaintiff alleged that defendant falsely represented to consumers that its product, Enfamil LIPIL, was the only formula that contained certain nutrients essential to the brain and eye development of babies. The court granted plaintiff's motion for class certification.

Plaintiff satisfied Rule 23(a). First, defendant did not challenge numerosity. Second, the court found that the case involved several issues of law or fact that were common to the proposed class, including whether defendant's representations about Enfamil LIPIL were true and whether defendant's allegedly deceptive conduct would deceive an objective consumer. Third, typicality was satisfied. In so holding, the court acknowledged that Plaintiff may have viewed different Enfamil LIPIL labels than the other proposed class members. However, the court held that plaintiff's claim had "the same *essential* characteristics as the claims of the class at large." *Id.* at 695. Lastly, the court concluded that plaintiff was an adequate class representative insofar as she purchased the subject product within the applicable statute of limitations.

Turning to Rule 23(b)(3), the court found that common issues predominated including whether it was true that Enfamil LIPIL contained nutrients that other brands of infant formula did not and whether defendant's representations regarding Enfamil LIPIL would deceive an objective reasonable consumer. Additionally, the court concluded that because the controversy involved many common questions of law and fact, a class action would be superior to other available methods for adjudicating the controversy.

Wolph v. Acer Am. Corp., 272 F.R.D. 477 (N.D. Cal. 2011), *reconsideration denied*, No. C 09-01314 JSW, 2012 WL 993531 (N.D. Cal. Mar. 23, 2012).

Plaintiffs alleged that defendant engaged in false advertising in

connection with allegedly defective notebook computers. The court conditionally granted plaintiffs' motion for class certification, with leave to amend the complaint. The court noted that, as a threshold matter, plaintiff failed to demonstrate that an identifiable and ascertainable class existed. Specifically, the proposed class definition was overbroad to the extent that it would include purchasers who had returned their notebooks or otherwise disposed of them. Accordingly, the court modified the class definition.

The court then proceeded with the Rule 23 analysis under a modified class definition. Regarding Rule 23(a), numerosity was met because the record demonstrated that the proposed class consisted of approximately one million persons. Commonality was satisfied given that the claims of the proposed class stemmed from the same set of core facts regarding whether Acer sold notebook computers with the alleged defect. Next, the court found that plaintiffs were typical representatives because the claims at issue arose from whether defendant marketed defective computers. Defendant's conduct was not unique to the named plaintiffs. Lastly, the court determined that the plaintiffs would fairly and adequately represent the interests of the class.

Plaintiffs also satisfied the Rule 23(b)(3) predominance and superiority requirements. The court noted that plaintiffs' claims did not require an individualized showing of reliance. Instead, plaintiffs identified plausible common sources of proof on the issues of materiality and falsity. Additionally, a class action would be a superior method for resolving the litigation because the amount of damages sought for each class member did not exceed $600. Class treatment was thus more efficient than litigation on an individual basis.

Zeisel v. Diamond Foods, Inc., No. C 10–01192 JSW, 2011 WL 2221113 (N.D. Cal. Jun. 7, 2011).

Plaintiff alleged that defendant used misleading labels on its shelled walnut products. The court granted plaintiff's motion for class certification. As a threshold issue, the court concluded that plaintiff had standing despite the fact that he bought the walnuts for multiple reasons because "[defendant's] misrepresentation was a substantial factor . . . . influencing his decision." *Id.* at *4.

With respect to Rule 23(a), the court found that the existence of thousands of potential class members ensured that the class was sufficiently numerous. Next, the proposed class shared sufficient commonality because the class members were exposed to the same misleading labels and the case would focus on whether those statements were reasonably likely to deceive members of the general public. The court next found that the typicality requirement was met because plaintiff's claims regarding the misbranding of defendant's products were co-extensive with those of absent class members. Finally, plaintiff and plaintiff's counsel were found to be adequate class representatives despite the fact that plaintiff made numerous changes to his deposition and proposed counsel was plaintiff's friend.

Lastly, Rule 23(b)(3) was also satisfied. The court determined that the issues of reliance and damages were subject to common proof and that common issues of law and fact would therefore predominate. Next, given the large number of potential class members and small amount of the claims, class action was a superior method of resolving the case.

Brazil v. Dell Inc., No. C-07-01700 RMW, 2010 WL 5387831 (N.D. Cal. Dec. 21, 2010).

Plaintiffs moved for class certification alleging violations of California's Unfair Competition Law ("UCL"), CAL. BUS. & PROF. CODE §§ 17200, et seq., False Advertising Law ("FAL"), CAL. BUS. & PROF. CODE §§ 17500, et seq., and Consumer Legal Remedies Act ("CLRA"), CAL. CIV. CODE §§ 1750, et seq., as well as negligent and intentional misrepresentation. *Id.* at *1-2, *4. Plaintiffs claimed defendant Dell deceived customers by advertising false discounts from false former prices to create the illusion of discounts and savings. *Id.* at *1. The court granted plaintiffs' motion for class certification because plaintiffs satisfied the ascertainability requirement, Rule 23(a)'s numerosity, commonality, typicality, and adequacy of representation requirements, and Rule 23(b)(3)'s predominance and superiority requirements. *Id.* at *2-6.

The class was ascertainable because class membership could be determined based on a set of objective criteria. *Id.* at *2. Regarding Rule 23(a), there was no dispute concerning plaintiffs' satisfaction of the numerosity or commonality requirements. *Id.* at *3. Additionally, plaintiffs were adequate representatives because they did not have

conflicts of interest with the proposed class, and they were represented by qualified and competent counsel. *Id.* Further, plaintiffs satisfied typicality with respect to purchases made through the Home & Home Office segment of Dell's website because they had a substantially similar purchasing experience as the purchaser of a single laptop for personal use. *Id.* at *4. Regarding Rule 23(b)(3), predominance was satisfied because the plaintiffs were able to prove falsity and reliance with common evidence, and the proposed methods of calculating damages were common to the class as a whole. *Id.* at *4-5. Finally, plaintiffs "clearly [met] the superiority requirement, because the class action provide[d] the only practical means by which Dell purchasers [could] pursue these claims." *Id.* at *4.

Bruno v. Quten Research Inst., LLC, 280 F.R.D. 524 (C.D. Cal. 2011), *reconsideration denied*, *Bruno v. Eckhart Corp.*, 280 F.R.D. 540 (C.D. Cal. 2012).

Plaintiff sought class certification for violations of California's UCL, FAL, and CLRA, as well as breach of express warranty. 280 F.R.D. at 529. Plaintiff purchased defendants' liquid product which contained the allegedly material misrepresentation that its active ingredient had "6X BETTER ABSORPTION" and was "6 Times More Effective" than the equivalent active ingredient in competing brands. *Id.* at 528. The court granted certification of a class composed of consumers exposed to the same misrepresentation that the plaintiff experienced because the plaintiff had standing, and satisfied Rule 23(a)'s numerosity, typicality, commonality, and adequacy requirements, as well as Rule 23(b)(3)'s predominance and superiority requirements. *Id.* at 530, 536, 538.

The court held that the plaintiff "clearly has standing to bring her claims arising from her purchase of the liquid product that Defendants marketed using alleged material misrepresentations." *Id.* at 530. Regarding Rule 23(a), numerosity was satisfied because "the proposed class contain[ed] at least forty members." *Id.* at 533. Additionally, the plaintiff was typical of those class members exposed to the same misrepresentation that the plaintiff experienced, but was atypical of those members exposed to the representation that the product had "300%" or "3X BETTER ABSORPTION." *Id.* Therefore, the court limited the class to exclude those who were only exposed to the "3X" misrepresentation. *Id.* at 534. Commonality was met because there were "shared legal issues and facts," and the

plaintiff was an adequate representative because she was credible and familiar with the facts of the case. *Id.* at 535-36. Regarding Rule 23(b)(3), predominance was satisfied because "central questions . . . predominate[d] over any individual question." *Id.* at 537. Finally, superiority was met because "[g]iven the small size of each class member's claim, class treatment [was] not merely the superior, but the only manner in which to ensure fair and efficient adjudication of the present action." Id.

Carrera v. Bayer Corp., No. 08-4716 (JLL), 2011 WL 5878376 (D.N.J. Nov. 22, 2011).

Plaintiff alleged defendants violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), FLA. STAT. §§ 501.201, et seq., by falsely claiming on its packaging and advertisements that the "One-A-Day WeightSmart" multivitamin enhanced metabolism. *Id.* at *1. The court certified a class of all persons who purchased WeightSmart in the State of Florida because the requirements of Rules 23(a) and (b)(3) were met. *Id.* at *1, *8.

Regarding Rule 23(a), numerosity was satisfied because "putative class members purchased millions of dollars worth of WeightSmart," thus joinder of all class members was impracticable. *Id.* at *7. Commonality was met because whether WeightSmart enhanced metabolism was a common issue, and typicality was satisfied because other putative class members "[would] advance the same theory based on the same course of conduct" as plaintiff. *Id.* at *7-8. In addition, plaintiff was an adequate representative because his interests did not conflict with those of the putative class, and his counsel was capable of fairly and adequately representing the class. *Id.* at *8. Regarding Rule 23(b)(3), the common issue of "whether Bayer employed deceptive advertising and marketing in violation of FDUTPA" predominated. *Id.* at *4. Finally, superiority was satisfied because the putative class was not so unwieldy as to refuse certification on grounds that the class action was difficult to manage. *Id.* at *6.

Cartwright v. Viking Indus., Inc., No. 2:07-CV-02159-FCD-EFB, 2009 U.S. Dist. LEXIS 83286 (E.D. Cal. Sept. 14, 2009), *reconsideration denied*, No. 2:07-cv-2159 FCD EFB, 2009 U.S. Dist. LEXIS 107066 (E.D. Cal. Nov. 17, 2009).

Plaintiffs moved for class certification asserting claims for violations of California's UCL and CLRA, as well as breach of express and

implied warranties, fraudulent concealment, and unjust enrichment. 2009 U.S. Dist. LEXIS 83286, at *1, *5. Defendant allegedly fraudulently concealed the defective nature of its window products and deceptively advertised that the window products were free from defects in order to induce plaintiffs and class members to purchase them. *Id.* at *36. The court granted certification because the requirements of Rules 23(a) and (b)(3) were met. *Id.* at *14, *16, *19-20, *50.

Regarding Rule 23(a), numerosity was satisfied because the defendant's windows were likely installed in approximately 50,000 residential units during the proposed class period. *Id.* at *14. Commonality was met because plaintiffs set forth questions of law and fact common to all prospective class members. *Id.* at *15-16. Typicality was satisfied because the purported class members' claims all arose from the same or similar course of conduct and resulted in the same or similar injury. *Id.* at *19. Additionally, representation was adequate because plaintiffs' counsel had experience litigating class action lawsuits. *Id.* at *20. Regarding Rule 23(b)(3), predominance was met because common issues of law and fact predominated with respect to plaintiffs' claims, and superiority was satisfied because "individual prosecution of the claims [was] impractical." *Id.* at *36, *40-43, *50.

Chavez v. Blue Sky Natural Beverage Co., 268 F.R.D. 365 (N.D. Cal. 2010).

Plaintiff claimed violations of California's UCL, FAL, CLRA, as well as common law fraud, deceit and/or misrepresentation where defendants allegedly misrepresented the geographic origins of their beverages on defendants' labels and website. *Id.* at 368-69. Specifically, plaintiff contended that defendants' beverages stated "SANTA FE, NEW MEXICO" when they were not manufactured or bottled in Santa Fe or anywhere else in New Mexico. *Id.* The court granted certification because the plaintiff satisfied Article III standing, the class definition was ascertainable, and the requirements of Rules 23(a) and (b)(3) were met. *Id.* at 375, 377, 380.

The court held that the plaintiff suffered an injury-in-fact sufficient to satisfy Article III standing, and that unnamed class members were not required to establish standing under the UCL. *Id.* at 375-76. Further, the class was ascertainable because it was "defined by an objective standard of consumers who purchased [defendants'] beverage bearing

the allegedly misleading labels in violation of state law." *Id.* at 377. Regarding Rule 23(a), the court inferred from the allegation that defendants sold over $20 million of product that there were numerous purchasers who were potential class members so as to satisfy the numerosity requirement. *Id.* Commonality was met because class members' claims had common issues of fact and law, including whether defendants' packaging and marketing materials were deceptive or misleading to a reasonable consumer. *Id.* Typicality was satisfied because the plaintiff's claims arose out of the allegedly false statement on all of defendants' beverage containers, hence his claims were "reasonably coextensive with those of absent members." *Id.* at 378. Additionally, adequacy was met because the plaintiff rigorously prosecuted the class claims, and had a lack of conflicts of interest with other class members. *Id.* Regarding Rule 23(b)(3), common issues predominated over individual issues because relief was available without an individual showing of reliance for each of the plaintiff's claims. *Id.* at 376-78. Finally, superiority was satisfied because "the class action [was] superior to maintaining individual claims for a small amount of damages." *Id.* at 379-80.

Cole v. Asurion Corp., 267 F.R.D. 322 (C.D. Cal. 2010).

Plaintiffs claimed violations of California's UCL and FAL, and also fraud and negligent misrepresentation where defendant allegedly misrepresented the terms of its insurance program for lost, stolen, or damaged cell phones in its marketing materials. *Id.* at 324-25. Plaintiff purchased a cell phone from defendants, and alleged that while defendants represented to consumers "that they will receive a replacement phone of 'like kind, quality, and value,'" defendants failed to adequately disclose that most of the replacement phones were defective "refurbished" phones returned by previous customers. *Id.* Certification was granted because the requirements of Rules 23(a) and (b)(3) were met. *Id.* at 328, 331, 333.

Regarding Rule 23(a), numerosity was satisfied because "the proposed class [had] thousands of members." *Id.* at 326. Commonality was met because the plaintiff demonstrated the existence of a shared legal issue, namely, "whether Defendants' manner of selling their insurance program 'had the capacity to deceive.'" *Id.* Typicality was satisfied because the plaintiff viewed the allegedly misleading marketing materials to which all members of the proposed class were subjected. *Id.* at 326-27. Additionally,

adequacy was satisfied because the plaintiff had no conflicts of interest, and the plaintiff and her law firm were "capable of prosecuting this action vigorously on behalf of the class." *Id.* at 328. Regarding Rule 23(b), predominance was met because class relief was available on plaintiff's UCL and FAL claims "without individualized proof of deception, reliance, and injury," and plaintiff was entitled to a class-wide presumption of reliance on her fraud and negligent misrepresentation claims. *Id.* at 329-31. Superiority was satisfied because the relief plaintiff sought was available for each of her claims, and the fact that "damages amounts may have to be calculated for class members on an individual basis [was] no bar to class certification." *Id.* at 331. Finally, the court excluded from the proposed class all individuals who released their claims against defendants pursuant to a previous settlement agreement. *Id.* at 333.

Delarosa v. Boiron, Inc., 275 F.R.D. 582 (C.D. Cal. 2011).

Plaintiff claimed violations of California's UCL and CLRA, as well as common-law fraud where defendant allegedly intentionally misrepresented the efficacy of its homeopathic medicine on the outside of the product packaging. *Id.* at 585, 593. The court granted certification because plaintiff had standing and satisfied the requirements of Rules 23(a), (b)(2) and (b)(3). *Id.* at 586, 588-91, 595.

Plaintiff had standing because she bought the medicine as a result of defendant's allegedly deceptive representations, she did not receive the relief promised, and she suffered economic injury. *Id.* at 586. Regarding Rule 23(a), numerosity was satisfied because the medicine was sold in major retail stores throughout California. *Id.* at 587-88. Commonality was met because whether defendant's representation was true or false was a question common to the class. *Id.* at 589. Plaintiff's claim was typical because, like absent class members, she purchased the medicine in California, relied on the defendant's misrepresentation, and suffered economic injury. *Id.* at 589-90. Additionally, adequacy was met because the plaintiff and the class sought remedies equally applicable and beneficial to the class, and plaintiff's counsel had "vast experience" in litigating class action lawsuits. *Id.* at 590. Regarding Rule 23(b)(2), the court certified a subclass to the extent the plaintiff sought injunctive relief, because the actual, statutory, and punitive damages the plaintiff sought were "incidental" to the injunctive relief. *Id.* at 591-93. Regarding Rule

23(b)(3), whether the defendant misrepresented the medicine's efficacy on the product's packaging was the predominant common question. *Id.* at 594. Finally, superiority was met because "class members' potential interests in individually controlling the prosecution . . . and the potential difficulties in managing the class action [did] not outweigh the desirability of concentrating this matter in one litigation." *Id.* at 595.

Fitzpatrick v. Gen. Mills, Inc., 263 F.R.D. 687 (S.D. Fla. 2010), *vacated*, 635 F.3d 1279 (11th Cir. 2011), *class redefined*, No. 09-60412-CIV-HUCK/BANDSTRA, 2011 U.S. Dist. LEXIS 138939 (S.D. Fla. Dec. 2., 2011).

Plaintiff sought certification for her FDUTPA and Florida common law breach of express warranty claims where defendants allegedly falsely advertised the digestive health benefits of their yogurt food product, Yo-Plus. 263 F.R.D. at 691-92. Plaintiff alleged that eating Yo-Plus did not provide any digestive health benefits that could not be obtained from eating normal yogurt, and that defendants' claim to the contrary was unsubstantiated, false, misleading, and reasonably likely to deceive the public. *Id.* at 692. The court granted certification as to plaintiff's FDUTPA claim because the prerequisites of Rules 23(a) and (b)(3) were met. *Id.* at 696, 702.

Regarding Rule 23(a), numerosity was satisfied because defendants sold approximately two million packages of Yo-Plus to Florida consumers during the relevant time period. *Id.* at 696. Commonality was met because "[w]hether [defendants'] claim that Yo-Plus aids in the promotion of digestive health is 'deceptive' is a mixed question of law and fact common to every class member." *Id.* Further, plaintiff's claims were typical of the class members' claims because the "legal theories and supporting facts relied upon by both Plaintiff and the putative class members [were] substantially similar." *Id.* at 698. Additionally, plaintiff was an adequate representative because she "appear[ed] reasonable, proactive, and sufficiently familiar and invested with the case," and her lead counsel specialized in class actions. *Id.* at 699. Regarding Rule 23(b), common issues such as whether defendants' representations were "deceptive" under FDUPTA predominated over individual issues. *Id.* at 699. Finally, superiority was satisfied as to the FDUPTA claim because "no individual plaintiff will litigate this case individually," given that the "amount in

controversy for any individual plaintiff . . . is simply too insignificant." *Id.* at 702.[2]

Galvan v. KDI Distrib. Inc., No. SACV 08-0999-JVS (ANx), 2011 WL 5116585 (C.D. Cal. Oct. 25, 2011).

Plaintiff sought class certification for violations of California's UCL and CLRA, as well as breach of contract, unjust enrichment, and declaratory relief. *Id.* at *1. Defendant is a wholesaler/distributor of prepaid calling cards who allegedly deceptively advertised that consumers will receive more minutes on their calling cards than they were actually provided. *Id.* The court granted certification because the class was sufficiently ascertainable, and the plaintiff satisfied Rules 23(a) and (b)(3). *Id.* at *4, *8, *14-15.

First, the class was ascertainable because the defendant maintained a list of cards sold by sales representatives. *Id.* at *4. Regarding Rule 23(a), numerosity was met because there were likely "tens of thousands of consumers who were similarly affected by [defendant's] conduct." *Id.* at *6. Commonality was met because common issues of fact and law existed, including whether defendant made misleading misrepresentations in its advertisements. *Id.* Further, typicality was satisfied because plaintiff and absent class members shared similar claims and sought the same potential remedies. *Id.* at *7. Additionally, adequacy was met because the plaintiff had no conflicts of interests with absent class members and had been an active participant in the litigation. *Id.* at *7-8. Regarding Rule 23(b)(3), common issues predominated because the inquiries under each claim looked almost exclusively at the defendant's conduct and required few individualized inquiries into the plaintiffs' conduct. *Id.* at *8, *12. Finally, class treatment was superior because there was no indication that the class members would have a strong interest in individual litigation, the plaintiff presented a workable trial plan, and the court was not aware of any pending litigation concerning the claims of the putative class. *Id.* at *12-13.

[2] On interlocutory appeal, the appellate court vacated the district court's certification order because the district court "defined the class in a manner which seems to conflict with its earlier sound analysis." 635 F.3d at 1280-81, 1283. However, on remand, the district court redefined the class to be consistent with the Eleventh Circuit's opinion, and proceeded with the certified class as redefined. 2011 U.S. Dist. LEXIS 138939, at *4.

Greenwood v. Compucredit Corp., No. C 08-04878 CW, 2010 WL 291842 (N.D. Cal. Jan. 19, 2010), decertification denied, No. 08–04878 CW, 2010 WL 4807095 (N.D. Cal. Nov. 19, 2010).

> Plaintiff moved for class certification claiming violations of California's UCL for deceptive advertising and promotion. 2010 WL 291842, at *1. Plaintiff alleged defendant deceptively marketed a subprime credit card by representing to consumers that the card could be used to "rebuild your credit" with "no deposit required," while activation, account maintenance, and annual fees were concealed in small print and buried in the advertisement. *Id.* Certification was granted because the class was ascertainable, and the requirements of Rules 23(a) and (b)(3) were met. *Id.* at *3-4, *6-7.
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> The class was ascertainable because it was limited to persons who were mailed defendant's credit card solicitations while they were residents of California. *Id.* at *3. Regarding Rule 23(a), numerosity was satisfied because the number of class members was likely "well-above 100,000 people." *Id.* Commonality was satisfied because "whether class members were likely to be deceived by Defendants' solicitation materials present[ed] common legal and factual issues for all class members." *Id.* at *4. Typicality was met because the plaintiff's claims were "reasonably coextensive with those of the absent class members," since "all solicitation materials were substantially the same." *Id.* Additionally, plaintiff was an adequate representative because she was "familiar with her claims and the facts of the case," and her counsel had "extensive experience with complex consumer class actions." *Id.* at *6. Regarding Rule 23(b)(3), common issues predominated because plaintiffs could prove with generalized evidence that defendants' conduct was "likely to deceive" members of the public, and unnamed class members were not required to prove reliance and damage under the UCL. *Id.* at *7. Finally, superiority was met because "certifying the UCL class [was] superior to, and more manageable than, any other procedure available for the treatment of factual and legal issues raised by Plaintiffs' claims." Id.

In re Brazilian Blowout Litig., No. CV 10-8452-JFW (MANx), 2011 U.S. Dist. LEXIS 40158 (C.D. Cal. Apr. 12, 2011).

> Plaintiffs alleged violations of California's UCL and FAL, as well as fraud and deceit, negligent misrepresentation, unjust enrichment, breach of contract, breach of express warranty, and negligence. *Id.* at

*4. Defendant allegedly falsely advertised that its hair-straightening products were "formaldehyde free," when in fact they contained average formaldehyde levels of 8-8.8%. *Id.* at *2-3. Certification was granted because plaintiffs satisfied the prerequisites of Rules 23(a) and (b)(3). *Id.* at *7-8, *14-15, *17, *27-28.

Regarding Rule 23(a), numerosity was satisfied because thousands of consumers purchased defendant's hair-straightening products in the United States. *Id.* at *7. Commonality was met because there were common questions of law and fact, including "whether Defendant's representations were false or misleading or likely to deceive the public." *Id.* at *8. Typicality was satisfied because plaintiffs presented evidence that they, like other class members, purchased defendant's hair-straightening products, and relied on representations that those products were formaldehyde free. *Id.* at *14. Additionally, adequacy was met because plaintiffs understood their responsibilities as class representatives, no conflicts existed between their interests and other members of the class, and plaintiffs' counsel had substantial experience with similar class actions. *Id.* at *15. Regarding Rule 23(b)(3), common questions of law or fact predominated because the defendant employed a standardized marketing campaign and there were no meaningful variations in the defendant's products. *Id.* at *17, *19-20. Finally, the class action was superior because "individual prosecution of Plaintiffs' claims [was] impractical," given that "the cost of litigating a single case would likely exceed the potential return." *Id.* at *27.

In re Ferrero Litig., 278 F.R.D. 552 (S.D. Cal. 2011).

Plaintiffs sought certification of their California UCL, FAL, and CLRA claims on behalf of a nationwide class of consumers who purchased defendant's Nutella spread after relying on defendant's allegedly deceptive and misleading labeling and advertisements. *Id.* at 556. Plaintiffs alleged that defendant misleadingly promoted its Nutella spread as healthy and beneficial to children when in fact it contained dangerous levels of fat and sugar. *Id.* The court granted certification because plaintiffs satisfied Rules 23(a) and (b)(3). *Id.* at 558-62. However, the court limited the class to only those who purchased Nutella in California because plaintiffs did not meet their burden to establish significant contacts between California and the claims of class members who saw defendant's advertisements and purchased Nutella in other states. *Id.* 561-62.

Regarding Rule 23(a), numerosity was met because 10.1% of American households purchased Nutella during the relevant time period. *Id.* at 557-58. Commonality was satisfied because "the claims made on behalf of the proposed class [were] based on a common advertising campaign, and include[d] common questions such as whether [defendant's] advertising campaign misrepresented that Nutella is healthier or more nutritious than it actually is." *Id.* at 558. Typicality was met because plaintiffs' claims that defendant "deceptively labeled and marketed the product as healthful and appropriate for school-aged children" were "reasonably co-extensive with those of absent class members." *Id.* at 559. Further, adequacy was satisfied because there was "no conflict of interests between the proposed class representatives, their counsel, and the class." *Id.* Regarding Rule 23(b)(3), predominance was met because "all of the class members' claims share[d] a common contention; namely, that defendant made a material misrepresentation regarding the nutritious benefits of Nutella that violated the UCL, FAL, and the CLRA." *Id.* at 560-61. Finally, class action was "clearly superior" because "[i]t would not be economically feasible to obtain relief for each class member given the small size of each class member's claim." *Id.* at 561.

Jermyn v. Best Buy Stores, L.P., 256 F.R.D. 418 (S.D.N.Y. 2009), *decertification denied*, No. 08 Civ. 214(CM), 2011 WL 280798 (S.D.N.Y. Jan. 18, 2011), *decertification denied*, 276 F.R.D. 167 (S.D.N.Y. 2011).

Plaintiff claimed violations of Minnesota's Consumer Fraud Act and N.Y. GEN. BUS. LAW §§ 349 and 350, as well as common law false advertising and unjust enrichment. 256 F.R.D. at 423. Plaintiff alleged defendant Best Buy falsely advertised its "price match guarantee" policy to lure consumers into its stores and induce them to purchase merchandise while having an undisclosed "Anti-Price Matching Policy" whereby employees would deny customers' legitimate price match requests. *Id.* The court granted certification because the class was ascertainable, and the requirements of Rules 23(a), (b)(2), and (b)(3) were satisfied. *Id.* at 429-32, 434, 437.

The class was ascertainable because liability was predicated on one unifying question shared by the entire class; specifically, whether Best Buy's internal Anti-Price Matching Policy violated various laws. *Id.* at 432-33. Regarding Rule 23(a), numerosity was met because "thousands of customers . . . were unfairly denied the benefits of Best

Buy's price match guarantee." *Id.* at 429. Commonality was satisfied because the class shared common questions of law and fact. *Id.* at 430. Typicality was met because each member of the class complained of the same conduct, sued under the same theory of liability, and requested the same relief. *Id.* at 431. Next, the plaintiff was an adequate representative because he had competent counsel and the "exact same interest in prosecuting this action as the rest of the class." *Id.* at 431-32. Regarding Rule 23(b)(2), certification was appropriate because there was an "overwhelming positive value to the injunctive relief" the class sought. *Id.* at 434. Regarding Rule 23(b)(3), common issues such as "whether Best Buy's advertisements about its price match guarantee were false and misleading" predominated over any individual issues. *Id.* at 435-36. Finally, superiority was met because "[e]ach class member's claim [was] too small to warrant bringing an individual lawsuit," and a class action would save "enormous litigation costs." *Id.* at 436.

Johns v. Bayer Corp., No. 09cv1935 AJB (POR), 2012 WL 368032 (S.D. Cal. Feb. 3, 2012).

Plaintiffs claimed defendant Bayer violated California's UCL and CLRA by falsely stating on its packages and advertising that the "One A Day" line of men's multivitamins would "support prostate health." *Id.* at *1. Plaintiffs alleged that, contrary to defendant's marketing, the multivitamins did not provide any prostate health benefits and may even have increased the prostate cancer risk for some men. *Id.* Certification was granted because the plaintiffs had standing, and the requirements of Rules 23(a) and (b)(3) were met. *Id.* at *6-7.

Plaintiffs had standing because they allegedly purchased the vitamins in reliance on the promised prostate health benefit. *Id.* at *6. Regarding Rule 23(a), numerosity was satisfied because it was "reasonable to assume a sufficient number of individuals" purchased the multivitamins, given that the national net sales of the vitamins within the relevant time period exceeded $200 million. *Id.* at *3. Commonality was met because "common issues include[d] whether Bayer misrepresented that the Men's Vitamins 'support prostate health.'" *Id.* at *4. Additionally, both typicality and adequacy were satisfied because plaintiffs and class members were all exposed to the same alleged misrepresentations on the packages and advertisements. *Id.* Regarding Rule 23(b)(3), common questions such as "whether [defendant's] misrepresentations were likely to deceive a reasonable

consumer" predominated over individual questions. *Id.* at *4. Finally, superiority was satisfied because "it would be economically infeasible for class members to pursue their claims individually." *Id.* at *6.

Johnson v. Gen. Mills, Inc., 275 F.R.D. 282 (C.D. Cal. 2011), *decertification denied*, 276 F.R.D. 519 (C.D. Cal. 2011).

Plaintiff asserted defendants violated California's UCL and CLRA by falsely advertising that YoPlus yogurt products promoted digestive health. 275 F.R.D. at 285. The court granted certification because the plaintiff had standing and satisfied the requirements of Rules 23(a) and (b)(3). *Id.* at 285-88.

Plaintiff had standing because he alleged that he bought YoPlus in reliance on defendants' allegedly deceptive advertising and suffered economic injury when he failed to receive the promised digestive health benefit. *Id.* at 286. Regarding Rule 23(a), numerosity was satisfied because the putative class consisted of "thousands of persons that purchased YoPlus in California over a period of several years." *Id.* Commonality was met because the plaintiff's claims "raise[d] common issues regarding [defendants'] allegedly deceptive representation that YoPlus promotes digestive health." *Id.* at 286-87. Typicality was satisfied because the plaintiff claimed that he, like other reasonable consumers, purchased YoPlus in reliance on the defendants' allegedly false representations. *Id.* Additionally, adequacy was met because the plaintiff's claims were aligned with the claims of proposed class members and his attorneys had significant class action experience. *Id.* at 288. Regarding Rule 23(b), the common issue that predominated was "whether [defendants'] packaging and marketing communicated a persistent and material message that YoPlus promotes digestive health." *Id.* at 289. Finally, superiority was satisfied because "injured consumers [were] extremely unlikely to pursue their claims on an individual basis." *Id.*

Pfaff v. Whole Foods Mkt. Grp. Inc., No. 1:09-cv-02954, 2010 WL 3834240 (N.D. Ohio Sept. 29, 2010).

Plaintiff claimed violations of the Ohio Consumer Sales Practices Act ("OCSPA"), as well as fraud, breach of contract, breach of the duty of good faith and fair dealing, negligent misrepresentation, unilateral mistake, and unjust enrichment. *Id.* at *1-2. Plaintiff alleged that after extensively advertising 10% case discounts, defendant Whole

Foods intentionally failed to program its registers to subtract 10% off cases while simultaneously instructing its employees and customers that the case discount was being applied. *Id.* at *2. The court first redefined the plaintiff's proposed class to ensure it comported with the applicable two-year statute of limitations for the plaintiff's OCSPA claim. *Id.* at *3. Proceeding with the modified class definition, the court granted plaintiff's motion for class certification because the requirements of Rules 23(a) and (b)(3) were met. *Id.* at *6, *8.

Regarding Rule 23(a), numerosity was satisfied because "common sense indicate[d] that the proposed class include[d] at least several thousand members." *Id.* at *4. Plaintiff showed sufficient commonality because there were many common factual and legal issues among the class members, such as "whether Whole Foods' advertisements or representations were false or misleading." *Id.* at *4. Plaintiff showed adequate typicality because the claims of the plaintiff and those of absentee class members "[arose] from the same practice or course of conduct and involve[d] the same legal theory and elements of proof." *Id.* at *5. Additionally, adequacy was satisfied because "[the plaintiff's] interest in this litigation [was] coextensive with that of unnamed class members, and she [was] perfectly capable of vigorously prosecuting this action through her well-qualified counsel." *Id.* Regarding Rule 23(b)(3), predominance was met because the plaintiff's claims pertained largely to actions taken by Whole Foods vis-à-vis the class. *Id.* at *6. Finally, superiority was satisfied because, "due to the small amount of damages allegedly suffered by individual class members, maintenance of this case as a class action provide[d] the only feasible procedural mechanism for the proposed class to pursue their claims." *Id.* at *7.